MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

September 2, 2016, through July 28, 2017

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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SUPREME COURT

May 17, 2017

Back row left to right: Justices JOAN L. LARSEN, DAVID F. VIVIANO, RICHARD H. BERNSTEIN, and KURTIS T. WILDER.

Front row left to right: Justice BRIAN K. ZAHRA, Chief Justice STEPHEN J. MARKMAN, and Justice BRIDGET M. MCCORMACK.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019[1]
STEPHEN J. MARKMAN	2021[2]
Justices	
ROBERT P. YOUNG, Jr.	2019[3]
STEPHEN J. MARKMAN	2021[4]
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
JOAN L. LARSEN	2019
KURTIS T. WILDER	2019[5]

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER	GARY L. ROGERS
NELSON S. LEAVITT[6]	RICHARD B. LESLIE
SHARI M. OBERG	KATHLEEN M. DAWSON
DEBRA A. GUTIERREZ-McGUIRE	SAMUEL R. SMITH
ANNE-MARIE HYNOUS VOICE	ANNE E. ALBERS
DON W. ATKINS	AMY L. Van DYKE[7]
JÜRGEN O. SKOPPEK	AARON J. GAUTHIER
MICHAEL S. WELLMAN	STACI STODDARD[8]

MARK E. PLAZA[9]

State Court Administrator

MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS[10]
Crier: DAVID G. PALAZZOLO

[1] To January 6, 2017.

[2] From January 6, 2017.

[3] From January 6, 2017 to April 30, 2017.

[4] To January 6, 2017.

[5] From May 10, 2017.

[6] To January 31, 2017.

[7] To June 30, 2017.

[8] From January 3, 2017.

[9] From July 3, 2017.

[10] From October 10, 2016.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2021
Judges	
DAVID SAWYER	2023
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2023
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
KURTIS T. WILDER	2023[1]
PATRICK M. METER	2021
DONALD S. OWENS	2017[2]
KIRSTEN FRANK KELLY	2019
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2019[3]
THOMAS C. CAMERON	2019[4]

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To May 9, 2017.

[2] To January 1, 2017.

[3] From January 1, 2017.

[4] From July 17, 2017.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	JOHN M. DONAHUE	2023
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021[1]
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017[2]
	MEGAN MAHER BRENNAN	2021
	JAMES A. CALLAHAN	2017[3]
	THOMAS CAMERON	2019[4]
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	MELISSA ANNE COX	2023[5]
	DAPHNE MEANS CURTIS	2021[6]
	PAUL JOHN CUSICK	2019[7]
	CHRISTOPHER D. DINGELL	2021
	CHARLENE M. ELDER	2021

[1] From May 30, 2017.

[2] To December 31, 2016.

[3] To December 31, 2016.

[4] To July 14, 2017.

[5] From January 1, 2017.

[6] To May 1, 2017.

[7] From November 7, 2016.

	Term Expires January 1 of
VONDA R. EVANS	2021
WANDA EVANS	2023[8]
EDWARD EWELL, Jr.	2019
PATRICIA SUSAN FRESARD	2023
SHEILA ANN GIBSON	2023
JOHN H. GILLIS, Jr.	2021
ALEXIS GLENDENING	2023
DAVID ALAN GRONER	2023
RICHARD B. HALLORAN, Jr.	2019
ADEL A. HARB	2019
CYNTHIA GRAY HATHAWAY	2023
DANA MARGARET HATHAWAY	2019
DANIEL ARTHUR HATHAWAY	2021
MICHAEL M. HATHAWAY	2017[9]
THOMAS M.J. HATHAWAY	2023[10]
CHARLES S. HEGARTY	2019
CATHERINE HEISE	2019
SUSAN L. HUBBARD	2023
MURIEL D. HUGHES	2023
EDWARD JOSEPH	2021
CONNIE MARIE KELLEY	2021
TIMOTHY MICHAEL KENNY	2023
QIANA D. LILLARD	2019
KATHLEEN I. MACDONALD	2017[11]
KATHLEEN M. McCARTHY	2019
BRUCE U. MORROW	2023
JOHN A. MURPHY	2023
LYNNE A. PIERCE	2021
LITA MASINI POPKE	2023
KELLY RAMSEY	2023[12]
RICHARD M. SKUTT	2021
MARK T. SLAVENS	2023
LESLIE KIM SMITH	2019
VIRGIL C. SMITH	2019
MARTHA M. SNOW	2023
CRAIG S. STRONG	2021
BRIAN R. SULLIVAN	2023

[8] From January 1, 2017.

[9] To December 31, 2016.

[10] From January 1, 2017.

[11] To December 31, 2016.

[12] From January 1, 2017.

		Term Expires January 1 of
	LAWRENCE S. TALON	2021
	DEBORAH A. THOMAS	2019
	MARGARET MARY VANHOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN E. BEEBE	2023
	RICHARD N. LAFLAMME	2023
	JOHN G. MCBAIN, JR.	2021
	THOMAS D. WILSON	2019
5.	AMY MCDOWELL	2021
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	KAREN D. MCDONALD	2019
	PHYLLIS C. MCMILLEN	2019
	DANIEL PATRICK O'BRIEN	2023
	WENDY LYNN POTTS	2019
	VICTORIA ANN VALENTINE	2023[13]
	MICHAEL D. WARREN, JR.	2019
	JOAN E. YOUNG	2017[14]
7.	DUNCAN M. BEAGLE	2023
	JOSEPH J. FARAH	2023
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2023
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2019

[13] From January 1, 2017.

[14] To December 31, 2016.

		Term Expires January 1 of
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017[15]
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023[16]
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	KEVIN ELSENHEIMER	2021[17]
	THOMAS G. POWER	2023
	PHILIP E. RODGERS, Jr.	2021[18]
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2019
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023[19]
	RACHEAL RANCILIO	2023[20]
	EDWARD A. SERVITTO, Jr.	2019
	MICHAEL E. SERVITTO	2023[21]
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2019

[15] To December 31, 2016.

[16] From January 1, 2017.

[17] From January 26, 2017.

[18] To October 28, 2016.

[19] From January 1, 2017.

[20] From January 1, 2017.

[21] From January 1, 2017.

		Term Expires January 1 of
17.	GEORGE S. BUTH	2017[22]
	PAUL J. DENENFELD	2023
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	DEBORAH McNABB	2023[23]
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023[24]
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023[25]
	EDWARD R. POST	2017[26]
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2023
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DAVID S. SWARTZ	2021
23.	WILLIAM F. MYLES	2017[27]
	DAVID C. RIFFEL	2023[28]
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
	THOMAS L. SOLKA	2017[29]
26.	MICHAEL G. MACK	2021

[22] To December 31, 2016.

[23] From January 1, 2017.

[24] From January 1, 2017.

[25] From January 1, 2017.

[26] To December 31, 2016.

[27] To December 31, 2016.

[28] From January 1, 2017.

[29] To December 31, 2016.

		Term Expires January 1 of
27.	ANTHONY A. MONTON	2019[30]
	ROBERT D. SPRINGSTEAD	2019[31]
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2023
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2023
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2019
32.	MICHAEL POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2019
	TINA YOST JOHNSON	2023[32]
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
	STEPHEN B. MILLER	2017[33]
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2023
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2019
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2023
	RICHARD J. CELELLO	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2019

[30] To February 28, 2017.

[31] From March 1, 2017.

[32] From January 1, 2017.

[33] To December 31, 2016.

		Term Expires January 1 of
43.	MICHAEL E. DODGE	2017[34]
	MARK A. HERMAN	2023[35]
44.	MICHAEL P. HATTY	2019
	DAVID READER	2023
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2017[36]
	COLIN G. HUNTER	2023[37]
	GEORGE J. MERTZ	2021
47.	STEPHEN T. DAVIS	2017[38]
	JOHN B. ECONOMOPOULOS	2023[39]
48.	MARGARET BAKKER	2023
	KEVIN W. CRONIN	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2019
50.	JAMES P. LAMBROS	2019
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	SCOTT LEE PAVLICH	2023
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2019

[34] To December 31, 2016.

[35] From January 1, 2017.

[36] To December 31, 2017.

[37] From January 1, 2017.

[38] To December 31, 2017.

[39] From January 1, 2017.

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019
	JAROD M. CALKINS	2021
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	ROBERT T. HENTCHEL	2017[1]
	MICHAEL T. McKAY	2023[2]
8.	ANNE E. BLATCHFORD	2019
	CHRISTOPHER HAENICKE	2019
	KATHLEEN P. HEMINGWAY	2021[3]
	ROBERT C. KROPF	2021[4]
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	SAMUEL I. DURHAM, Jr.	2023
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2019

[1] To December 31, 2016.

[2] From January 1, 2017.

[3] From June 12, 2017.

[4] To June 3, 2017.

		Term Expires January 1 of
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2023
14B.	CHARLES POPE	2021
15.	JOSEPH F. BURKE	2019
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2023
	CHARLOTTE L. WIRTH	2021
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	WILLIAM C. HULTGREN	2017[5]
	L. EUGENE HUNT, Jr.	2023[6]
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA JOHNSON	2019
23.	GENO SALOMONE	2019
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2023
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023

[5] To December 31, 2016.

[6] From January 1, 2017.

		Term Expires January 1 of
	ROBERTA C. ARCHER	2019
	CHRISTOPHER MICHAEL BLOUNT	2019[7]
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2023
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT-WEEKES	2021
	DONALD COLEMAN	2019
	KAHLILIA YVETTE DAVIS	2023[8]
	WANDA EVANS	2019[9]
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2019
	WILLIAM AUSTIN GARRETT	2023[10]
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023[11]
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017[12]
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2023
	CYLENTHIA L. MILLER	2023
	DAVID PERKINS	2023
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2023
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021

[7] From March 27, 2017.

[8] From January 1, 2017.

[9] To December 31, 2016.

[10] From January 1, 2017.

[11] From January 1, 2017.

[12] To December 31, 2016.

		Term Expires January 1 of
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2019
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
47.	JAMES BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2023
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2019[13]
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2023
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2023
	HUGH B. CLARKE, Jr.	2023
	FRANK J. DeLUCA	2019

[13] From January 1, 2017.

		Term Expires January 1 of
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2023
	THOMAS P. BOYD	2021
56A.	JULIE O'NEILL	2023[14]
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023[15]
	KENNETH D. POST	2017[16]
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019
	GEOFFREY THOMAS NOLAN	2023[17]
	ANDREW WIERENGO	2017[18]
61.	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2019
	CHRISTINA ELMORE	2023
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2019
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2023
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021

[14] From January 1, 2017.

[15] From January 1, 2017.

[16] To December 31, 2016.

[17] From January 1, 2017.

[18] To December 31, 2016.

		Term Expires January 1 of
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
67-5.	TRACY L. COLLIER-NIX	2021[19]
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017[20]
	G. DAVID GUINN	2021[21]
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2023
70-2.	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2019[22]
	KYLE HIGGS TARRANT	2019[23]
	MANVEL TRICE, III	2021
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2019
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	PETER JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
81.	ALLEN C. YENIOR	2021[24]
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2023
87A.	PATRICIA A. MORSE	2021[25]
89.	MARIA L. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH GIBSON	2021

[19] To April 14, 2017.

[20] To December 31, 2016.

[21] From May 15, 2017.

[22] From January 9, 2017.

[23] To October 21, 2016.

[24] To November 30, 2016.

[25] To January 1, 2017.

		Term Expires January 1 of
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	JEFFREY G. BARSTOW	2021
95B.	CHRISTOPHER S. NINOMIYA	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	MARK A. WISTI	2021

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2018
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2018

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2019
Bay	JOHN C. KEUVELAAR	2019[1]
Bay	JAN A. MINER	2019[2]
Benzie	JOHN MEAD	2019
Berrien	BRIAN BERGER	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	2021[3]
Chippewa	ERIC BLUBAUGH	2021[4]
Clare/Gladwin	MARCY A. KLAUS	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019

[1] To December 31, 2016.

[2] From January 1, 2017.

[3] To May 6, 2017.

[4] From May 16, 2017.

County		Term Expires January 1 of
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019[5]
Emmet/Charlevoix	VALERIE SYNDER	2019[6]
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2021
Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2021
Ionia	ROBERT SYKES, Jr.	2019
Iosco	CHRISTOPHER P. MARTIN	2019
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2019
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	MIRIAM CAVANAUGH	2019
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2019[7]
Macomb	CARL J. MARLINGA	2019[8]
Manistee	THOMAS N. BRUNNER	2019

[5] To May 31, 2017.

[6] From July 19, 2017.

[7] From April 24, 2017.

[8] To December 31, 2016.

County		Term Expires January 1 of
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	MARCO S. MENEZES	2019[9]
Mecosta/Osceola	TYLER O. THOMPSON	2019[10]
Menominee	DANIEL E. HASS	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	NEIL G. MULLALLY	2017[11]
Muskegon	GREGORY C. PITTMAN	2019
Muskegon	BRENDA E. SPRADER	2023[12]
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	JENNIFER S. CALLAGHAN	2023[13]
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	ELIZABETH M. PEZZETTI	2017[14]
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019[15]
Roscommon	MARK JERNIGAN	2019[16]
Saginaw	PATRICK J. McGRAW	2019
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021

[9] To October 1, 2016.

[10] From November 17, 2016.

[11] To December 31, 2016.

[12] From January 1, 2017.

[13] From January 1, 2017.

[14] To December 31, 2016.

[15] To October 31, 2016.

[16] From November 9, 2016.

County		Term Expires January 1 of
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	DAVID DiSTEFANO	2019
Washtenaw	DARLENE A. O'BRIEN	2019
Washtenaw	JULIA OWDZIEJ	2021
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2019
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019[17]

[17] To October 31, 2017.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	23
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	56
Emmet	Petoskey	57
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	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
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	53
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

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TABLE OF SPECIAL ORDERS NOT RELATED TO CASES

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RULES AMENDED

MICHIGAN COURT RULES OF 1985

RULES RESCINDED

ADMINISTRATIVE ORDER No. 2016-3

PRISONER ELECTRONIC FILING PROGRAM WITH THE MICHIGAN SUPREME COURT AND THE MICHIGAN DEPARTMENT OF CORRECTIONS

Entered November 2, 2016, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, effective immediately, the Michigan Supreme Court ("Court") is authorized to implement a Prisoner Electronic Filing Program with the Michigan Department of Corrections.

Participants in the Prisoner Electronic Filing Program consist of the Clerk's Office of the Michigan Supreme Court, the correctional facilities operated by the Michigan Department of Corrections ("MDOC") identified in Exhibit A to this order, and the prisoner litigants housed in the identified correctional facilities who are or who seek to be parties to litigation filed in the Michigan Supreme Court. Additional facilities may be made part of this program at the discretion of the Clerk's Office and the MDOC.

For the initial phase of the Prisoner Electronic Filing Program, the Court will provide to the MDOC, and retain ownership of, digital equipment for use in the identified correctional facilities with the sole purpose of transmitting authorized documents between the Court and the identified correctional facilities. The

digital equipment will be programmed with an email address used by the Clerk's Office for receiving electronic filings from the MDOC. The MDOC will provide the Clerk's Office with email addresses for receiving electronic notices from the Court on behalf of the prisoner litigants at the identified correctional facilities.

Filings by prisoner litigants during the initial phase of the program will be limited to applications for leave to appeal and related documents in criminal cases. Prisoner litigants must utilize the form created by the Clerk's Office for self-represented litigants and made available to the MDOC.

All filings by prisoner litigants must be submitted electronically to the Clerk's Office unless the system is not operational when the documents are presented to the MDOC for e-filing. If the system is not operational at the time of presentment, the filing shall be submitted by mail, unless the system is expected to resume operation before the filing deadline. A prisoner litigant transferred from a correctional facility with e-filing capability to a correctional facility without e-filing capability must submit all future filings by mail via the U.S. Postal Service. A prisoner litigant who is transferred into a correctional facility with e-filing capability must electronically transmit all subsequent filings to the Court. The prisoner litigant must notify the Clerk's Office immediately of any change of address.

MDOC staff will scan the prisoner litigant's filings at the correctional facility and transmit them, with a time stamp applied by the digital equipment, to the Clerk's Office email address. An automated email reply will be immediately sent to the MDOC email address acknowledging receipt of the filing. The original documents will be returned to the prisoner litigant, who

must retain them in their original form and produce them at a later time if ordered by the Court.

The Clerk's Office will review filings as soon as practicable (usually by 5:00 p.m. if received in the morning on a business day or by 12:00 p.m. the following business day if received in the afternoon) for jurisdiction and compliance with the court rules. If the Court does not have jurisdiction or if the filing does not substantially comply with the court rules, the Clerk's Office will transmit a Notice of Rejection to the MDOC that specifies the reason(s) for the rejection.

If the filing is accepted, it will be docketed in the Court's case management system and electronically served on those persons or entities that the prisoner litigant has identified as parties to the litigation if they are registered users of TrueFiling or have provided an official email address to the Court. The Clerk's Office will mail copies of the prisoner litigant's filing via the U.S. Postal Service to identified parties who cannot be e-served. For accepted filings, the Clerk's Office will transmit a Notice of Electronic Filing to the MDOC that identifies, among other things, the names and service information of parties who were served with the filing. The Notice of Electronic Filing also will be electronically transmitted or mailed to the Michigan Court of Appeals and the trial court/tribunal as notice of the appeal under MCR 7.305(A)(3).

The MDOC will provide a copy of the Notice of Rejection or Notice of Electronic Filing to the prisoner litigant as soon as practicable.

Exhibit A

Correctional Facilities Participating in the Prisoner Electronic Filing Program:

Carson City Correctional Facility, 10274 Boyer Road, Carson City, MI 48811

St. Louis Correctional Facility, 8585 N. Croswell Road, St. Louis, MI 48880

ADMINISTRATIVE ORDER
No. 2016-4

ADOPTION OF ADMINISTRATIVE ORDER TO EXPEDITE DISPOSITION OF PENDING PROBATE APPEALS IN CIRCUIT COURT

Entered November 23, 2016, effective immediately (File No. 2016-32)—REPORTER.

On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and this administrative order is adopted, effective immediately.

Expedited Consideration of Probate Appeals in Circuit Court

2016 PA 186 provides that all final orders issued by the probate court are appealable to the Court of Appeals beginning September 27, 2016. To facilitate disposition of the appeals of orders pending in the circuit court on September 27, 2016, each circuit judge is directed to:

(1) Insofar as possible, expedite the consideration of pending appeals from orders of the probate court; and

(2) On March 1, 2017, and every 6 months thereafter, file a report with the State Court Administrator listing each such appeal that remains pending, including a statement of the reasons the appeal has not been concluded.

Staff Comment: This administrative order directs circuit courts to expedite disposition of pending appeals, and report unresolved appeals beginning March 1, 2017.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

ADMINISTRATIVE ORDER No. 2016-5

ADOPTION OF NEW ANTINEPOTISM POLICY AND RESCISSION OF ADMINISTRATIVE ORDER NO. 1996-11

Entered December 7, 2016, effective January 1, 2017, except as otherwise provided (File No. 2014-3)—REPORTER.

On order of the Court, notice of the proposed new antinepotism order and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order No. 2016-5 is adopted and replaces Administrative Order No. 1996-11, which is rescinded, effective January 1, 2017.

Administrative Order No. 2016-5

Antinepotism Order

1. *Policy*. All courts in Michigan are committed to make all business decisions — including decisions regarding employment, contracting with vendors, and selecting interns — on the basis of qualifications and merit, and to avoid circumstances in which the appearance of impropriety or possibility of favoritism exist. On the basis of this policy, the following situations are prohibited:

(a) A superior-subordinate relationship existing at or developing after the time of employment between any related employees;

(b) A related chief judge and a court administrator working in the same court, regardless of whether there is a superior-subordinate relationship;

(c) Except as waived under this order, a related judge and court employee working in the same court.

All other relatives of court personnel who meet established requirements for job vacancies, court contract, or internship opportunities based on their qualifications and performance are eligible for judiciary employment, contracts, or internships in the same court. But advocacy of one relative on behalf of the other is prohibited in all circumstances.

2. *Definitions*. For purposes of this order, the following definitions apply:

(a) "Relative" includes spouse, child, parent, brother, sister, grandparent, grandchild, first cousin, uncle, aunt, niece, nephew, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, and father-in-law, whether natural, adopted, step or foster. The term also includes same-sex or different-sex individuals who have a relationship of a romantic, intimate, committed, or dating nature, which relationship arises after the effective date of this policy. The definition of relative does not include two related judges who are elected to or appointed to serve in the same court.

(b) "Court Administrator" includes the highest level of administrator, clerk, or director of the court who functions under the general direction of the chief justice or chief judge, including but not limited to state court administrator, circuit court administrator, friend of the court, probate court administrator, juvenile court administrator, probate register and district court administrator/clerk.

(c) A "superior-subordinate relationship" is one in which one employee is the direct supervisor of the other employee.

(d) An intern is a student or trainee who works for the court, with or without pay, to gain work experience.

(e) A vendor is an individual or someone appearing on behalf of a corporation or other entity that offers to provide or provides goods or services to the court.

3. *Application*. This policy applies to all applicants for employment, as well as all full-time and part-time employees, temporary employees, and contractual employees, including independent contractors, interns, vendors, and personal service contracts.

4. *Affected Employees*. No person shall be transferred, promoted, or rehired following separation in a position that would create a nepotic relationship in violation of this policy.

5. *Collective Bargaining Agreements*. After the date this order enters, chief judges and court administrators are prohibited from entering into collective bargaining agreements inconsistent with this policy.

6. *Conflicts; Waiver*. The chief judge of a court shall resolve any employment situations that conflict with or would conflict with this policy, unless the conflict involves a relative of the chief judge. In such a situation, the State Court Administrator shall resolve the issue.

In making a hiring decision, a chief judge (or the State Court Administrator, if the chief judge of a court is a relative of the prospective employee) may waive the prohibition in Paragraph 1(c) if the following requirements are met:

(a) The position for which the waiver is sought must have been announced or advertised to the public in the

same manner and for the same duration as other vacancies within the court.

(b) The prospective employee's judge relative cannot have participated in any way in the selection process.

(c) Other qualified applicants must have been considered.

(d) Selection of a candidate who is related to a judge must have been based on merit and qualifications, including evidence that the candidate meets the minimum requirements for the position.

(e) The chief judge (or the State Court Administrator, if applicable) completes and files with the State Court Administrative Office a form approved by the State Court Administrative Office in which the chief judge affirms that the court has followed this procedure.

If an employee is employed by a court and a relative of the employee subsequently becomes a judge in that court, the prohibition does not apply as long as the judge is not in a superior-subordinate position with the employee and as long as the employee retains the current employment status. If the employee seeks a different position, a court may seek a waiver only if it complies with the waiver procedure outlined above.

In making a decision about a waiver, the chief judge or State Court Administrator must determine whether the requirements listed above have been met, and whether such employment would create an appearance of impropriety or possibility of favoritism.

A decision rendered by a chief judge or the State Court Administrator under this order is not appealable or otherwise subject to review.

7. *Chief Judge Appointments*. Nothing in this policy prohibits the Supreme Court from selecting any judge

as a chief judge of a court. If such selection occurs, and such selection creates a nepotic relationship, the putative chief judge shall provide to the Court, and the Court shall approve, an alternative means by which the relative of the chief judge shall be supervised.

8. *No new rights created*. Adoption of this policy creates no new rights for employees or prospective employees.

9. *Grandfather clause*. This policy shall not apply to any person who is an employee of a court on the date this order enters. However, from the date this order enters, no person may be transferred, promoted, or enter into a nepotic relationship in violation of this policy, except as provided herein.

ADMINISTRATIVE ORDER No. 2017-1

ADJUSTMENT OF DISCIPLINE PORTION OF STATE BAR OF MICHIGAN DUES

Entered July 12, 2017, effective immediately (File No. 2017-09)—REPORTER.

In light of an attorney discipline system reserve of about $5 million, the Court lowered the discipline portion of the State Bar of Michigan annual dues from $120 to $110 (in 2011) and then to $90 (in 2014), intending that those reserve funds be used to offset annual operating expenses until the fund was reduced to a more reasonable level. With the reserve now projected to be approximately $1.86 million by the end of fiscal year 2016-2017, the Court has determined that bar dues should be restored, albeit in a phased-in fashion.

Therefore, on order of the Court, the amount of discipline dues is increased to $105 in the 2017-18 fiscal year, and further increased to $120 in the 2018-19 fiscal year, unless otherwise ordered by the Court. These changes will be reflected in the dues notices that are communicated to all bar members under Rule 4 of the Rules Concerning the State Bar.

AMENDED ADMINISTRATIVE ORDER No. 2015-9

EXTENSION OF ADMINISTRATIVE ORDER NO. 2015-9
(MAACS PILOT PROJECT)

Entered September 21, 2016, effective immediately (File No. 2014-36)—REPORTER.

On order of the Court, the MAACS Regional Pilot Project authorized under Administrative Order No. 2015-9 is extended until December 31, 2017.

EXTENDED ADMINISTRATIVE ORDER No. 2015-1

EXTENSION OF ADMINISTRATIVE ORDER NO. 2015-1

Entered June 21, 2017, effective immediately (File No. 2014-24)—REPORTER.

On order of the Court, Administrative Order No. 2015-1 is extended until March 25, 2020.

ADMINISTRATIVE ORDER
Nos. 1981-5 and 1992-3

RESCISSION OF ADMINISTRATIVE ORDER NOS. 1981-5 AND 1992-3

Entered December 14, 2016, effective immediately (File No. 2016-14)—REPORTER.

On order of the Court, Administrative Order No. 1981-5 and Administrative Order No. 1992-3 are rescinded, effective immediately.

ADMINISTRATIVE ORDER
No. 2014-19

TERMINATION OF ADMINISTRATIVE ORDER NO. 2014-19

Entered December 21, 2016, effective immediately (File No. 2014-41)—REPORTER.

Administrative Order No. 2014-19 is terminated, effective immediately.

AMENDMENTS OF MICHIGAN RULES

Adopted September 21, 2016, effective January 1, 2017 (File No. 2013-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.004, 3.705, 3.708, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.140, 5.404, 5.738a (deleted), 6.006, and 6.901 of the Michigan Court Rules are adopted, effective January 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.004. INCARCERATED PARTIES.

(A)-(B) [Unchanged.]

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call or by ~~video conference~~videoconferencing technology in a hearing or conference, including a friend of the court adjudicative hearing or

meeting. The order shall include the date and time for the hearing or conference, and the prisoner's name and prison identification number, and shall be served at least 7 days before the hearing or conference by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides. The initial telephone call or videoconference shall be conducted in accordance with subrule (E). If the prisoner indicates an interest in participating in subsequent proceedings following an initial telephone call or videoconference pursuant to subrule (E), the court shall issue an order in accordance with this subrule for each subsequent hearing or conference.

(D) [Unchanged.]

(E) The purpose of the initial telephone call or ~~video conference~~videoconference with the incarcerated party, as described in ~~this~~ subrule (C), is to determine

(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,

(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,

(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation ~~in~~by way of additional telephone calls or ~~video conferences~~videoconferencing technology as permitted by the Michigan Court Rules, and

(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

(F)-(G) [Unchanged.]

RULE 3.705. ISSUANCE OF PERSONAL PROTECTION ORDERS.

(A) [Unchanged.]

(B) Hearings.

(1)-(2) [Unchanged.]

(3) The hearing shall be held on the record. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(4)-(6) [Unchanged.]

(C) [Unchanged.]

RULE 3.708. CONTEMPT PROCEEDINGS FOR VIOLATION OF PERSONAL PROTECTION ORDERS.

(A)-(C) [Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(6) [Unchanged.]

As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location.

(E)-(G) [Unchanged.]

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. As long

as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, and with the consent of the parties, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location.

(3)-(5) [Unchanged.]

In addition to such a sentence, the court may impose other conditions to the personal protection order.

(I) Mechanics of Use. The use of videoconferencing technology under this rule must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

RULE 3.904. USE OF ~~INTERACTIVE VIDEO~~VIDEOCONFERENCING TECHNOLOGY.

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

~~(B) Hearings.~~

~~(1) Delinquency Proceedings. Two way interactive video technology may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.~~

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

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Courts may use videocon-

ferencing technology in delinquency, designated, and personal protection violation proceedings as follows.

(1) Juvenile in the Courtroom or at a Separate Location. Videoconferencing technology may be used between a courtroom and a facility when conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985, postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.

(2) Juvenile in the Courtroom—Other Proceedings. Except as otherwise provided in this rule, as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter. If the proceeding is a trial, the court may use videoconferencing technology with the consent of the parties. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

(B) Child Protective and Juvenile Guardianship Proceedings.

(1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1), in any proceeding.

(2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testi-

mony from an expert witness or any person at another location in the following proceedings:

(a) removal hearings under MCR 3.967 and evidentiary hearings; and

(b) termination of parental rights proceedings under MCR 3.977 and trials, with the consent of the parties. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

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

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

(1)-(4) [Unchanged.]

(5) For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(H) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(4) [Unchanged.]

(5) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1)-(2) [Unchanged.]

(3) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(I)-(L) [Unchanged.]

RULE 4.304. CONDUCT OF TRIAL.

(A) Appearance. If the parties appear, the court shall hear the claim as provided in MCL 600.8411. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1). The trial may be adjourned to a later date for good cause.

(B) [Unchanged.]

RULE 4.401. DISTRICT COURT MAGISTRATES.

(A) Procedure. Proceedings involving district court magistrates must be in accordance with relevant statutes and rules.

(B) Duties. Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division.

(C) Control of Magisterial Action. An action taken by a district court magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves.

(D) Appeals. Appeals of right may be taken from a decision of the district court magistrate to the district court in the district in which the magistrate serves by filing a written claim of appeal in substantially the form provided by MCR 7.104 within 7 days of the entry of the decision of the magistrate. No fee is required on the filing of the appeal, except as otherwise provided by statute or court rule. The action is heard de novo by the district court.

(E) A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006.

RULE 5.140. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A) Except as otherwise prescribed by this rule, upon request of any participant or sua sponte, the court may allow the use of videoconferencing technology under this chapter in accordance with MCR 2.407.

(B) In a mental health proceeding, if the subject of the petition wants to be physically present, the court must allow the individual to be present unless the court excludes or waives the physical presence of the subject pursuant to MCL 330.1455. This does not apply to proceedings under MCL 330.2050.

(C) In a proceeding concerning a conservatorship, guardianship, or protected individual, if the subject of the petition wants to be physically present, the court must allow the individual to be present. The right to be present for the subject of a minor guardianship applies only to a minor 14 years of age or older.

(D) The court may not use videoconferencing technology for a consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and MCR 5.404(B).

(E) Mechanics of Use. The use of videoconferencing technology under this chapter must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) [Unchanged.]

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid. The court may not use videoconferencing technology for the consent hearing required to be held under the Michigan Indian Family Preservation Act and this subrule.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

~~RULE 5.738a USE OF INTERACTIVE VIDEO TECHNOLOGY~~

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

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

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

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Defendant in the Courtroom — Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use ~~two-way interactive video~~ videoconferencing technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

(2) with the consent of the parties, trials. A party who does not consent to the use of ~~two way interactive~~

~~video~~ videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

(D) [Unchanged.]

RULE 6.901. APPLICABILITY.

(A)-(B) [Unchanged.]

(C) Video and Audio Proceedings. The courts may use telephonic, voice, or videoconferencing technology under this subchapter as prescribed by MCR 6.006.

Staff Comment: These amendments permit courts to expand the use of videoconferencing technology in many court proceedings, and clarify the proceedings at which videoconferencing technology may be used.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2016, effective January 1, 2017 (File No. 2013-39)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 6.112 of the Michigan Court Rules are adopted, effective January 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 6.112. THE INFORMATION OR INDICTMENT.

(A)-(F) [Unchanged.]

(G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an

information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. ~~This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.~~

(H) Amendment of Information or Notice of Intent to Seek Enhanced Sentence. The court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

Staff Comment: The amendments of MCR 6.112 clarify the procedure for amending a notice of intent to seek an enhanced sentence by requiring such amendment to be approved by the court, and eliminate the provision that makes the harmless-error standard inapplicable when a notice of intent to seek an enhanced sentence is not filed timely.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2016, effective immediately (File No. 2015-02)—REPORTER.

On order of the Court, the need for immediate action having been found, the notice requirements of MCR 1.201 are dispensed with and the following amendment of Rule 7.213 of the Michigan Court Rules is adopted, effective immediately. However, the issue will be placed on a future administrative public hearing. Comments will be received until January 1, 2017, and may be submitted to the Office of Administrative Counsel in writing or electronically to P.O. Box 30052, Lan-

sing, MI 48909, or ADMComment@courts.mi.gov. The amendment will be considered at a future public hearing. The notices and schedules of public hearings are posted on the Supreme Court's website at the following address: Administrative Public Hearings. [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrativehearings.aspx].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.213. CALENDAR CASES.

(A) ~~Pre-Argument Conference~~ Mediation in Calendar Cases.

(1) Selection for Mediation.

(a) At any time during the pendency of an appeal before the Court of Appeals, the chief judge or another designated judge may order an appeal submitted to mediation. When a case is selected for mediation, participation is mandatory; however, the chief judge or another designated judge may remove the case on finding that mediation would be inappropriate.

(b) To identify cases for mediation, the Court of Appeals will review civil appeals to determine if mediation would be of assistance to the court or the parties. At any time, a party to a pending civil appeal may file a written request that the appeal be submitted to mediation. Such a request may be made without formal motion and shall be confidential.

(c) A party to a case that has been selected for mediation may file a request to have the case removed from mediation. Such a request may be made without formal motion and shall be confidential. If the request

to remove is premised on a desire to avoid the cost of mediation, it is not necessary to demonstrate an inability to pay such costs.

(d) The submission of an appeal to mediation will not toll any filing deadlines in the appeal unless the court orders otherwise.

(2) Mediation Procedure.

(a) Mediation shall be conducted by a mediator selected by stipulation of the parties or designated by the court. A mediator designated by the court shall be an attorney, licensed in Michigan, who has met the qualifications of mediators provided in MCR 2.411(F).

(b) Mediation shall consider the possibility of settlement, the simplification of the issues, and any other matters that the mediator determines may aid in the handling or disposition of the appeal.

(c) The order referring the case to mediation shall specify the time within which the mediation is to be completed. Within 7 days after the time stated in the order, the mediator shall file a notice with the clerk stating only the date of completion of mediation, who participated in the mediation, whether settlement was reached, and whether any further mediation is warranted.

(d) If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) pursuant to MCR 7.218(B).

(e) The mediator may charge a reasonable fee, which shall be divided between and borne equally by the parties unless otherwise agreed and paid by the parties directly to the mediator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the chief judge or another designated judge

shall set a reasonable fee. In all other respects, mediator fees shall be governed by MCR 2.411(D).

(f) The statements and comments made during mediation are confidential as provided in MCR 2.412 and may not be disclosed in the notice filed by the mediator under (A)(2)(c) of this rule or by the participants in briefs or in argument.

(g) Upon failure by a party or attorney to comply with a provision of this rule or the order submitting the case to mediation, the chief judge or another designated judge may assess reasonable expenses, including attorney's fees, caused by the failure, may assess all or a portion of appellate costs, or may dismiss the appeal.

(3) Selection of Mediator.

(a) Except as otherwise provided in this rule, the selection of a mediator shall be governed by MCR 2.411(B).

(b) Within the time provided in the order referring a case to mediation, the parties may stipulate to the selection of a mediator. Such stipulation shall be filed with the clerk of the court. If the parties do not file a stipulation agreeing to a mediator within the time provided, the court shall appoint a mediator from the roster of approved mediators maintained by the circuit court in which the case originated.

~~(1) At any time before submission of a case, the Court of Appeals may direct the attorneys for the parties and client representatives with information and authority adequate for responsible and effective participation in settlement discussions to appear in person or by telephone for a pre-argument conference. The conference will be conducted by the court, or by a judge, retired judge or attorney designated by the court, known as a mediator. The conference shall~~

~~consider the possibility of settlement, the simplification of the issues, and any other matters which the mediator determines may aid in the handling of or the disposition of the appeal. The mediator shall make an order that recites the action taken at the conference and the agreements made by the parties as to any of the matters considered, and that limits the issues to those not disposed of by the admissions or agreements of counsel. Such order, when entered, controls the subsequent proceedings, unless modified to prevent manifest injustice.~~

~~(2) All civil cases will be examined to determine if a pre-argument conference would be of assistance to the court or the parties. An attorney or a party may request a pre-argument conference in any case. Such a request shall be confidential. The pre-argument conference shall be conducted by~~

~~(a) the court, or by a judge, retired judge or attorney designated by the court;~~

~~(b) if the parties unanimously agree, a special mediator designated by the court or selected by unanimous agreement of the parties. The special mediator shall be an attorney, licensed in Michigan, who possesses either mediation-type experience or expertise in the subject matter of the case. The special mediator may charge a reasonable fee, which shall be divided and borne equally by the parties unless agreed otherwise and paid by the parties directly to the mediator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the Court of Appeals shall set a reasonable fee.~~

~~When a case has been selected for participation in a pre-argument conference, participation in the conference is mandatory; however, the Court of Appeals may except the case from participation on motion for good~~

~~cause shown if it finds that a pre-argument conference in that case would be inappropriate.~~

~~(3) Any judge who participates in a pre-argument conference or becomes involved in settlement discussions under this rule may not thereafter consider any aspect of the merits of the case, except that participation in a pre-argument conference shall not preclude the judge from considering the case pursuant to MCR 7.215(J).~~

~~(4) Statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-argument conference order, and shall not be disclosed by the mediator or by the participants in briefs or in argument.~~

~~(5) To facilitate the pre-argument conference, unless one has already been filed, an appellant must file the docketing statement required by MCR 7.204(H).~~

~~(6) Upon failure by a party or attorney to comply with a provision of this rule or the pre-argument conference order, the Court of Appeals may assess reasonable expenses caused by the failure, including attorney's fees, may assess all or a portion of appellate costs, or may dismiss the appeal.~~

(B)-(E) [Unchanged.]

Staff Comment: This proposal, submitted by the Michigan Court of Appeals, would make permanent the mediation pilot project that has been operating under authority of Administrative Order No. 2015-8 since October 2015. The proposed amendments have been adopted with immediate effect to enable the mediation program to continue during the comment period.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may

be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMComment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted November 2, 2016, effective January 1, 2017 (File No. 2013-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.804 of the Michigan Court Rules is adopted, effective January 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.804. CONSENT AND RELEASE.

(A) [Unchanged.]

(B) Hearing.

(1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.

(2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29.

Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).

(3) Use of Videoconferencing Technology. Except for a consent hearing involving an Indian child pursuant to MCL 712B.13, the court may allow the use of videoconferencing technology under this subchapter in accordance with MCR 2.407.

(C) [Unchanged.]

Staff Comment: This amendment permits courts to use videoconferencing technology in adoption consent/release hearings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted December 14, 2016, effective immediately (File No. 2016-14)—REPORTER.

On order of the Court, the following corrections are adopted, effective immediately.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A)-(C) [Unchanged.]

(D) Stay on Appeal. Stay on appeal is governed by MCR 7.108, 7.209, and ~~7.302(I)~~7.305(I). If a party appeals a trial court's denial of the party's claim of governmental immunity, the party's appeal operates as an automatic stay of any and all proceedings in the case until the issue of the party's status is finally decided.

(E)-(G) [Unchanged.]

(E)-(G) [Unchanged.]

Staff Comment: These amendments relate to stay bonds. The amendments of MCR 7.209 are modeled on the recent revisions of MCR 7.108, the circuit court appeals rule, and provide that filing a bond automatically stays enforcement of a money judgment or order. The amendments further clarify that ~~the automatic stay provision~~ the provision for obtaining a stay of a money judgment by filing a bond under MCR 7.209(E)(2)(a) does not apply to domestic relations matters, in which a stay must be ordered by the trial court. The amendment of MCR 2.614 coordinates with the amendment of MCR 7.209 and clarifies that execution may not issue until 21 days after a *final* judgment enters in a case.

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(25) [Unchanged.]

(26) "Register of actions" means the ~~permanent~~ case history maintained in accord with the Michigan Supreme Court Case File Management Standards. See MCR 8.119(D)(1)(c).

(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.923. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Electronic Equipment; Support Person. The court may allow the use of ~~closed-circuit television~~ videoconferencing technology, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, or support persons, and may take other measures to protect the child witness as authorized by MCL 712A.17b.

(F)-(G) [Unchanged.]

RULE 3.943. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(6) [Unchanged.]

(7) Mandatory Detention for Use of a Firearm.

(a) In addition to any other disposition, a juvenile, other than a juvenile sentenced in the same manner as an adult under MCL 712A.18(1)~~(n)~~(m), shall be committed under MCL 712A.18(1)(e) to a detention facility for a specified period of time if all the following circumstances exist:

(i)-(iii) [Unchanged.]

(b)-(c) [Unchanged.]

RULE 3.955. SENTENCING OR DISPOSITION IN DESIGNATED CASES.

(A) Determining Whether to Sentence or Impose Disposition. If a juvenile is convicted under MCL 712A.2d, sentencing or disposition shall be made as provided in MCL 712A.18(1)~~(n)~~(m) and the Crime Victim's Rights Act, MCL 780.751 *et seq*., if applicable. In deciding whether to enter an order of disposition, or impose or delay imposition of sentence, the court shall consider all the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:

(1)-(6) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A)-(C) [Unchanged.]

(D) Court Responsibilities.

(1) Annual Reviews.

(a)-(b) [Unchanged.]

(c) Termination of Juvenile Guardianship. Upon receipt of notice from the Department of Health and Human Services that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship.

(2)-(4) [Unchanged.]

(E)-(F) [Unchanged.]

RULE 5.140. USE OF VIDEOCONFERENCING TECHNOLOGY.

(A) [Unchanged.]

(B) In a mental health proceeding, if the subject of the petition wants to be physically present, the court must allow the individual to be present unless the court excludes or waives the physical presence of the subject pursuant to MCL 330.1455. This does not apply to proceedings concerning a person originally committed as a result of MCL 330.2050.

(C)-(E) [Unchanged.]

RULE 6.445. PROBATION REVOCATION.

(A)-(F) [Unchanged.]

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) [Unchanged.]

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A)-(F) [Unchanged.]

~~(G) Appeals from Orders Granting or Denying Motions for Summary Disposition. Appeals arising solely from orders granting or denying motions for summary disposition under MCR 2.116 are to be processed in accordance with Administrative Order 2004-5.~~

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A)-(I) [Unchanged.]

Staff Comment: These amendments relate to stay bonds. The amendments of MCR 7.209 are modeled on the recent revisions of MCR 7.108, the circuit court appeals rule, and provide that filing a bond automatically stays enforcement of a money judgment or order. The amendments further clarify that ~~the automatic stay provision~~ the provision for obtaining a stay of a money judgment by filing a bond under MCR 7.209(E)(2)(a) does not apply to domestic relations matters, in which a stay must be ordered by the trial court. The amendment of MCR 2.614 coordinates with the amendment of MCR 7.209 and clarifies that execution may not issue until 21 days after a *final* judgment enters in a case.

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A) Form. Briefs in calendar cases must be prepared in the form provided in MCR 7.212(B), (C), ~~and~~ (D), and (G). Briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Original typewritten pages may be used, but not carbon copies.

(B)-(J) [Unchanged.]

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(F) [Unchanged.]

(G) Certification.

(1)-(2) [Unchanged.]

(3) Certification by Testing.

(a) The board shall approve administration of an examination to be offered at~~At~~ least twice each year ~~the board shall administer an examination~~ testing knowledge and speed, and, as to a recorder, operator, or voice writer, familiarity with basic logging techniques and minor repair and maintenance procedures. The board shall determine the passing score.

(b)-(e) [Unchanged.]

(f) The ~~registration~~certification fee is $60.

(4)-(7) [Unchanged.]

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the complainant, by a final order entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR ~~7.302~~7.305 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR ~~7.304~~7.306.

(B)-(E) [Unchanged.]

RULE 9.126. OPEN HEARINGS; ~~PRIVILIGED~~PRIVILEGED, CONFIDENTIAL FILES AND RECORDS.

(A)-(D) [Unchanged.]

(E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial miscon-

duct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to:

(1) the State Bar of Michigan Client ~~Security~~Protection Fund,

(2)-(8) [Unchanged.]

Staff Comment: These amendments update cross-references and make other nonsubstantive revisions to clarify the rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted January 25, 2017, effective immediately (File No. 2015-02) —REPORTER.

By order dated September 21, 2016, this Court amended Rule 7.213 of the Michigan Court Rules, effective immediately. 500 Mich clxv (2016). Notice and an opportunity for comment at a public hearing having been provided, the amendments are retained, and are further amended as indicated below.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 7.213. CALENDAR CASES.

(A) Mediation in Calendar Cases.

(1) Selection for Mediation.

(a) At any time during the pendency of an appeal before the Court of Appeals, the chief judge or another designated judge may order an appeal submitted to mediation. When a case is selected for mediation, participation is mandatory; however, the chief judge or another designated judge may remove the case on

finding that mediation would be inappropriate. Appeals of domestic relations actions and protection matters are excluded from mediation under this rule.

(b)-(d) [Unchanged.]

(2)-(3) [Unchanged.]

(B)-(E) [Unchanged.]

Staff Comment: The Court retained the amendments previously adopted in this file, and included a new clarifying provision at the suggestion of several commenters that domestic relations actions and protection matters are excluded from the mediation program.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted January 25, 2017, effective immediately (File No. 2016-24)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.115 of the Michigan Court Rules is adopted, effective immediately.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 9.115. HEARING PANEL PROCEDURE.

(A)-(E) [Unchanged.]

(F) Prehearing Procedure.

(1)-(4) [Unchanged.]

(5) Discipline by Consent.

(a) In exchange for a stated form of discipline and on the condition that the plea or admission is accepted by the commission and the hearing panel, a~~A~~ respondent may offer to

(i) plead no contest or to admit all ~~essential~~ or some of the facts and misconduct alleged ~~contained~~ in the complaint or ~~any of its allegations~~ otherwise agreed to by the parties or

(ii) stipulate to facts and misconduct in a proceeding filed under subchapter 9.100 not initiated by a formal complaint.

~~in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel.~~ The respondent's offer shall first be submitted to the commission. If ~~the offer is accepted by~~ an agreement is reached with the commission, the administrator and the respondent shall ~~prepare~~ file with the board and the hearing panel a stipulation for a consent order of discipline~~ that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation with the hearing panel~~. At the time of filing, the administrator shall serve a copy of the stipulation upon the complainant.

(b) The stipulation shall include:

(i) admissions, which may be contained in an answer to the complaint, or a plea of no contest to facts sufficient to enable the hearing panel to determine the nature of the misconduct and conclude that the discipline proposed is appropriate in light of the identified misconduct;

(ii) citation to the applicable American Bar Association Standards for Imposing Lawyer Sanctions; and

(iii) disclosure of prior discipline.

~~If the stipulation contains any nonpublic information, it shall be filed in camera.~~ Admonishments and contractual probations shall be filed separately and kept confidential until the hearing panel accepts the stipulation under this rule. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.~~

(c) Upon the filing of a stipulation for a consent order of discipline, the hearing panel may:

(i) approve the stipulation and file a report and enter a final order of discipline; or

(ii) communicate with the administrator and the respondent about any concerns it may have regarding the stipulation. Before rejecting a stipulation, a hearing panel shall advise the parties that it is considering rejecting a stipulation and the basis for the rejection. The hearing panel shall provide an opportunity, at a status conference or comparable proceeding, for the parties to offer additional information in support of the stipulation.

(d) If a hearing panel rejects a stipulation, the hearing panel shall advise the parties in writing of its reason or reasons for rejecting the stipulation and allow the parties an opportunity to submit an amended stipulation.

(e) If a hearing panel rejects an amended stipulation, or if no amended stipulation is filed within 21 days after rejection of the initial stipulation, the matter shall be reassigned to a different hearing panel. Upon reassignment to a different hearing panel,

(i) the stipulation and any amended stipulation shall be deemed withdrawn,

(ii) statements and stipulations made in connection with the stipulation and any amended stipulation shall be inadmissible in disciplinary proceedings against the respondent and not binding on either party, and

(iii) the newly assigned hearing panel shall conduct a hearing.

(G)-(M) [Unchanged.]

Staff Comment: The amendment of MCR 9.115(F)(5) clarifies that a hearing panel may allow parties to submit an amended stipulation. If a hearing panel rejects an amended stipulation, the matter would be referred to a different hearing panel to conduct a hearing. This language was submitted jointly by the Attorney Grievance Commission and Attorney Discipline Board.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted April 5, 2017, effective May 1, 2017 (File No. 2013-38)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of MRPC 1.5 is adopted, effective May 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 1.5. FEES.

(a)-(c) [Unchanged.]

(d) A lawyer shall not enter into an arrangement for, charge, or collect: ~~a contingent fee in a domestic relations matter or in a criminal matter.~~

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, the lawyer's success, results obtained, value added, or any factor to be applied that leaves the client unable to discern the basis or rate of the fee or the method by which the fee is to be determined, or

(2) a contingent fee for representing a defendant in a criminal case.

(e) [Unchanged.]

[The following paragraph is to be added in the Comment following Rule 1.5, after the comment on "Basis or Rate of Fee."]

Prohibited Contingent Fees.

Paragraph (d) prohibits a lawyer from charging a fee in a domestic relations matter when payment is contingent upon the securing of a divorce, or upon the amount of alimony or support or property settlement to be obtained. The amount of alimony, support or property awarded to a client shall not be used by a lawyer as a basis for enhancing the fee. This provision does not preclude a contract for a contingent fee for legal

representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Staff Comment: At the invitation of the Supreme Court, the Attorney Grievance Commission, the Family Law Council of the State Bar of Michigan, and the Bar's Committee on Professional Ethics submitted individual proposals to revise MRPC 1.5(d) related to the ability of an attorney to charge "results obtained" or "value-added fees" in a domestic relations case. Proposals by the AGC and Committee on Professional Ethics were combined for purposes of publication, and that proposal was published along with the Family Law Council's proposal for comment. The Court adopted the AGC-proposed language that clarifies that a lawyer is prohibited from charging a contingent fee in a domestic relations action based on the "results obtained" or "value added."

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

BERNSTEIN, J., would adopt the alternative published proposal that would allow an attorney and client to agree in writing to an enhanced fee.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2014-25)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.306 of the Michigan Court Rules is adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A) When Available. A complaint may be filed to invoke the Supreme Court's superintending control power

(1)-(2) [Unchanged.]

When a dispute regarding court operations arises between judges within a court that would give rise to a complaint under this rule, the judges shall participate in mediation as provided through the State Court Administrator's Office before filing such a complaint. The mediation shall be conducted in compliance with MCR 2.411(C)(2).

(B)-(I) [Unchanged.]

Staff Comment: Under the amendment of MCR 7.306, judges in an intra-court dispute are required to submit to mediation before filing a complaint for superintending control in the Supreme Court under this rule.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2015-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.108 of the Michigan Court Rules is adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A)-(D) [Unchanged.]

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

(1)-(3) [Unchanged.]

(4) when prompt action is required, seek an injunction from the Supreme Court ~~against~~enjoining an attorney's misconduct or enjoining an attorney from engaging in the practice of law~~when prompt action is required~~, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5)-(7) [Unchanged.]

Staff Comment: The amendment of MCR 9.108 clarifies that the Court has the authority to enjoin an attorney from practicing law, at the request of the Attorney Grievance Commission.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2015-24)—REPORTER.

On order of the Court, notice of the proposed change and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.116 and 2.119 of the Michigan Court Rules are adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 2.116. SUMMARY DISPOSITION.

(A)-(F) [Unchanged.]

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i)-(ii) [Unchanged.]

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief and must be limited to 5 pages. The reply brief must be filed and served at least 4 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

(b) If the court sets a different time for filing and serving a motion, ~~or~~ a response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(2)-(6) [Unchanged.]

(H)-(J) [Unchanged.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions.

(a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

(b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

(c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

(d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(3)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment: The amendments, originally submitted in a slightly different form by the State Bar of Michigan Representative Assembly, amend the rules regarding motions for summary disposition to allow for the filing of reply briefs only in summary disposition proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2016-04)—REPORTER.

On order of the Court, notice of the proposed change and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rule 8.126 of the Michigan Court Rules are adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Except as otherwise provided in this rule, an out-of-state attorney may seek temporary admission as determined in this subsection. 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, before an administrative tribunal or agency, or in a specific arbitration proceeding 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 be temporarily admitted to practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, administrative tribunal or agency, or arbitrator 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 and who is not a member of the State Bar of Michigan.

(1) [Unchanged.]

(B) Waiver. An applicant is not required to associate with local counsel, limited to the number of appearances to practice, or required to pay the fee to the State Bar of Michigan, if the applicant establishes to the satisfaction of the court in which the attorney seeks to appear that:

(1) the applicant appears for the limited purpose of participating in a child custody proceeding as defined by MCL 712B.3(b) in a Michigan court pursuant to the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*; and

(2) the applicant represents an Indian tribe as defined by MCL 712B.3; and

(3) the applicant presents an affidavit from the Indian child's tribe asserting the tribe's intent to intervene and participate in the state court proceeding, and averring the child's membership or eligibility for membership under tribal law; and

(4) the applicant presents an affidavit that verifies:

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

(b) the jurisdiction where the attorney is presently eligible to practice;

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

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

(5) If the court in which the attorney seeks to appear is satisfied that the out-of-state attorney has met the requirements in this subrule, the court shall enter an order authorizing the out-of-state attorney's temporary admission.

Staff Comment: The amendment of MCR 8.126, submitted by the Michigan Tribal State Federal Judicial Forum, waives fees and other requirements for out-of-state attorneys who seek temporary admission in Michigan. The exemption from certain requirements applies only in cases in which the attorney desires to represent an Indian tribe intervening in a child custody proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2016-29)—REPORTER.

On order of the Court, notice of the proposed change and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rule 7.121 of the Michigan Court Rules are adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 7.121. ~~APPEALS FROM CONCEALED WEAPON LICENSING BOARDS~~ CONCEALED PISTOL LICENSE APPEALS.

(A) Scope. This rule governs appeals to the circuit court under MCL 28.425d.~~from a final determination of a concealed weapon licensing board refusing to restore rights under MCL 28.424 or denying, failing to issue, revoking, or suspending a license to carry a concealed pistol.~~ Unless this rule provides otherwise, MCR 7.101 through MCR ~~7.115~~7.114 apply.

(B) Suspensions and Revocations. Failure of the county clerk to reinstate a concealed pistol license under MCL 28.428(2) or (6) shall be considered a failure to issue a license under MCL 28.425d unless otherwise noted by statute.

(~~B~~C) Appeal of Right.

(1) [Unchanged.]

(2) Manner of Filing.

(a) Claim of Appeal — Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the license applicant or licensee is the appellant, and

(ii) the ~~board is~~county clerk, department of state police, or entity taking the fingerprints may be the appellee.

(b) Claim of Appeal — Content. The claim of appeal must~~:~~ state whether the appellant is appealing a statutory disqualification, failure to issue a receipt, or failure to issue a concealed pistol license, and the facts on which venue is based.

~~(i) state:~~

~~[A] "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the county*] Concealed Weapon Licensing Board," or~~

~~[B] "[*Name of appellant*] claims an appeal from the failure of the [*name of the county*] Concealed Weapon Licensing Board to issue a decision on the application for a license by [*date*]," and~~

~~(ii) include concise statements of the following:~~

~~[A] the nature of the proceedings before the board, including citation to the statute authorizing the board's decision;~~

~~[B] citation to the statute or Const 1963, art 6 § 28 authorizing appellate review;~~

~~[C] the facts on which venue is based.~~

(c) [Unchanged.]

~~(d) Other Documents. In addition to the documents required under MCR 7.104(D), the claim of appeal shall include a copy of the board's decision and any materials accompanying the board's decision. If the appeal is from the board's failure to issue a timely decision, the claim of appeal shall state the date on which the application was filed and shall include a~~

~~statement addressing whether the application complied with MCL 28.425b(1), (5), and (9).~~

(~~e~~d) Service. The appellant shall serve the claim of appeal on all parties.

(~~f~~e) Request for Certified Record. Within the time for filing a claim of appeal, the appellant shall send a written request to the ~~board~~county clerk to send a certified copy of the record to the circuit court.

(3) [Unchanged.]

~~(C) Hearing De Novo from Denial of License for Grounds Specified in MCL 28.425b(7)(n).~~

~~(1) Briefs. The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.~~

~~(2) Hearing. The court shall hold a hearing de novo that comports with MCL 28.425d(1). Any determination that the appellant is unfit under MCL 28.425b(7)(n) shall be based on clear and convincing evidence.~~

~~(3) Decision. The circuit court shall enter an order either affirming the board's denial or finding the applicant qualified under MCL 28. 425b(7)(n) and ordering the board to issue a license.~~

~~(D) Procedure in All Other Appeals.~~

(~~1~~4) Briefs. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(~~2~~5) Oral Argument. If requested in accord with MCR 7.111(C), the court shall hold oral argument within 14 days after the appellee's brief was filed or due. The court may dispense with oral argument under MCR 7.114(A).

~~(3) Decision. The court shall confine its consideration to a review of the record. If the court determines~~

~~that the denial of a license was clearly erroneous, the court shall order the board to issue a license as required by the act. If the court determines that the board erroneously refused to restore rights pursuant to MCL 28.424(3), the court shall order the board to restore the applicant's rights. If the court determines that the board erroneously revoked or suspended a license, the court shall order the board to reinstate the license. If the court determines that the board failed to issue a license pursuant to MCL 28.425b(13), the court shall order the board to act on the application within 14 days. The court shall retain jurisdiction to review the board's decision.~~

(~~E~~D) Notice of Decision. The circuit court shall serve the parties with a copy of its order resolving the appeal.

~~(F) Costs and Attorney Fees.~~

~~(1) Arbitrary and Capricious Board Decision. If the court determines that the decision of the board to deny issuance of a license to an applicant was arbitrary and capricious, the court shall order the state to pay 1/3 and the county in which the concealed weapon licensing board is located to pay 2/3 of the actual costs and actual attorney fees of the applicant in appealing the denial.~~

~~(2) Frivolous Appeal. If the court determines that an applicant's appeal was frivolous, the court shall order the applicant to pay the actual costs and actual attorney fees of the board in responding to the appeal.~~

Staff Comment: The amendments of MCR 7.121 update the court rules to incorporate statutory changes enacted in 2015 PA 3 and 207.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2016-33)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.216 of the Michigan Court Rules is adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(B) [Unchanged.]

(C) Referral to Mediation.

(1)-(2) [Unchanged.]

(3) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the P~~p~~arties ~~who~~ are subject to a personal protection order or other protective order, or ~~who~~ are involved in a child abuse and neglect proceeding ~~may not be referred to mediation without a hearing to determine whether mediation is appropriate~~. The court may order mediation without a hearing if a protected party requests mediation.

(D)-(G) [Unchanged.]

(H) Mediation Procedure.

(1) [Unchanged.]

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout

the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the state court administrative office as directed by the supreme court.

(2)-(8) [Renumbered but otherwise unchanged.]

(I)-(K) [Unchanged.]

Staff Comment: The amendments of MCR 3.216 update the rule to be consistent with 2016 PA 93, which allows a court to order mediation if a protected party requests it and requires a mediator to screen for the presence of domestic violence throughout the process.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 24, 2017, effective September 1, 2017 (File No. 2016-39)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.903, 3.932, and 3.936 of the Michigan Court Rules are adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(24) [Unchanged.]

(25) "Records" are as defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders.

(26) "Register of actions" means the permanent case history of all cases, as defined in subrule (A)(1), maintained in accordance with Michigan Supreme Court Case File Management Standards. See MCR 8.119(D)(1)(ca).

(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

~~(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian and the prosecutor, agree to have the case placed on the consent calendar. A court may not consider a case on the consent calendar that includes an offense listed as an assaultive crime by the Juvenile Diversion Act, MCL 722.822(a). The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.~~

~~(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 *et seq.*~~

~~(2) Plea; Adjudication. No formal plea may be entered in a consent calendar case unless the case is based on an alleged violation of the Michigan Vehicle Code, MCL 257.1 *et seq*. in which case the court shall enter a plea. The court must not enter an adjudication.~~

~~(3) Conference. The court shall conduct a consent calendar conference with the juvenile and the parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.~~

~~(4) Case Plan. If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.~~

~~(5) Custody. A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.~~

~~(6) Disposition. No order of disposition may be entered by the court in a case placed on the consent calendar.~~

~~(7) Closure. Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding.~~

~~(8) Transfer to Formal Calendar. If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements~~

~~made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.~~

~~(9) Abstracting. If the court finds that the juvenile has violated the Michigan Vehicle Code, the court must fulfill the reporting requirements imposed by MCL 712A.2b(d).~~

(C) Consent Calendar.

(1) If the court determines that formal jurisdiction should not be acquired over the juvenile, the court may proceed with the case on the consent calendar. A case transferred to the consent calendar shall be transferred before disposition but may occur any time after receiving a petition, citation, or appearance ticket. Upon transfer, the clerk of the court shall make the case nonpublic.

(2) A case shall not be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar. A case involving the alleged commission of an offense as that term is defined in section 31 of the Crime Victim's Rights Act, MCL 780.781 *et seq*., shall only be placed on the consent calendar upon compliance with procedures set forth in MCL 780.786b.

(3) Fingerprinting. Except as otherwise required by law, a juvenile shall not be fingerprinted unless the court has authorized the petition. If the court authorizes the petition and the juvenile is alleged to have committed an offense that requires the juvenile to be fingerprinted according to law, the court shall ensure the juvenile is fingerprinted before placing the case on consent calendar under subrule (C)(1).

(4) Victim Notice. After a case is placed on consent calendar, the prosecutor shall provide the victim notice as required by article 2 of the Crime Victim's Rights act, MCL 780.781 to 780.802.

(5) Conference. After placing a matter on the consent calendar, the court shall conduct a consent calendar case conference with the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian. The prosecutor and victim may, but need not, be present. At the conference, the court shall discuss the allegations with the juvenile and issue a written consent calendar case plan in accordance with MCL 712A.2f(7).

(6) Case Plan. The case plan is not an order of the court, but shall be included as part of the case record. If the court determines the juvenile has violated the terms of the case plan, it may transfer the case to the formal calendar in accordance with subrule (C)(9).

(7) Disposition. The court shall not enter an order of disposition in a case while it is on the consent calendar.

(8) Access to Consent Calendar Case Records. Records of consent calendar proceedings shall be nonpublic. Access to consent calendar case records is governed by MCL 712A.2f(5).

(9) Transfer to Formal Calendar. If it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may transfer the case from the consent calendar to the formal calendar. The court shall proceed with the case where court proceedings left off before the case was placed on the consent calendar.

(a) If the original petition was not authorized before being placed on the consent calendar, the court may,

without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition to determine whether the petition should be authorized.

(b) If the original petition was authorized before being placed on the consent calendar, the court shall conduct a hearing on the record before transferring the case to the formal calendar. At the hearing, the court shall:

(i) Advise the juvenile that any statements made during the consent calendar proceedings cannot be used against the juvenile at a trial on the same charge.

(ii) Allow the juvenile and the juvenile's attorney, if any, the opportunity to address the court and state on the record why the case should not be transferred to the formal calendar.

(10) Closing the Case. Upon a judicial determination that the juvenile has completed the terms of the consent calendar case plan, the court shall report the successful completion to the juvenile and the Department of State Police. The report to the Department of State police shall be in a form prescribed by the Department of State Police.

(11) Record Retention. The case records shall only be destroyed in accordance with the approved record retention and disposal schedule established by the State Court Administrative Office.

(D) [Unchanged.]

RULE 3.936. FINGERPRINTING.

(A) [Unchanged.]

(B) Order for Fingerprints. At the time that the court authorizes the filing of a petition alleging a juvenile offense and before the court enters an order of

disposition on a juvenile offense or places the case on consent calendar, the court shall examine the confidential files and verify that the juvenile has been fingerprinted. If it appears to the court that the juvenile has not been fingerprinted, the court must:

(1)-(2) [Unchanged.]

(C) [Unchanged.]

(D) Order for Destruction of Fingerprints. ~~When a juvenile has been fingerprinted for a juvenile offense, but no petition on the offense is submitted to the court, the court does not authorize the petition, or the court does not take jurisdiction of the juvenile under MCL 712A.2(a)(1), if the records have not been destroyed as provided by MCL 28.243(7)-(8), the court, on motion filed pursuant to MCL 28.243(8), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the fingerprints and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12).~~ The court, on motion filed pursuant to MCL 28.243(8), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the fingerprints and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12), when a juvenile has been fingerprinted for a juvenile offense and no petition on the offense is submitted to the court, the court does not authorize the petition, or the court has neither placed the case on consent calendar nor taken jurisdiction of the juvenile under MCL 712A.2(a)(1).

Staff Comment: The amendments of MCR 3.903, 3.932, and 3.936 clarify the procedures used for consent calendar proceedings in juvenile delinquency cases, consistent with the recent enactment of 2016 PA 185.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 31, 2017, effective September 1, 2017 (File No. 2014-25)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.316 of the Michigan Court Rules is adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 7.316. MISCELLANEOUS RELIEF.

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers

(1)-(6) [Unchanged.]

(7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require; ~~or~~

(8) if a judgment notwithstanding the verdict is set aside on appeal, grant a new trial or other relief~~;~~, or

(9) order an appeal submitted to mediation. The mediator shall file a status report with this Court within the time specified in the order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318.

(B)-(C) [Unchanged.]

Staff Comment: The amendment of MCR 7.316 explicitly provides that the Supreme Court may order an appeal to mediation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

MARKMAN, C.J. (*dissenting*). When the proposed amendment of MCR 7.316(A) was published for comment, I wrote a concurring statement raising questions, and expressing concerns, about the proposed amendment, which will allow this Court to "order an appeal submitted to mediation." 500 Mich 1224, 1225-1227 (2016). Following publication of the proposed amendment, the Appellate Practice Section of the State Bar indicated that it "shares in [my] concerns," while the Alternative Dispute Resolution Section offered point-by-point responses to these concerns. Although I certainly appreciate these responses, they do not alleviate my concerns. As a result of the concerns raised in my statement of November 30, 2016, I respectfully dissent from the adoption of the present amendment.

Adopted June 21, 2017, effective September 1, 2017 (File No. 2015-22)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.203 and 3.208 of the Michigan Court Rules are adopted, effective September 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 3.203. SERVICE OF NOTICE AND COURT PAPERS IN DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1)-(2) [Unchanged.]

(3) Alternative Electronic Service

(a) A party or an attorney may file an agreement with the friend of the court to authorize the friend of the court to serve notices and court papers on the party or attorney by any of the following methods:

(i) e-mail;

(ii) text message;

(iii) sending an e-mail or text message alert to log into a secure website to view notices and court papers.

(b) Obligation to Provide and Update Information

(i) The agreement for service by e-mail or e-mail alert shall set forth the e-mail addresses for service. Attorneys who agree to e-mail service 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. Parties or attorneys who have agreed to service by e-mail or e-mail alert under this subsection shall immediately notify the friend of the court if the e-mail address for service changes.

(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this

subsection shall immediately notify the friend of the court if the phone number for service changes.

(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:

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

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed or text message 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.

(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.

(e) A paper served by alternative electronic service that the friend of the court or an authorized designee is required to sign may include the 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).

(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a document shall identify in the e-mail subject line or at the beginning of the text message the case by court, party name, case number, and the title or legal description of the document(s) being sent.

(g) An alternative electronic service 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 under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the friend of the court in writing at least 28 days in advance of the withdrawal.

(i) Alternative electronic service is complete upon transmission, unless the friend of the court learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliverable, the friend of the court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The friend of the court must also retain a notice that the electronic transmission was undeliverable.

(j) The friend of the court shall maintain an archived record of sent items that shall not be purged until a judgment or final order is entered and all appeals have been completed.

(k) This rule does not require the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service.

(B)-(C) [Unchanged.]

(D) Administrative Change of Address. The friend of the court office ~~shall~~may change a party's address administratively pursuant to the policy established by the state court administrator for that purpose when:

(1) [Unchanged.]

(2) notices and court papers are returned to the friend of the court office as undeliverable or the friend

of the court determines that a federal automated database has determined that mail is not deliverable to the party's listed address.

(E)-(H) [Unchanged.]

(I) Notice to Attorneys.

(1) Copies of notices required to be given to the parties also must be sent to the attorneys of record.

(2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.

(J) [Former subrule "(I)" relettered as "(J)," but otherwise unchanged.]

RULE 3.208. FRIEND OF THE COURT.

(A)-(C) [Unchanged.]

~~(D) Notice to Attorneys~~

~~(1) Copies of notices required to be given to the parties also must be sent to the attorneys of record.~~

~~(2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.~~

Staff Comment: The amendments of MCR 3.203 allow the friend of the court to use automated databases such as the United States Postal Services' National Change of Address database to identify outdated addresses and update them to correct addresses. The amendments allow a party or a party's attorney to agree to receive notices and other court papers from the friend of the court electronically. The amendments move the requirement to provide notices to attorneys of record from MCR 3.208.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted June 21, 2017, effective immediately (File No. 2016-32)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.204, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 of the Michigan Court Rules are adopted, effective immediately.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 5.801. APPEALS TO ~~OTHER COURTS~~COURT OF APPEALS.

(A) ~~Right to~~ Appeal of Right. A~~n~~ party or an interested person aggrieved by a~~n~~ final order of the probate court may appeal as a matter of right as provided by this rule.

~~(B) Orders Appealable to Court of Appeals.~~ Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order, as defined in MCR 7.202(6)(a), affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

(2) [Unchanged.]

(a) appointing or removing a ~~personal representative, conservator, trustee,~~ fiduciary or trust protector as ~~referred to~~defined in MCL 700.7103(n), or denying such an appointment or removal;

(b) [Unchanged.]

(c) determining the validity of a governing instrument as defined in MCL 700.1104(m);

(d) interpreting or construing a governing instrument as defined in MCL 700.1104(m);

(e) approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(m);

(f)-(ee) [Unchanged.]

(ff) adoption assistance determinations pursuant to MCL 400.115k;

(3) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding under the Estates and Protected Individuals Code;

(4) a final order affecting the rights or interests of a person under the Mental Health Code;

(5) an order entered in a probate proceeding, other than a civil action commenced in probate court, that otherwise affects with finality the rights or interests of a party or an interested person in the subject matter; or

(36) other appeals as ~~may be hereafter~~ provided by ~~statute~~law.

~~(C) Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:~~

~~(1) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding;~~

~~(2) a final order affecting the rights or interests of a person under the Mental Health Code, except for a final order affecting the rights and interests of a person in the estate of an individual with developmental disabilities.~~

(B~~D~~) Appeal by Leave~~Interlocutory Orders~~. All orders of the probate court not listed in subrule (A) are appealable to the Court of Appeals by leave of that court. ~~An interlocutory order, such as an order regarding discov-~~

~~ery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court and only by leave of that court. The circuit court shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.~~

~~(E) Transfer of Appeals from Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.~~

~~(F) Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.~~

RULE 5.802. APPELLATE PROCEDURE; STAYS PENDING APPEAL.

(A)-(B) [Unchanged.]

(C) Stays Pending Appeals. An order removing or appointing a fiduciary; appointing a special personal representative or a special fiduciary; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary's bond; or suspending a fiduciary and appointing a special fiduciary, is not stayed pending appeal unless ordered by the court on motion for good cause.

RULE 7.102. DEFINITIONS.

For purposes of this subchapter:

(1)-(8) [Unchanged.]

(9) "trial court" means the district~~, probate,~~ or municipal court from which the "appeal" is taken.

RULE 7.103. APPELLATE JURISDICTION OF THE CIRCUIT COURT.

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) [Unchanged.]

~~(2) a final order of a probate court under MCR 5.801(C);~~

(3)-(4) [Renumbered (2)-(3) but otherwise unchanged.]

(B) [Unchanged.]

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A)-(D) [Unchanged.]

~~(E) Probate Actions.~~

~~(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.~~

~~(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).~~

RULE 7.109. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

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

(a) [Unchanged.]

~~(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.~~

(c)-(e) [Relettered (b)-(d) but otherwise unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A)-(C) [Unchanged.]

(D) Form of Claim of Appeal.

(1)-(2) [Unchanged.]

(3) If the case involves

(a) a contest as to the custody of a minor child, ~~or~~

(b) a case involving an adult or minor guardianship under the Estates and Protected Individuals Code or under the Mental Health Code or an involuntary mental health treatment case under the Mental Health Code, or

(c) a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid,

that ~~the~~ fact must be stated in capital letters on the claim of appeal. In an appeal specified in subrule (D)(3)(~~b~~c), the Court of Appeals shall give expedited consideration to the appeal, and, if the state or an officer or agency of the state is not a party to the appeal, the Court of Appeals shall send copies of the claim of appeal and the judgment or order appealed from to the Attorney General.

(E)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1)-(4) [Unchanged.]

~~(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;~~

(6)-(7) [Renumbered (5)-(6) but otherwise unchanged.]

(C)-(H) [Unchanged.]

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A)-(C) [Unchanged.]

(D) Probate Actions. The probate court retains continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.

(D)-(I) [Relettered (E)-(J) but otherwise unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614 or MCL 600.867, or except as otherwise provided under this rule, an appeal does not stay the effect or

enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a cause in which a party has appealed a trial court's denial of the party's claim of governmental immunity.

(2)-(3) [Unchanged.]

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions and Probate Proceedings. Unless determined by law, or as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action or probate proceeding must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Conditions of Stay Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant shall promise in writing:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(G) Sureties and Filing of Bond; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court that entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings.

(a)-(g) [Unchanged.]

(2) [Unchanged.]

(H)-(I) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, an adult or minor guardianship proceeding under the Estates and Protected Individuals Code, or a proceeding under the Mental Health code, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

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

(a) [Unchanged.]

(b) In an appeal from probate court in an estate or trust proceeding, an adult or minor guardianship proceeding under the Estates and Protected Individuals Code, or a proceeding under the Mental Health code, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcript.

(c)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.212. BRIEFS.

(A) Time for Filing and Service

(1) *Appellant's Brief.*

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 28 days after the claim of appeal is filed, the order granting leave is certified, the transcript is filed with the trial court, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later, in a child custody case, adult or minor guardianship case under the Estates and Protected Individuals Code or under the Mental Health Code, involuntary mental health treatment cases under the Mental Health Code, or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion; or

(ii)-(iii) [Unchanged.]

(b) [Unchanged.]

(2) *Appellee's Brief.*

(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 21 days after the appellant's brief is served on the appellee, in an interlocutory criminal appeal, adult or minor guardianship case under the Estates and Protected Individuals Code or under the Mental Health Code, involuntary mental health treatment cases under the Mental Health Code, or a child custody case. This time may be extended only by the Court of Appeals on motion;

(ii) [Unchanged.]

(b) [Unchanged.]

(3)-(5) [Unchanged.]

(B)-(I) [Unchanged.]

RULE 7.213. CALENDAR CASES.

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1) [Unchanged.]

(2) child custody cases, guardianship cases under the Estates and Protected Individuals Code and under the Mental Health Code, and involuntary mental health treatment cases under the Mental Health Code;

(3)-(7) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: These amendments conform to recent statutory changes that require all appeals from probate court to be heard in the Court of Appeals, instead of the bifurcated system that previously required some probate appeals to be heard in the Court of Appeals and some to be heard in the local circuit court. The amendments also establish priority status for appeals in guardianship and involuntary mental health treatment cases, similar to child custody cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted June 21, 2017, effective July 1, 2017 (File No. 2017-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, the following Rule 8.115 of the Local Court Rules of the Third Judicial Circuit Court is adopted, effective July 1, 2017.

RULE 8.115. COURTHOUSE DECORUM.

(A) This court rule applies to the conduct and dress of those who attend court or engage in business in the court offices, including attorneys, litigants, witnesses, jurors, and interested persons.

(B) Court proceedings shall be conducted in a manner that protects the dignity and seriousness of the proceedings. Conduct by any person that may interfere with the decorum of the court is prohibited and may result in removal of that person from the court and/or a finding of contempt of court.

(C) Attorneys shall wear proper business attire while attending court, unless excused from doing so by the court.

(D) Jurors, parties, witnesses, and interested persons should wear appropriate attire while attending court, unless excused from doing so by the court.

(E) The jury clerk shall assist the court in ensuring compliance with this rule and may require a juror whose clothing does not comply with subsection (D) to obtain appropriate attire or to report for service on a later date. A juror who fails to return to court as directed may be found in contempt of court and is subject to the penalties permitted by statute and court rule.

(F) Persons attending court are required to abide by the following guidelines, which are representative rather than all inclusive.

(1) Smoking or the use of electronic smoking devices, eating, drinking beverages other than water, and gum chewing are not allowed in any courtroom at any time, whether during sessions of the court or during a recess.

(2) Taking photographs or making other audio or video recordings is not allowed in the courtroom without the express permission of the court.

(3) All conversations and reading of non-case related materials like books, newspapers, and periodicals, ex-

cept as necessary for the matter before the court, are prohibited in the courtroom during sessions of the court.

(4) Cellular telephones, beepers, and electronic communication devices that have the capacity to disrupt court proceedings must be turned off or set for silent notification during sessions of the court. Individuals shall not answer or send messages from telephones, beepers, or other electronic communication devices while the court is in session. Failure to comply with this section may result in the seizure of the device, a fine, incarceration, or both for contempt of court.

(G) Each business office of the court may set a policy regarding the use of cellular telephones, beepers, and other electronic communication devices in that office.

(H) It is within the discretion of the judge to have an individual removed from the courtroom if the individual's conduct or dress does not comport with this rule.

Staff Comment: These local court rule provisions of the Third Judicial Circuit Court have been adopted to reinforce the solemnity and importance of court proceedings, clearly enunciate to all court users the conduct expected or prohibited in court facilities, and establish a single standard.

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

SUPREME COURT CASES

LOWREY v LMPS & LMPJ, INC

Docket No. 153025. Decided December 13, 2016.

Krystal Lowrey filed a complaint in the Oakland Circuit Court against LMPS & LMPJ, Inc., after she slipped and fell while descending a stairway at Woody's Diner and sustained a broken tibia and fibula. She asserted that the stairs were wet and slippery at the time of her fall, a condition Lowrey insisted Woody's Diner should have known about and should have remedied or guarded against, or about which the diner should have warned its patrons. Lowrey subsequently amended her complaint to name KSK Hospitality Group, Inc., doing business as Woody's Diner, as the defendant. Woody's Diner moved for summary disposition under MCR 2.116(C)(10). The court, Rudy J. Nichols, J., granted summary disposition in favor of Woody's Diner. Lowrey appealed in the Court of Appeals. The Court of Appeals, RONAYNE KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ., reversed the trial court, explaining that Woody's Diner was obligated to establish that it lacked notice of the hazard, which required it to present evidence showing what a reasonable inspection of the premises would have entailed under the circumstances the night Lowrey was injured. 313 Mich App 500 (2016). Woody's Diner applied for leave to appeal in the Supreme Court.

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

A premises owner moving for summary disposition of a premises liability claim against it under MCR 2.116(C)(10) has the burden of demonstrating that the claimant's evidence is insufficient to establish an essential element of the claim or presenting affirmative evidence to negate an element of the claim. The premises owner, however, is not required to proffer evidence negating an element of the claim if the claimant's evidence is insufficient to establish an essential element of the claim. In addition, a premises owner is not liable for injuries arising from a hazard unless it had actual or constructive notice of the hazard; the premises owner is not required to show that a routine or reasonable inspection of the premises would have failed to discover the

hazard because it is not required to prove that it lacked actual or constructive notice.

1. A party defending against a motion for summary disposition of its negligence claim in a premises liability case must raise a genuine issue of fact regarding each element of its claim, including whether the premises owner had actual or constructive notice of the condition that caused the party's injury. The premises owner is not required to present evidence to negate one of the elements of the plaintiff's claim and is therefore not required to prove that it did not have actual or constructive notice of the hazard. To place that requirement on the premises owner would improperly shift the burden of proof from the plaintiff to the defendant. In this case, Woody's Diner only needed to show that Lowrey's evidence was insufficient to create a genuine issue of material fact about whether Woody's Diner had actual or constructive notice of the hazard because Lowrey was required to produce enough evidence to create a genuine issue of material fact on each element of her premises liability claim to withstand Woody's Diner's motion for summary disposition.

2. A premises owner moving for summary disposition of a negligence claim against it is not required to present evidence of what would constitute a reasonable inspection of the premises under the circumstances and whether such inspection would apprise the premises owner of the hazard that caused its patron's injury. Never has a premises owner, the moving party in the motion for summary disposition in this case, been required to prove its lack of notice by describing what kind of inspection it should have conducted and that, even if it had engaged in such an inspection, it would have remained unaware of the hazard. Rather, Lowrey was required to present evidence that Woody's Diner had actual or constructive notice of the wet steps. Lowrey failed to present any evidence that Woody's Diner knew or should have known about the wet steps, and the Court of Appeals improperly reversed the trial court's grant of summary disposition in favor of Woody's Diner.

Court of Appeals judgment regarding notice reversed, remainder of the Court of Appeals judgment vacated, and trial court order granting summary disposition in favor of Woody's Diner reinstated.

Ernst & Marko Law (by *Kevin Ernst* and *Jonathan R. Marko*) and *Bendure & Thomas* (by *Mark R. Bendure*) for Krystal Lowrey.

Kallas & Henk PC (by *Constantine N. Kallas* and *Joseph F. Fazi*) for KSK Hospitality Group, Inc.

PER CURIAM. This case concerns the standard for granting a motion for summary disposition and the elements of a premises liability claim. On a snowy night, plaintiff Krystal Lowrey went with friends to Woody's Diner (defendant) for drinks to celebrate St. Patrick's Day. While exiting the diner, she fell on the stairs and injured herself. She brought this premises liability action, and the trial court granted summary disposition in defendant's favor. The Court of Appeals subsequently reversed, concluding that defendant had failed to establish that it lacked notice of the hazardous condition alleged in the complaint, reasoning that defendant had not presented evidence of what a reasonable inspection would have entailed under the circumstances. We conclude that in order to obtain summary disposition under MCR 2.116(C)(10), defendant was not required to present proof that it lacked notice of the hazardous condition, but needed only to show that plaintiff presented insufficient proof to establish the notice element of her claim. We conclude that defendant met its burden because plaintiff failed to establish a question of fact as to whether defendant had notice of the hazardous condition. Accordingly, we reverse the judgment of the Court of Appeals regarding defendant's notice, reinstate the trial court's order granting summary disposition in favor of defendant on that issue, and vacate the remainder of the Court of Appeals' opinion.

I. FACTS AND HISTORY

Plaintiff Krystal Lowrey and her friends went to Woody's Diner for drinks on March 17, 2013, in cel-

ebration of St. Patrick's Day. They arrived at approximately 12:30 a.m. and went to the dance area located on the second floor. Plaintiff and her friends used the back stairs to travel from the dance area to the smoking patio several times without incident while they were at the diner. Plaintiff consumed four shots of alcohol before she and her friends left around 1:45 a.m. The group once again used the back stairs, this time for the purpose of exiting the diner. Plaintiff was about five stairs from the bottom when she fell forward on the stairs and landed approximately two or three steps below. She asserted that she had slipped on a wet step. Plaintiff acknowledged that she had not seen any water on the stairs at any time that night, but assumed that the stairs were wet because her backside was wet after she landed from her fall and a person "can't just slip on nothing." Plaintiff did not know which of her feet had slipped on the stairs, but thought it might have been both feet because she had lost her balance. Plaintiff and her friends testified that many people were using the same stairs that night and that plaintiff and her friends had not heard of anyone else slipping on the stairs or complaining that the stairs were slippery. The manager of the diner testified that she had not received a report of anyone else falling on the stairs that night.

After being diagnosed with and treated for a broken tibia and fibula, plaintiff sued defendant, alleging negligence. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), holding that plaintiff failed to raise a genuine issue of material fact regarding whether defendant had actual or constructive knowledge of the condition of the stairs; alternatively, the court found the hazardous condition to be open and obvious.

The Court of Appeals reversed and remanded to the trial court, stating that "[w]hen the defendant is convinced that the plaintiff will be unable to support an element of the claim at trial, but is unwilling or unable to marshal his or her own proofs to support a motion under MCR 2.116(C)(10), the defendant's recourse is to wait for trial and move for a directed verdict after the close of the plaintiff's proofs." *Lowrey v LMPS & LMPJ, Inc*, 313 Mich App 500, 510; 885 NW2d 638 (2015). The Court of Appeals also held that defendant had failed to present evidence that it lacked notice of the hazardous condition because it had not presented evidence of what a reasonable inspection would have entailed under the circumstances. Finally, the Court of Appeals ruled that defendant could not invoke the "open and obvious danger" doctrine as a defense because it had failed to present evidence that a reasonable person would have discovered the hazard.

Defendant sought leave to appeal in this Court, challenging the Court of Appeals' analysis of the standard for summary disposition, its analysis of the elements for notice of an alleged dangerous condition, and its application of the open and obvious danger doctrine.

II. STANDARD OF REVIEW

A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled

to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

There are two issues in the Court of Appeals' opinion that require our attention. The first pertains to the standard for granting a motion for summary disposition under MCR 2.116(C)(10). MCR 2.116 provides in pertinent part:

> (B) Motion.
>
> (1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2912c must be made by motion under MCR 2.116 and MCR 2.119.
>
> * * *
>
> (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.
>
> * * *
>
> (G) Affidavits; Hearing.
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> * * *
>
> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes

> there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

The moving party may thus satisfy its burden under MCR 2.116(C)(10) by "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim," *or* by "demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Quinto*, 451 Mich at 362 (quotation marks and citation omitted). This Court has further described the nonmovant's burden to avoid summary disposition after the movant has satisfied its burden through one of these two courses of action:

> Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). [*Quinto*, 451 Mich at 362-363.]

This Court reaffirmed *Quinto* and the proper application of MCR 2.116(C)(10) in *Maiden*, 461 Mich at 121, stating that "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly

requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial."

In this case, defendant moved for summary disposition under MCR 2.116(C)(10). Plaintiff was an invitee of defendant and her negligence claim is based on premises liability. In order to successfully advance such a claim, an invitee must show that the premises owner breached its duty to the invitee and that the breach constituted the proximate cause of damages suffered by the invitee. *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A premises owner breaches its duty of care when it "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012).

The Court of Appeals recognized that "plaintiff must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue[.]" *Lowrey*, 313 Mich App at 510. It also understood that defendant would be entitled to summary disposition if there was no question of fact that defendant lacked such notice. *Id*. Yet, the Court of Appeals determined that "the trial court erred to the extent that it required [plaintiff] to present evidence to establish a question of fact as to whether [defendant] had actual notice[.]" *Id*. at 512. The Court of Appeals erroneously shifted the burden to defendant by ruling that because defendant "failed to present evidence that, if left unrebutted, would establish that it did not have actual or constructive notice of the condition[,] [plaintiff] . . . had no obligation to come forward with evidence establishing a question of fact

as to that element . . . ." *Id*. at 504. Defendant is not required to go beyond showing the insufficiency of plaintiff's evidence. The Court of Appeals erred when it imposed an additional requirement on defendant: to proffer evidence to negate one of the elements of plaintiff's claim. As discussed, the rule is well established that a moving party may be entitled to summary disposition as a result of the nonmoving party's failure to produce evidence sufficient to demonstrate an essential element of its claim. See, e.g., *Bernardoni v Saginaw*, 499 Mich 470; 886 NW2d 109 (2016) (granting summary disposition to the defendant because the defendant demonstrated that the plaintiff's evidence was insufficient to establish an essential element of her claim—the defendant's knowledge of the alleged defect). The Court of Appeals erred to the extent that its opinion is inconsistent with this standard for deciding summary disposition motions under MCR 2.116(C)(10).

The second issue we must clarify pertains to the notice element of a premises liability claim. While the Court of Appeals correctly noted that "[t]o establish a claim of premises liability, the plaintiff must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue," *Lowrey*, 313 Mich App at 510, the Court of Appeals both improperly shifted the burden to defendant to prove its lack of notice and imposed a new element necessary to prove such lack of notice:

> [A] premises possessor who moves for summary disposition on the ground that he or she did not have constructive notice of the dangerous condition will normally have to present evidence to establish what constitutes a reasonable inspection under the circumstances to permit an inference that, given the nature of the hazard, he or she

> would not have discovered the hazard even if he or she had performed that inspection. [*Lowrey*, 313 Mich App at 515.][1]

However, this Court has never required a defendant to present evidence of a routine or reasonable inspection under the instant circumstances to prove a premises owner's lack of constructive notice of a dangerous condition on its property. The Court of Appeals erred when it imposed this new condition on premises owners seeking summary disposition.

Rather, as earlier discussed, defendant could establish its entitlement to summary disposition by demonstrating that plaintiff failed to present sufficient evidence of notice. To prevail on her claim, plaintiff had to establish that defendant, as a premises owner, possessed actual or constructive notice of the dangerous condition. We have described liability based on a premises owner's notice of a dangerous condition as follows:

> The proprietor is liable for injury resulting from an unsafe condition caused by the active negligence of himself and his employees; and he is liable when the unsafe condition, otherwise caused, is known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have knowledge of it. [*Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937) (citation omitted).][2]

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[1] To the extent that *Grandberry-Lovette v Garascia*, 303 Mich App 566; 844 NW2d 178 (2014), supports the Court of Appeals' position regarding a defendant's burden of proof on a motion for summary disposition or the elements necessary to prove constructive notice, it was incorrect. See *Lowrey*, 313 Mich App at 512-520.

[2] We have described the duty a landowner owes to an invitee as "[an] obligation to also make the premises safe, which requires the landowner to inspect the premises and depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The plaintiff, however, bears the burden of proof of establishing

Therefore, in order to show notice, plaintiff had to demonstrate that defendant knew about the alleged water on the stairs or should have known of it because of its character or the duration of its presence. See, e.g., *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968) (stating that premises liability exists when the hazard is "known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it") (emphasis omitted).

We hold that plaintiff failed to proffer evidence sufficient to demonstrate a question of fact regarding defendant's actual or constructive notice of the hazardous condition, and defendant was entitled to summary disposition on this basis. As it relates to actual notice, plaintiff herself did not see any water on the stairs at any time that night, and defendant's manager testified that no customers or employees had reported water on the stairs or any accidents on the stairs that night. Nor did plaintiff or her friends hear any other customers expressing concerns about water on the stairs. Plaintiff alleged that an employee of the bar was standing at the bottom of the stairs and witnessed her fall, but neither plaintiff nor any of her friends were able to identify the employee. Even assuming an employee was present, his presence would not by itself have indicated that he knew of the water on the step before plaintiff's fall. Thus, plaintiff presented no evidence that defendant had actual knowledge of the hazardous condition.

Plaintiff likewise failed to present any evidence of constructive notice, i.e., that the hazard was of such a

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that the defendant breached this duty of care, i.e., the defendant knew or should have known "of a dangerous condition on the premises of which the invitee [was] unaware and fail[ed] to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner*, 492 Mich at 460.

character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it. Plaintiff and her friends traversed the stairs several times during the evening without incident, evidence which would tend to support the conclusion that the hazardous condition that caused plaintiff's fall had not been present on the steps for the entirety of the evening. Nor did plaintiff present any evidence as to when the condition arose. *Goldsmith v Cody*, 351 Mich 380, 389; 88 NW2d 268 (1958) (granting summary disposition in favor of the defendant because "[t]he missing link in [the] plaintiff's case [was] any proof as to when the [hazardous condition arose]"). Finally, plaintiff presented no evidence that the hazardous condition in this case was of such a character that the defendant should have had notice of it. In fact, no evidence concerning the character of the condition was presented; plaintiff's assumption that the stairs must have been wet because her pants were wet after her fall does not support any particular conclusion concerning the character of the condition. The Court of Appeals erred by reversing the trial court's grant of summary disposition to defendant because plaintiff failed to support an essential element of her claim—defendant's notice of the hazardous condition.[3]

In summary, the Court of Appeals (1) improperly altered the burden of proof a moving party must meet to obtain summary disposition under MCR 2.116(C)(10) in a negligence action based on premises liability; (2) improperly required defendant to provide "proof of reasonable inspection" to show that it lacked

[3] Given that defendant is entitled to summary disposition because plaintiff failed to establish an essential element of her claim, we need not address the Court of Appeals' open and obvious danger determination. Rather, we vacate that portion of its opinion.

constructive notice of the alleged harm; and (3) erred by reversing the trial court's grant of summary disposition to defendant. Accordingly, we reverse the judgment of the Court of Appeals regarding defendant's notice, reinstate the trial court's order granting summary disposition in favor of defendant on that issue, and vacate the remainder of the Court of Appeals' opinion.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

PEOPLE v BARRERA

Docket No. 151282. Decided April 4, 2017.

John J. Barrera was charged in the Saginaw Circuit Court with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, for sexually assaulting his wife's granddaughter. Defendant pleaded no contest as a fourth-offense habitual offender, MCL 769.12, to two counts of CSC-II and two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d. At sentencing, defendant objected to the scoring of several offense variables (OVs). The court, James T. Borchard, J., overruled all of defense counsel's objections to the scoring of the OVs except for the objection to the score for OV 12. Specifically, over defense counsel's objection, the court scored OV 8, MCL 777.38, at 15 points because defendant asported the victim to a place of greater danger during his commission of the crimes—that is, defendant took the victim to his bedroom where he sexually assaulted her. Defendant sought delayed leave to appeal in the Court of Appeals. In an unpublished order entered on January 21, 2015, the Court of Appeals, WILDER, P.J., and MURRAY and RIORDAN, JJ., denied for lack of merit defendant's delayed application for leave to appeal. Defendant then sought leave to appeal in the Supreme Court.

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

On appeal in this case, defendant only challenged the scoring of OVs 8 and 11. Under OV 8, asportation occurs when a victim is carried away or removed from one place to another place of greater danger or to a situation of greater danger. There is no "incidental movement" exception to the meaning of asportation for purposes of scoring OV 8. OV 8 is correctly scored at 15 points whenever a victim is moved to a place or a situation of greater danger regardless of whether the movement was incidental to the commission of the sentencing offense. The Court of Appeals improperly relied on caselaw involving kidnapping when defining "asportation" as used in OV 8. The incidental-movement excep-

tion to the plain-meaning definition of "asportation" arose in the kidnapping context to prevent the possibility that defendants would be unconstitutionally overcharged when their crimes involved some movement of the victim or some confinement of the victim that was merely incidental to a lesser underlying crime. The same concerns do not apply when scoring OV 8. Therefore, the Court of Appeals should have used the plain meaning of the term. For purposes of OV 8, a victim is asported whenever he or she is carried away or removed to another place of greater danger or to a situation of greater danger. The movement need not be greater than necessary to commit the sentencing offense, and the movement may be incidental to commission of the offense. Prior cases, including *People v Thompson*, 488 Mich 888 (2010), and *People v Spanke*, 254 Mich App 642 (2003), are overruled to the extent they suggested a contrary interpretation of OV 8. Notwithstanding the accuracy of defendant's OV 8 score, defendant's sentences were vacated and the case was remanded for resentencing because there was an undisputed error involved in scoring OV 11.

Remanded to the trial court for resentencing.

CRIMINAL LAW — FELONY SENTENCING — OFFENSE VARIABLE 8 — ASPORTATION.

Fifteen points are appropriately assigned under Offense Variable (OV) 8, MCL 777.38, when a victim is moved to a place of greater danger or to a situation of greater danger, even when the movement is merely incidental to commission of the crime being scored; there is no incidental-movement exception to the definition of asportation and its application to scoring OV 8.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

John J. Barrera *in propria persona*.

PER CURIAM. In this case, we address the proper reading of MCL 777.38, which is Offense Variable (OV) 8. OV 8 states that 15 points are to be assessed when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held

captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). The statute does not define "asported."

In order to define "asportation" as used in MCL 777.38, the Court of Appeals in *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003), borrowed from one of its previous opinions, which in turn relied on prior decisions of this Court interpreting the meaning of "asportation" in the context of the term's use as a judicially required element of the crime of kidnapping by forcible confinement or imprisonment. *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998), citing *People v Barker*, 411 Mich 291, 299-302; 307 NW2d 61 (1981); see also *People v Adams*, 389 Mich 222, 236; 205 NW2d 415 (1973). Relying on this authority, the *Spanke* Court concluded that asportation—as an element of kidnapping—required that "there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." *Spanke*, 254 Mich App at 647. Subsequently, this Court and the Court of Appeals have sometimes interpreted this quoted language from *Spanke* as effectively creating an "incidental movement" exception to OV 8, such that asportation does not occur if the movement is incidental to commission of the *offense* for which OV 8 is being scored. See, e.g., *People v Thompson*, 488 Mich 888 (2010); *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013); *People v McCreary*, unpublished per curiam opinion of the Court of Appeals, issued November 8, 2016 (Docket No. 328373), p 4 (asserting that asportation cannot be incidental to committing the underlying offense; instead, it "must facilitate the crime for which the defendant was convicted").

To the extent that *Thompson* and *Spanke* have been interpreted to have created an incidental-movement exception to OV 8, we hold that they were wrongly decided and we therefore overrule them. We further conclude that "asported" as used in OV 8 should be defined according to its plain meaning, rather than by reference to our kidnapping jurisprudence. Under the plain meaning of the term "asportation," movement of a victim that is incidental to the commission of a crime nonetheless qualifies as asportation. Accordingly, the trial court in this case correctly scored OV 8 at 15 points.[1]

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, related to sexual assaults he perpetrated on his wife's granddaughter. Defendant entered into a plea deal under which he pleaded no contest as a fourth-offense habitual offender to the two CSC-II counts and to two added counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d.

At sentencing, defendant's trial counsel objected to the scoring of OVs 3, 4, 8, 11, and 12.[2] With respect to OV 8, defendant's counsel insisted that there was no asportation shown in the case. The prosecution re-

[1] But because the parties have agreed there was an error in the scoring of OV 11, we conclude that defendant is entitled to resentencing in accordance with the parties' agreement. In lieu of granting leave to appeal, we vacate defendant's sentences and remand this case to the Saginaw Circuit Court for resentencing.

[2] The trial court overruled all of counsel's objections except for defendant's challenge to the scoring of OV 12, which it sustained. Defendant challenges only the scoring of OVs 8 and 11 in this Court.

sponded that the victim was taken into defendant's bedroom, which was a sufficient showing of asportation to merit assessing points for OV 8. The trial court agreed with the prosecution and scored OV 8 at 15 points. The Court of Appeals denied leave to appeal for lack of merit. We directed the Saginaw County Prosecutor to respond to defendant's application and specifically to address whether, under *Thompson* and *Spanke*, the trial court erred by scoring OV 8 at 15 points when the movement was incidental to the offense of CSC-II. *People v Barrera*, 885 NW2d 295 (2016).

II. ANALYSIS

This case presents a question of statutory interpretation, which we review de novo. *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 255; 865 NW2d 908 (2015). When a statutory term is undefined, we give it its plain and ordinary meaning unless it is a term of art. See *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). But terms that " 'have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.' " *Id*., quoting MCL 8.3a.

The term "asportation" has a long history in the larceny context. At common law, the elements of larceny included

> "(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

In that context, the Court of Appeals has long recognized that "[a]ny movement of the goods is sufficient to constitute an asportation." *People v Alexander*, 17 Mich App 30, 32; 169 NW2d 190 (1969). This broad understanding of asportation includes a movement of goods by a victim at the defendant's direction. *Id*. at 32-33. And this understanding is consistent with the legal-dictionary definition of "asportation," which defines the term as "the act of carrying away or removing (property or a person)." *Black's Law Dictionary* (7th ed).

The term "asportation" also has a long history in the kidnapping context. See, e.g., *Adams*, 389 Mich at 230-235 (summarizing the history of asportation in the kidnapping context). In *Adams*, however, this Court departed from the common understanding of the word. This departure was rooted in the fact that *Adams* did not seek to *define* the word "asportation"; rather, it limited the plain meaning of the word (which it implicitly recognized as including "any movement at all," *id*. at 232) to ensure that the asportation element of the crime was not overly broad. *Id*. at 230-238. For the following reasons, we conclude that application of the plain meaning of the word "asportation" is the better approach in this case because there is no reason to conclude that the Legislature intended to import to OV 8 the judicial limitations on the meaning of that term as found in our kidnapping jurisprudence.[3]

It is important to understand first how inapt our kidnapping jurisprudence (and its discussion of asportation) is to the instant context. In *Adams*, this Court held that part of our kidnapping statute "is so broad that it requires the interpolation of the historical concept of asportation to render it constitutional . . . ."

[3] Indeed, OV 8 specifically states that it is not to be scored when the conviction being scored is kidnapping. MCL 777.38(2)(b).

Id. at 230. We noted that "[i]t is obvious that virtually any assault, any battery, any rape, or any robbery involves some 'intentional confinement' " of the victim, and as a consequence "[t]o read the kidnapping statute literally is to convert a misdemeanor, for example, assault and battery, into a capital offense." *Id*. at 232-233 (quotation marks and citation omitted). The entirety of our analysis of what constituted asportation was therefore done in the shadow of and in response to our observation that failing to add an asportation requirement would unconstitutionally allow prosecutors to charge defendants committing lesser offenses with kidnapping. *Id*. at 232-233, citing *People v Adams*, 34 Mich App 546, 560; 192 NW2d 19 (1971). But, the Court explained, even with an asportation requirement incorporated, a person could be improperly convicted of kidnapping if asportation was given its broadest meaning. *Adams*, 389 Mich at 230-238. To avoid that result, we held that to qualify as asportation sufficient to sustain a conviction for kidnapping, the movement of the victim "must not be merely incidental to the commission of a lesser underlying crime, i.e., it must be incidental to the commission of the kidnapping." *Id*. at 236. In other words, the *Adams* Court not only read an asportation requirement into our kidnapping statute, it also limited the plain meaning of asportation to avoid potential constitutional problems.

The concerns expressed in *Adams* do not apply here. There is no concern that OV 8 is constitutionally deficient, and applying a plain language definition of "asportation" does not present the concern we faced in *Adams* that defendants committing lesser offenses could be overcharged with kidnapping. Accordingly, we decline to export the judicially crafted understanding of asportation from our kidnapping jurisprudence and import it to the unrelated context of interpreting OV 8.

Moreover, even were we to deem it appropriate to import into our understanding of OV 8 the narrow reading of asportation from our kidnapping jurisprudence, the "incidental movement" exception is an almost unrecognizable distortion of that reading. The rule in *Adams* was that the movement of the victim "must not be merely incidental to *the commission of a lesser underlying crime* . . . ." *Id*. (emphasis added). In the guidelines-scoring context, there is no "lesser underlying crime" with which to be concerned; rather, the guidelines are scored for the sentencing offense. *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009) ("[O]ffense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise."). Therefore, all of the bases for limiting the meaning of asportation, as well as the applicability of the limitation itself to this context, collapse on their own terms.

A plain reading of asportation is this: If a victim is carried away or removed "to another place of greater danger or to a situation of greater danger," MCL 777.38(1)(a), the statutory language is satisfied. Nothing in the statute requires that the movement be greater than necessary to commit the sentencing offense, and we see no other basis for reading the statute as excluding the movement of a victim that is only incidental to that offense. See *People v Hardy*, 494 Mich 430, 442; 835 NW2d 340 (2013) ("[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables.").

III. APPLICATION

The trial court concluded that defendant's asportation of the victim was sufficient to score OV 8 at 15 points because defendant took the victim from the

living room into his bedroom in order to sexually assault her. From those facts, the trial court could reasonably determine by a preponderance of the evidence that the victim was "removed" to a location where the sexual assault was less likely to be discovered, which rendered the location a "place of greater danger" or "a situation of greater danger." Given that determination and because such movement, whether incidental to the offense or meaningfully deliberate, may suffice to assess points for OV 8, OV 8 was properly scored at 15 points. See *People v Chelmicki*, 305 Mich App 58, 70-71; 850 NW2d 612 (2014) (stating that "[a] victim is asported to a place or situation involving greater danger when moved away from the presence or observation of others"), citing *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009).

IV. CONCLUSION

We hold that movement of a victim that is incidental to the commission of a crime nonetheless qualifies as asportation under OV 8. Therefore, we overrule *Thompson* and *Spanke* to the extent that they stand for the contrary proposition, and we conclude that the trial court properly scored OV 8 at 15 points. Finally, in light of the trial court's undisputed error in scoring OV 11, we remand this case to the Saginaw Circuit Court for further proceedings consistent with this opinion.

MARKMAN, C.J., and YOUNG, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

GRAHAM v FOSTER

Docket No. 152058. Argued on application for leave to appeal January 10, 2017. Decided April 7, 2017.

Shae K. Graham filed a complaint in the Oakland Circuit Court under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., against Sharea Foster to establish his alleged paternity and legal fatherhood of Foster's son, BF. Foster married her husband, Christopher, in 2004, and BF was born in 2009 during Foster's marriage to Christopher. Because a child born during a marriage is presumed to be the legitimate child of that marriage, Christopher was BF's father as a matter of law. An action under the RPA must be filed within three years of the child's birth or within one year of the RPA's effective date. Graham timely filed his complaint on May 15, 2013, within the one-year period of limitations in MCL 722.1437(1) that began on June 12, 2012. Graham's complaint asked the court to first determine under MCL 722.1443(2)(d) that BF was born out of wedlock and then, under MCL 722.1443(2)(e), to determine that Graham was BF's biological father, after which the court could enter an order of filiation establishing Graham as BF's biological father and naming him BF's legal father. Foster moved for summary disposition after the limitations period expired, asserting that Christopher was a necessary party to the litigation, MCR 2.205(A), but had not been named in Graham's complaint. According to Foster, Graham's action was time-barred because the period of limitations had expired and Christopher had not been made a party to the action. The court, Joan E. Young, J., ruled that Christopher was not a necessary party and denied Foster's motion for summary disposition. The Court of Appeals granted Foster's interlocutory application for leave to appeal the trial court's decision and held that Christopher was a necessary party to the litigation because Graham could not be named BF's father without terminating Christopher's parental rights. However, the Court of Appeals, CAVANAGH, P.J., and METER and SHAPIRO, JJ., affirmed the trial court's denial of Foster's motion for summary disposition, concluding that Graham's failure to name Christopher in his complaint before expiration of the limitations period was not fatal to Graham's complaint. 311 Mich App 139 (2015). The Court

acknowledged that generally an action commences as to a party named in a complaint on the date the complaint is filed. Similarly, an action in which a party is first named in an amended complaint ordinarily commences as to that party on the date the amended complaint is filed. In this case, Christopher was not added to the complaint before the limitations period expired. But the Court of Appeals recognized a necessary-party exception to the general rule. According to the Court of Appeals, the necessary-party exception allows a party to be added to an action after the limitations period has expired when the party is necessary to fully resolve the litigation. The Court of Appeals remanded the case to the trial court to allow Graham to add Christopher to the action even though the statutory limitations period had expired. Foster filed an application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant Foster's application for leave to appeal or take other action. 499 Mich 862 (2016).

In a memorandum opinion signed by Chief Justice MARKMAN and Justices YOUNG, ZAHRA, MCCORMACK, VIVIANO, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

A person whose parental rights may be terminated as a result of litigation must be made a party to the litigation because he or she is a person having such an interest in the litigation that his or her presence is essential to rendering complete relief. A person timely made a party to an action may not claim on his or her own behalf that the action is time-barred on the basis of the plaintiff's failure to add a necessary party before the limitations period expired. Additionally, a court may not preemptively decide whether a statute of limitations defense is available to a necessary party before he or she has been made a party to the litigation.

1. A person whose parental rights must be terminated in order to provide a plaintiff with the relief sought is a necessary party who must be added to the litigation before disposition. In this case, Christopher was a necessary party to the action because the relief Graham sought could not have been rendered without terminating Christopher's parental rights. Graham's complaint sought an order of filiation regarding a child born to Foster while she was married to Christopher. Because the child, BF, was born during Foster's marriage to Christopher, Christopher was BF's presumptive father. To name Graham as the father of BF would first require the termination of Christopher's parental rights, and Christopher had to be made a party to the litigation because it could affect his status as BF's legal father. The trial court erred

when it held that Christopher was not a necessary party, and the Court of Appeals correctly reversed that determination.

2. A statute of limitations defense is personal, and a party may not assert a statute of limitations defense on his or her own behalf simply because other necessary parties were not timely sued. Specifically, Foster could not raise the statute of limitations defense potentially available to Christopher if he were added to the complaint because Foster was made a party to the litigation before the period of limitations had expired. Further, the availability to a party of a statute of limitations defense may not be decided before that party has been added to the proceedings. In this case, Christopher was a necessary party but he had not yet been added to the proceedings. Therefore, the Court of Appeals erred by adjudicating the merits of his anticipated statute of limitations defense, and that portion of the Court of Appeals opinion had to be vacated. If, on remand, Graham files an amended complaint naming Christopher as a defendant, Christopher will have the opportunity to raise a statute of limitations defense, and Graham will have the opportunity to litigate whether any exceptions apply to excuse his tardy joinder of Christopher to the litigation.

Affirmed in part and vacated in part.

Justice BERNSTEIN would have denied leave to appeal.

1. CHILDREN BORN OUT OF WEDLOCK — REVOCATION OF PATERNITY ACT — NECESSARY PARTIES — TERMINATION OF PARENTAL RIGHTS.

A person whose parental rights could be terminated as a result of a court's disposition of a party's action under the Revocation of Paternity Act, MCL 722.1431 *et seq*., is a necessary party to the action because that party is essential to the court's ability to render complete relief; joinder of a necessary party to an action is required.

2. DEFENSES — STATUTE OF LIMITATIONS — WHO MAY RAISE.

That an action is time-barred because the period of limitations has expired is a personal defense, and a party may not raise on its own behalf another party's potential statute of limitations defense.

Perkins Law Group, PLLC (by *Todd Russell Perkins* and *David Melton, Jr.*), for Shae K. Graham.

T. Daniels & Associates, PLLC (by *Tammy Daniels*), for Sharea Foster.

MEMORANDUM OPINION. In this proceeding under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., the Court of Appeals erred by prematurely adjudicating a nonparty's anticipated defense. For that reason, we vacate the offending portions of the judgment below, while leaving in place the portion of the judgment remanding the case for further proceedings consistent with the remainder of the Court's opinion.

On September 23, 2009, defendant, Sharea Foster, gave birth to a son, BF. Plaintiff alleges that he is the biological father of BF and therefore should be recognized as BF's legal father. However, defendant has been married to her husband, Christopher Foster, since 2004. Because "a child conceived and born during a marriage is legally presumed the legitimate child of that marriage, and the mother's husband is the child's father as a matter of law," *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 305-306; 805 NW2d 226 (2011), our law presumes that Christopher is the father of BF notwithstanding plaintiff's assertions.

Plaintiff, nonetheless, has sought to establish his alleged paternity and legal fatherhood of BF. When a minor child has a presumptive father, the RPA allows an individual to come forward under certain circumstances and allege his paternity and legal fatherhood. See MCL 722.1441(3). A successful plaintiff can obtain a judicial determination that a child was born out of wedlock, a determination of his own biological paternity, and an appropriate order of filiation. MCL 722.1443(2)(d) and (e). On May 15, 2013, plaintiff filed a complaint seeking such a determination and order. Ordinarily, an action brought under the RPA must be filed within three years of the child's birth. However, the RPA also allows for actions to be brought within one year of the statute's effective date of June 12, 2012.

MCL 722.1437(1). While plaintiff's action here was brought more than three years after BF's birth, it was brought within the alternative one-year limitations period.

In June 2013, shortly after the alternative limitations period expired, defendant moved for summary disposition. She argued that Christopher, her husband and BF's presumptive father, was a necessary party to the litigation under MCR 2.205(A). Because he had not been joined in the action within either limitations period, defendant argued that plaintiff's action was time-barred. The trial court, however, concluded that Christopher was not a necessary party to the action and denied defendant's motion for summary disposition. Defendant then filed an interlocutory application for leave to appeal in the Court of Appeals, which it granted.

While the Court of Appeals ultimately held that the trial court erred by determining that Christopher was not a necessary party, the Court nonetheless affirmed the trial court's denial of summary disposition. The Court held that Christopher *was* a necessary party to the action because for plaintiff to prevail, Christopher's parental rights to BF would necessarily have to be terminated. *Graham v Foster*, 311 Mich App 139, 145; 874 NW2d 355 (2015). However, the Court rejected defendant's argument that plaintiff's failure to add Christopher within either of the limitations periods barred the action. Although the Court acknowledged that "if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action with regard to the new defendant," it pointed to a "necessary party" exception, which allows "an additional defendant [to] be brought in after

the expiration of the limitations period if the new party is a necessary party."[1] *Id*. Consequently, the Court of Appeals affirmed the trial court's denial of summary disposition but remanded to the trial court for the addition of Christopher as a "necessary party."

On appeal in this Court, defendant argues that the Court of Appeals erred by holding that Christopher could be added to this litigation after the expiration of both limitations periods because he is a necessary party. She points to our decision in *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007), in which we held that the relation-back doctrine does not apply to the addition of new parties, and contends that the necessary-party exception invoked by the Court of Appeals is inconsistent with *Miller*. We review de novo motions for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Initially, the Court of Appeals was correct to conclude that, because plaintiff seeks a determination that BF was born out of wedlock and that he is the actual father of BF, plaintiff's action necessarily seeks to terminate Christopher's parental rights. This makes Christopher a "person[] having such [an] interest[] in the subject matter of [the] action that [his] presence in the action is essential to permit the court to render

[1] As authority for this "necessary party" exception, the Court of Appeals pointed to *Amer v Clarence A Durbin Assoc*, 87 Mich App 62; 273 NW2d 588 (1978), and *O'Keefe v Clark Equip Co*, 106 Mich App 23; 307 NW2d 343 (1981). Although unmentioned by the Court of Appeals, these two opinions drew upon *Forest v Parmalee (On Rehearing)*, 60 Mich App 401; 231 NW2d 378 (1975). While the Court of Appeals acknowledged the existence of this purported rule in these cases, it concluded in all three that the exception did not apply. This appears to be the first case in either this Court or the Court of Appeals in which the exception has ever actually been applied.

complete relief," meaning that he "must be made [a] part[y] . . . ." MCR 2.205(A).

Beyond this holding, we note two flaws in the Court of Appeals' opinion. First, as noted, defendant argued in the Court of Appeals that plaintiff's failure to add a necessary party within either of the limitations periods bars this suit, and that Court disagreed on the basis of a supposed necessary-party exception to the joinder rule and the statutes of limitations. Implicit in this reasoning is the notion that, if it could be definitively ascertained that there was no such exception, defendant could assert Christopher's statute of limitations defense on her *own* behalf. However, a statute of limitations defense is personal to the party raising it. *Casserly v Wayne Circuit Judge*, 124 Mich 157, 161; 82 NW 841 (1900) ("[T]he new defendant, only, could take advantage of the fact that he was not made a party within the year . . . .").[2] Thus, we conclude that defen-

[2] Accord *Cochren v Louisiana Power & Light Co*, 639 So 2d 342, 345; La App 1994-CA-0002 (4th Cir, June 15, 1994) (a statute of limitations defense "cannot be urged by one party defendant in favor of another"); *Railey v State Farm Mut Auto Ins Co*, 129 Ga App 875, 880; 201 SE2d 628 (1973) ("[T]he bar of the statute of limitation is a personal defense, and as a general rule can be interposed only by the party in whose direct favor it operates . . . ."); *Beery v Hurd*, 295 Ill App 124, 131; 14 NE2d 656 (1938) ("The defense of the statute of limitations has been held . . . to be a personal one as between the debtor and the creditor and to be availed of can only be pleaded or taken advantage of by the debtor . . . ."); *Utah Assets Corp v Dooley Bros Ass'n*, 92 Utah 577, 583; 70 P2d 738 (1937) ("The statute of limitations is a personal right and can only be raised or asserted by the debtor . . . ."); *Neill v Burke*, 81 Neb 125, 126; 115 NW 321 (1908) ("The defense of the statute of limitations is generally regarded as a personal privilege of the debtor, . . . which can only be made by him . . . ."); *Dawson v Callaway*, 18 Ga 573, 585 (1855) ("The Statute of Limitations may be pleaded by the person in whose direct favor it operates . . . [and] who can say that the cause of action has not risen against *him* . . . ."). Although much of the caselaw deals with actions to collect on a debt, it has also been recognized in a family law context, like this one. See, e.g., *Clark v Los Angeles*, 187 Cal App 2d 792,

dant cannot assert a statute of limitations defense that is only available to Christopher.

The second, and related, flaw is the Court of Appeals' adjudication of the *merits* of Christopher's statute of limitations defense while he remained a nonparty to this proceeding. Relying on *Amer* and *O'Keefe*, the Court preemptively adjudicated whether Christopher could avail himself of the statute of limitations defense *before* it was even known if he was going to plead it because he had not yet been made a party to the case. The ability of a nonparty to raise a particular defense should not be preemptively adjudicated in the nonparty's absence. The Court of Appeals "attempted to adjudicate the rights of persons who were not parties," but "was in no position to . . . circumvent the possible defenses of [Christopher] to [plaintiff's] claims, such as . . . the statute of limitations." *Yedinak v Yedinak*, 383 Mich 409, 419; 175 NW2d 706 (1970) (opinion by ADAMS, J.).[3] Until Christopher is properly designated as a defendant and exercises his right to raise the statute of limitations in his own defense, the availability of the defense to him cannot be resolved. *If* Christopher pleads this defense, and *if* plaintiff asserts an exception to the statute of limitations—including a necessary-party exception of the sort presumed by the

801; 9 Cal Rptr 913 (1960) ("[T]he right to assert the statute of limitations *as a defense to the annulment action* was a personal right . . . .") (emphasis added).

[3] Accord *Stringer v American Bankers Ins Co of Florida*, 822 So 2d 1011, 1014; 2000-CP-00496-COA (Miss App, 2002) ("An affirmative defense such as the statute of limitations can only be raised by a party properly before the court . . . ."); *Mrozek v Mrozek*, 129 NC App 43, 46-47; 496 SE2d 836 (1998) ("[T]here is no evidence that defendant intends to assert a statute of limitations defense to the collection of the debt [owed to a nonparty]."); *Whipple v Edelstein*, 148 Misc 681, 685; 266 NYS 127 (1933) ("The defense of the Statute of Limitations is personal and the court cannot assume that it would be interposed.").

Court of Appeals but vacated in this opinion—Christopher will then have an opportunity to litigate this issue for himself rather than having it adjudicated on his behalf in absentia.

We therefore vacate[4] that portion of the Court of Appeals' opinion preemptively adjudicating whether Christopher may avail himself of a statute of limitations defense. We leave undisturbed the Court of Appeals' determination that Christopher constitutes a necessary party to this proceeding, as well as its remand for further proceedings consistent with that determination.

MARKMAN, C.J., and YOUNG, ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred.

BERNSTEIN, J. I would deny leave to appeal.

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[4] Because we are vacating the portion of the Court of Appeals' decision concerning the relation-back doctrine, that portion of the Court of Appeals' opinion has no precedential effect, and the trial court is not bound by its reasoning. See *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003).

BARTON-SPENCER v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN

Docket Nos. 153655 and 153656. Decided April 14, 2017.

Cynthia Barton-Spencer brought an action in the Washtenaw Circuit Court against Farm Bureau Life Insurance Company of Michigan and others, arguing that defendants had breached her contract with them by withholding extended earnings owed to her under the Farm Bureau Insurance Agent Agreement (Agent Agreement); failed to pay her commissions that she alleged were owed to her; violated the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*.; and terminated her on the basis of unlawful age discrimination in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Plaintiff demanded a jury trial on all issues unless expressly waived. Defendants moved for summary disposition, and the court, Archie C. Brown, J., granted summary disposition to defendants on the CPA and CRA claims. Plaintiff then filed an amended complaint. Defendants filed an answer and a counterclaim, seeking to recover commissions they had paid to plaintiff as well as attorney fees and costs pursuant to the Agent Agreement, which provided that plaintiff agreed "to reimburse [defendants'] attorney fees and costs as may be fixed by the court." Following a trial, the jury returned a verdict finding for defendants on plaintiff's breach-of-contract claim, finding that plaintiff was entitled to recover commissions that defendants had failed to pay her, and finding that defendants were entitled to recover from plaintiff the commissions they had paid her on 11 policies that defendants had refunded to the purchasers because of plaintiff's misrepresentations to the purchasers. Defendants filed a postjudgment motion seeking contractual attorney fees and costs, and the court granted defendants attorney fees and costs as well as actual costs pursuant to MCR 2.403(O), deducting from the sanctions award some overlapping fees that had previously been paid as contractual attorney fees and costs. Both parties appealed, and the Court of Appeals, TALBOT, C.J., and WILDER and BECKERING, JJ., largely affirmed the resolution of the claims, but it reversed the trial court's decision to grant defendants contractual attorney fees. *Barton-Spencer v Farm Bureau*

Life Ins Co of Mich, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2016 (Docket No. 324661). The Court of Appeals held that contractual attorney fees are damages and therefore plaintiff had a constitutional right under Article 1, § 14, of Michigan's 1963 Constitution to have a jury determine the reasonableness of the contractual fees. The panel also concluded that the provision in the Agent Agreement providing that attorney fees and costs will be "fixed by the court" was not an express waiver of plaintiff's constitutional right to a jury trial on the question of attorney fees because that phrase was ambiguous, and therefore plaintiff had not agreed to have the amount of reasonable attorney fees and costs determined by a judge rather than a jury. The Court of Appeals reversed the trial court's award of contractual attorney fees, reversed the trial court's award of case evaluation sanctions, and directed the trial court to recalculate the case evaluation sanctions on remand because the sanctions award was impermissibly dependent on the judge's improper determination of reasonable contractual attorney fees and costs. Both parties sought leave to appeal.

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

Courts should construe contracts so as to give effect to every word or phrase as far as practicable. A contractual term is ambiguous on its face only if it is equally susceptible to more than a single meaning. The Court of Appeals erred when it held that the parties' agreement was ambiguous because the phrase "fixed by the court" in the Agent Agreement was not ambiguous. In ordinary parlance, the word "court" refers to judges, and legal opinions often use the terms "court" and "judge" synonymously, even when referring to amounts of money fixed by judgments of "the court." Therefore, the parties decided in the Agent Agreement that the amount of attorney fees and costs would be fixed by a judge, and plaintiff waived any right she had to a jury trial by agreeing to this contractual provision. To avoid the contract, plaintiff held the burden of proving that the contract was invalid, but plaintiff did not raise a contractual defense to argue that the Agent Agreement was invalid.

Court of Appeals' reversal of the trial court's award of contractual costs and attorney fees reversed; Court of Appeals' reversal of the award of case evaluation sanctions under MCR 2.403(O) reversed; Part III(C)(4) of the Court of Appeals' opinion holding that plaintiff had a constitutional right to a jury trial and that she

did not relinquish this right by signing the Agent Agreement vacated.

CONTRACTS — REASONABLE ATTORNEY FEES AND COSTS — WORDS AND PHRASES — "FIXED BY THE COURT."

A contractual provision providing that reasonable attorney fees are to be "fixed by the court" is not ambiguous; the clear import of the phrase "fixed by the court" is that the amount of reasonable attorney fees will be determined by a judge rather than a jury; if a party has validly agreed to a contractual provision providing that reasonable attorney fees are to be "fixed by the court," that party has waived its right to a jury trial.

Mark Granzotto, PC (by *Mark Granzotto*), for Cynthia Barton-Spencer.

Willingham & Coté, PC (by *Kimberlee A. Hillock*, *John A. Yeager*, and *Curtis R. Hadley*), for Farm Bureau Life Insurance Company of Michigan, Farm Bureau Mutual Insurance Company of Michigan, Farm Bureau General Insurance Company of Michigan, Farm Bureau Annuity Company of Michigan, and Community Service Acceptance Company.

PER CURIAM. The issue presented in this case is whether, by signing a contract providing that plaintiff agreed "to reimburse [defendants'] attorney fees and costs as may be fixed by the court," the parties agreed that the amount of reasonable attorney fees would be fixed by a court rather than a jury. We hold that the parties did so agree. Accordingly, we vacate Part III(C)(4) of the Court of Appeals' opinion[1] and reverse that portion of the judgment that reversed the award of contractual attorney fees and costs as well as that portion of the judgment that reversed the award of case evaluation sanctions. We otherwise deny the application

[1] *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2016 (Docket No. 324661), pp 14-17.

and cross-application for leave to appeal and leave in place the remainder of the Court of Appeals' opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff entered into a Farm Bureau Insurance Agent Agreement (Agent Agreement) with defendants in November 2000 and began working for defendants as an independent insurance agent. As relevant to our review of this case, the Agent Agreement allowed defendants to seek postlitigation attorney fees from plaintiff under the terms of the following provision:

> Attorneys Fees and Costs. If the Companies are successful in any suit or proceeding against the Agent brought to enforce any provision of this Agreement, or brought to establish damages sustained by the Companies as a result of the Agent's violation of any provision of this Agreement, the Agent agrees to reimburse the Companies' attorney fees and costs as may be fixed by the court in which such suit or proceeding is brought.

Plaintiff continued to work for defendants until February 2013 when defendants terminated the Agent Agreement for cause, alleging that plaintiff had made misrepresentations to insurance clients regarding the tax consequences of moving funds into a specific type of life insurance policy. Eleven clients testified that they had purchased these policies from plaintiff on the basis of this false advice. Defendants later reversed these policies and refunded the premiums to the clients.

Plaintiff sued defendants in the Washtenaw Circuit Court, arguing that defendants had breached her contract by withholding extended earnings owed to her under the Agent Agreement,[2] failed to pay her commis-

[2] These extended earnings were a contractual benefit paid to agents after the termination of the Agent Agreement.

sions that she alleged were owed to her, violated the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*., and terminated her on the basis of unlawful age discrimination in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Plaintiff demanded a jury trial on "all issues in this cause unless expressly waived."

Defendants moved for summary disposition, and the Washtenaw Circuit Court granted summary disposition to defendants on the CPA and CRA claims. Plaintiff filed an amended complaint,[3] and defendants filed an answer and a counterclaim. In the counterclaim, defendants sought to recover the commissions they had paid to plaintiff on the sale of the 11 policies that defendants had refunded because of plaintiff's misrepresentations. Defendants also sought attorney fees and costs pursuant to the Agent Agreement. Defendants relied on the jury demand filed by plaintiff "with respect to all issues as to which trial before a jury is applicable."

The parties proceeded to trial on plaintiff's remaining claims and on defendants' counterclaim. The jury returned a verdict finding for defendants on plaintiff's breach-of-contract claim but finding that plaintiff was entitled to recover commissions that defendants had failed to pay her. The jury additionally found for defendants on their counterclaim, determining that defendants were entitled to recover from plaintiff the commissions they had paid her on the subsequently refunded policies.

Defendants filed a postjudgment motion seeking contractual attorney fees and costs. In her response,

[3] The amended complaint added a claim of defamation per se; the court subsequently granted defendants summary disposition on this claim.

plaintiff argued both that defendants were not entitled to such fees and that the request for attorney fees should have been submitted to the jury. Plaintiff claimed that she had a constitutional right to a jury trial regarding the reasonableness of the attorney fees. The Washtenaw Circuit Court granted defendants attorney fees and costs in an order entered on September 11, 2014, without explicitly addressing plaintiff's asserted right to a jury trial. The Washtenaw Circuit Court also granted defendants' subsequent motion for actual costs pursuant to MCR 2.403(O), deducting from the sanctions award some overlapping fees that had previously been paid as contractual attorney fees and costs.

Both parties appealed. The Court of Appeals largely affirmed the resolution of the claims, but it reversed the trial court's decision to grant defendants contractual attorney fees, agreeing with plaintiff that defendants "failed to adduce evidence supporting the reasonableness of such fees at trial."[4] The Court of Appeals held that contractual attorney fees are "damages"[5] and therefore plaintiff had a constitutional right under Article 1, § 14, of Michigan's 1963 Constitution[6] to have a jury determine the reasonableness of the contractual fees.[7] The panel rejected defendants' argument that

[4] *Barton-Spencer*, unpub op at 14.

[5] *Id*. at 15.

[6] Const 1963, art 1, § 14 ("The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.").

[7] *Barton-Spencer*, unpub op at 15-16, citing *Madugula v Taub*, 496 Mich 685, 705-706, 713; 853 NW2d 75 (2014) ("If the nature of the controversy would have been considered legal at the time the 1963 Constitution was adopted, the right to a jury trial is preserved. . . . [C]laims for money damages were generally considered legal in nature at the time the 1963 Constitution was adopted.") (citations omitted), and

plaintiff agreed, through the provision in the Agent Agreement providing that attorney fees and costs will be "fixed by the court," to have the amount of reasonable fees and costs determined by a judge rather than a jury.[8] The Court of Appeals concluded that this provision "was not an express waiver":

> [T]he "fixed by the court" language renders the contract ambiguous on the question whether the parties intended to have the reasonableness of contractual attorney fees decided by the trial court rather than a jury. By its very nature, such ambiguous language cannot constitute an "express" waiver. Given the constitutional right at issue, and the fact that the agent agreement fails to expressly mention that right—indeed, the agreement contains neither the word "jury," the phrase "jury trial," nor any form of the word "waive"—we cannot conclude as a matter of law that the parties intended to waive their constitutional right to a jury trial on the question of attorney fees.[9]

Ultimately, the Court of Appeals reversed the trial court's award of contractual costs and attorney fees as well as the award of case evaluation sanctions.[10] The Court held that the amount of the case evaluation sanctions was impermissibly "dependent on" the judge's improper determination of reasonable contractual attorney fees and costs.[11] The judge had calculated the sanctions award on the basis of the total amount of reasonable fees incurred by defendants, minus the amount of overlapping payments already awarded in

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Zeeland Farm Servs, Inc v JBL Enterprises, Inc, 219 Mich App 190, 199; 555 NW2d 733 (1996) (holding that a jury could have concluded that the contractual attorney fees were reasonable).

[8] *Barton-Spencer*, unpub op at 16.

[9] *Id*.

[10] *Id*. at 17.

[11] *Id*.

the prior order granting *contractual* attorney fees and costs.[12] Accordingly, the Court of Appeals directed the trial court to recalculate the case evaluation sanctions on remand.

II. STANDARD OF REVIEW

This Court reviews questions regarding the proper interpretation of contractual language de novo, giving contractual terms their ordinary meaning when those terms are not defined in the contract itself.[13] Whether contractual language is ambiguous is also a question of law reviewed de novo.[14]

III. ANALYSIS

In the Agent Agreement, the parties agreed that if defendants succeeded in any suit against plaintiff alleging that defendants sustained damages "as a result of [plaintiff's] violation of any provision of" the agreement, plaintiff would "reimburse [defendants'] attorney fees and costs as may be fixed by the court in which such suit or proceeding is brought." The relevant question now presented to the Court is whether, by agreeing that attorney fees and costs would be "fixed by the court," the parties agreed that attorney fees would be fixed by a judge rather than a jury. If this language is most reasonably read as an agreement to have a judge determine the amount of attorney fees, then when plaintiff demanded a jury trial on the issue, she held the burden to avoid the agreement by showing

[12] *Id*.

[13] *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 288; 683 NW2d 656 (2004).

[14] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

that this provision was invalid or unenforceable on contractual grounds.[15]

The Court of Appeals erred when it held that the Agent Agreement was "ambiguous on the question whether the parties intended to have the reasonableness of contractual attorney fees decided by the trial court rather than a jury."[16] Courts should construe contracts "so as to give effect to every word or phrase as far as practicable."[17] A contractual term is ambiguous on its face only if it is equally susceptible to more than a single meaning.[18]

The phrase "fixed by the court" is not ambiguous. When the parties agreed to this provision, they agreed that the amount of attorney fees and costs would be fixed by a judge rather than by a jury. In ordinary parlance, the word "court" refers to judges.[19] Legal

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[15] See *Morris v Metriyakool*, 418 Mich 423, 439; 344 NW2d 736 (1984) (opinion by KAVANAGH, J.) ("We reject plaintiffs' allocation of the burden of proof to defendants. The burden of avoiding these arbitration agreements, as with other contracts, rests with those who would avoid them.").

[16] *Barton-Spencer*, unpub op at 16.

[17] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (citation and quotation marks omitted).

[18] *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982) ("[I]f a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous . . . ."). See also *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) ("[A] provision of the law is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning.") (quotation marks, citation, emphasis, and alteration omitted); *id*. at 165 n 6 (affirming that the rule "that ambiguity is a finding of last resort applies with equal force whether the court is interpreting a statutory text or a contractual one") (punctuation omitted).

[19] See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "court" as "an official assembly for the transaction of judicial business . . . a *judge* or *judges* in session") (emphasis added). Accord *Black's*

opinions often use the terms "court" and "judge" synonymously,[20] even when referring to amounts of money fixed by judgments of "the court."[21] As the Court of Appeals noted, juries have sometimes decided the question whether an attorney-fee award is reasonable.[22]

Law Dictionary (7th ed) (defining "court" as "[a] governmental body consisting of one or more *judges* who sit to adjudicate disputes and administer justice . . . [t]he *judge* or *judges* who sit on such a governmental body") (emphasis added).

[20] For instance, many cases contrast the "jury" with the "court," using "court" as a synonym for "judge." See, e.g., *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 272; 884 NW2d 257 (2016) ("The *trial court* noted that the *jury* awarded plaintiff approximately 33% of the judgment amount sought, and therefore the *trial court* awarded $23,412.48 in attorney fees, approximately 33% of the jury verdict.") (emphasis added); *In re Svitojus' Estate*, 307 Mich 491, 492; 12 NW2d 324 (1943) ("The heirs at law appealed to the circuit court for the county of Kent where, upon trial by *jury*, the *court* directed a verdict allowing the account with reduction of attorney fees to $4,000.") (emphasis added). See also *Madugula*, 496 Mich at 698 (examining whether a person bringing a shareholder-oppression suit under MCL 450.1489 had a right to a jury trial for a damages claim and reading statutory language referencing "circuit court" to refer to a judge rather than a jury).

[21] See, e.g., *People v Becker*, 349 Mich 476, 480; 84 NW2d 833 (1957) (approving of "the statutory sanction of requiring 'restitution' as a condition of probation," which required judges, without a trial as to the extent of damages, to "order[] the defendant in a criminal case to pay to certain third persons . . . a sum of money *fixed by the court* itself") (emphasis added); *In re Rite-Way Tool & Mfg Co*, 333 Mich 551, 559; 53 NW2d 373 (1952) (modifying an order of distribution administered by a receiver and monitored by a judge to pay "the fees of the receiver and his attorney as *fixed by the court*") (emphasis added). See also *Derby v Gage*, 60 Mich 1, 3; 26 NW 820 (1886) (applying "Section 15 of act No. 133 of the Session Laws of 1883," which required railroad companies condemning land to pay "in addition to the *damages* and compensation awarded by the commissioners or *jury*, a reasonable *attorney fee*, to be fixed and determined by the *court* when the report or verdict is confirmed") (quotation marks omitted; emphasis added).

[22] See, e.g., *In re Brewster's Estate*, 113 Mich 561, 563; 71 NW 1085 (1897); *Swift v Plessner*, 39 Mich 178, 180 (1878); *Zeeland Farm Servs*, 219 Mich App at 199.

However, this does not suggest that the contractual term "court" refers to a jury rather than a judge. Indeed, even in those cases in which juries evaluated the amount of an attorney-fee award, the language of the opinion has contrasted those "jury" determinations with the decisions of the "court."[23]

The parties decided in the Agent Agreement that the amount of attorney fees and costs would be fixed by a judge. Plaintiff seeks to avoid this agreement and therefore holds the burden of proving that the contract is invalid.[24] It is unnecessary to reach the question whether plaintiff had a constitutional right to a jury trial on the reasonableness of attorney fees because the nature of the inquiry into the validity of the agreement is the same *even if* plaintiff was contracting away a constitutional right.[25] "The burden of showing some ground for rescinding or invalidating a contract is not altered merely because the contract entails eschewal of constitutional rights."[26] Plaintiff has not raised a contractual defense, such as coercion, mistake, duress, or fraud, to argue that the Agent Agreement is invalid. Therefore, we conclude that the parties validly agreed to have a judge determine the reasonableness of the attorney fees, and we reverse the portion of the Court of Appeals' opinion that reverses the award of attorney fees and costs.

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[23] See, e.g., *Swift*, 39 Mich at 180 ("The *court* below directed the *jury* to allow a reasonable attorney fee on the application to dissolve the attachment . . . .") (emphasis added).

[24] *Morris*, 418 Mich at 439 (opinion by KAVANAGH, J.).

[25] *Id*. at 439-440.

[26] *Id*. Because it is unnecessary for us to reach the constitutional question, we merely vacate that portion of the Court of Appeals' opinion holding that plaintiff had a constitutional right to a jury trial on the reasonableness of the contractual attorney fees; we do not reach the question ourselves.

IV. CONCLUSION

The Court of Appeals erred when it held that the parties' agreement was ambiguous. The text of the Agent Agreement is plain: plaintiff agreed "to reimburse [defendants'] attorney fees and costs as may be fixed by the court." The clear import of the phrase "fixed by the court" is that the amount of reasonable attorney fees would be determined by a judge rather than a jury. By agreeing to this contractual provision, plaintiff waived any right she had to a jury trial, and if she seeks to avoid the contract, she bears the burden of demonstrating that this provision is invalid. Therefore, we vacate that portion of the Court of Appeals' opinion holding that plaintiff had a constitutional right to a jury trial and holding that she did *not* relinquish this right by signing the Agent Agreement. We reverse the Court of Appeals' reversal of the trial court's award of contractual costs and attorney fees to defendants as well as the Court of Appeals' reversal of the award of case evaluation sanctions under MCR 2.403(O).

MARKMAN, C.J., and YOUNG, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

PERKOVIC v ZURICH AMERICAN INSURANCE COMPANY

Docket No. 152484. Argued on application for leave to appeal December 7, 2016. Decided April 14, 2017.

Dragen Perkovic filed an amended complaint in the Wayne Circuit Court naming Zurich American Insurance Company as a defendant in an action seeking to recover no-fault personal protection insurance (PIP) benefits for injuries he sustained in a motor vehicle accident on February 28, 2009. At the time of the accident, Perkovic was operating a semitruck. Perkovic was treated for his injuries at The Nebraska Medical Center. On April 30, 2009, The Nebraska Medical Center sent Perkovic's medical records and associated bills to Zurich American, Perkovic's employer's insurance company. Zurich asserted that it had no injury report for Perkovic and on May 19, 2009, denied payment for Perkovic's medical treatment at The Nebraska Medical Center. Perkovic filed his initial complaint on August 11, 2009, seeking unpaid PIP benefits and naming his own automobile insurance company, Citizens Insurance Company of the Midwest, as a defendant. He later amended the complaint to add his bobtail insurer, Hudson Insurance Company, as a defendant. Perkovic did not add Zurich American as a defendant until March 25, 2010, about 13 months after the accident. Perkovic's claims against Citizens and Hudson were dismissed after the Court of Appeals, STEPHENS, P.J., and OWENS and MURRAY, JJ., ruled that Zurich American was the highest-priority insurer. *Perkovic v Hudson Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No. 302868). When the case returned to the trial court, Zurich American moved for summary disposition under MCR 2.116(C)(7), contending that Perkovic's claim was barred by the one-year limitations period in MCL 500.3145(1) because Zurich American had not received written notice of Perkovic's claim and had not paid any benefits on his behalf before the limitations period expired. Perkovic argued that The Nebraska Medical Center's correspondence with Zurich American constituted sufficient notice under MCL 500.3145(1). The trial court, Maria Oxholm, J., agreed with Zurich American and entered summary disposition in its favor. The Court of Appeals, TALBOT, P.J., and WILDER and FORT HOOD, JJ., affirmed. *Perkovic v Zurich*

American Ins Co, 312 Mich App 244 (2015). Perkovic sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant his application for leave to appeal or take other action. 499 Mich 935 (2016).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MARKMAN and Justices ZAHRA, MCCORMACK, VIVIANO, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

The statutory notice period for seeking no-fault benefits is satisfied when documentation containing all the information required by MCL 500.3145(1) is provided to a no-fault insurance company by the medical provider that treated the insured's injuries. In this case, The Nebraska Medical Center sent Perkovic's medical records and associated billing information to Zurich American. The documentation contained everything required by MCL 500.3145(1) to give notice to an insurer of an insured's claim for no-fault benefits. That is, the documentation sent to Zurich American included the claimant's name and address, the name of the person injured, and the time, place, and nature of the injuries. MCL 500.3145(1) does not include a requirement that the notice expressly state that the information is being provided to support a potential claim for no-fault benefits. The statute requires that notice be given in writing within one year after the accident causing injury, and it states that notice may be given by the person entitled to benefits—the insured—or by a person in the insured's behalf. Contrary to the Court of Appeals' conclusion that notice of injury must inform an insurer of the possible pendency of a claim for no-fault benefits, giving an insurer notice that a claimant may pursue a no-fault action for unpaid benefits is not required by MCL 500.3145(1). Nor does proper notice under MCL 500.3145(1) require that an insured presently be making a claim for no-fault benefits. It only mattered that Zurich American received the information required by MCL 500.3145(1) within one year of the accident. Because Zurich American received the records from The Nebraska Medical Center within one year of the accident, Perkovic's amended complaint against Zurich American filed 13 months after the accident was not barred by the statute of limitations.

Reversed and remanded. Trial court's summary disposition order vacated.

Justice YOUNG, dissenting, largely agreed with the reasoning of the majority opinion but disagreed with its outcome. Although Zurich American received notice that Perkovic had received medical treatment from The Nebraska Medical Center, the notice was not sent in behalf of an insured who was, at that time,

claiming that he was entitled to no-fault benefits. The notice Zurich American received did not clearly communicate that Perkovic was making a claim for PIP benefits; instead, the notice could have been interpreted as seeking other benefits under the insurance policy. The notice in this case was not given by either someone claiming to be entitled to no-fault benefits or someone acting in his behalf. Justice YOUNG would have affirmed the result reached by the Court of Appeals because summary disposition was properly granted in Zurich American's favor.

INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE — NOTICE OF CLAIM.

Under MCL 500.3145(1), notice of a claim for no-fault benefits must be given to an insurer within one year of the date the accident causing injury occurred; notice of a no-fault claim must be in writing, must contain specific information, and must be given by the person claiming the no-fault benefits or by someone acting in that person's behalf; notice to an insurer may be sufficient when a medical-care provider sends the insurer the injured person's medical records and associated billing as long as the information sent contains the content required by MCL 500.3145(1)—the claimant's name and address, the name of the person injured, and the time, place, and nature of the person's injury.

Mark Granzotto, PC (by *Mark Granzotto*), for Dragen Perkovic.

Dean & Fulkerson, PC (by *James K. O'Brien*), for Zurich American Insurance Co.

BERNSTEIN, J. This case concerns the notice requirements of the no-fault act, MCL 500.3101 *et seq.*, specifically those set forth in MCL 500.3145(1). The question before us is whether a nonparty medical provider's provision of medical records and associated bills to an injured person's no-fault insurer within one year of the accident causing injury constitutes proper written notice under MCL 500.3145(1), so as to prevent the one-year statute of limitations in MCL 500.3145(1) from barring the injured person's subsequent no-fault claim. We hold that when, as in this case, the docu-

mentation provided by the medical provider contains all of the information required by MCL 500.3145(1) and is provided to the insurer within one year of the accident, the statutory notice requirement is satisfied and the injured person's claim is not barred by the statute of limitations. Therefore, we reverse the judgment of the Court of Appeals, vacate the trial court's order granting summary disposition in favor of defendant Zurich American Insurance Company, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On February 28, 2009, plaintiff Dragen Perkovic was operating a semitruck in Nebraska when he swerved to avoid hitting a car that had spun out in front of him. Plaintiff's truck then crashed into a wall. Plaintiff's resulting injuries were treated at The Nebraska Medical Center. At the time of the accident, plaintiff maintained personal automobile insurance with Citizens Insurance Company of the Midwest (Citizens) and a bobtail insurance policy[1] with Hudson Insurance Company (Hudson). Plaintiff's employer was insured by defendant Zurich American Insurance Company.

On April 30, 2009, staff at The Nebraska Medical Center mailed a bill for the services it had provided, as well as plaintiff's medical records, to defendant. A custodian of records and billing for The Nebraska Medical Center explained by affidavit that the bills and records were sent to defendant on plaintiff's behalf in order to obtain payment for the services provided in

[1] Bobtail insurance provides liability coverage for the owner/operator of a commercial truck after a load has been delivered and the truck is not being used for trucking purposes.

relation to plaintiff's accident-related injuries. The medical bills and records both contained plaintiff's name and address. The medical records also provided the following summary:

> 46 yo male semi truck driver c/o R upper back pain after MVC. States that he was driving down interstate when car in front of him began to spin[;] he swerved to avoid the car since in semi and ran into a wall hitting front[]driver side.

The records further stated that plaintiff may have suffered a "back sprain, cervical sprain or fracture, chest wall contusion, contusion, head injury, liver injury, myocardial contusion, pneumothorax, splenic injury, sprained or fractured extremity."

On May 19, 2009, defendant denied payment for the services, returning the bill and records to the sender stamped with the following statement: "No injury report on file for this person."

On August 11, 2009, plaintiff filed suit under the no-fault act, seeking unpaid personal protection insurance (PIP) benefits arising out of the February 28 accident. The initial complaint filed in the trial court only named Citizens, plaintiff's personal insurer, as a defendant. Plaintiff later amended the complaint to add Hudson, the bobtail insurer, as a defendant. Plaintiff did not amend his complaint to add defendant as a party until March 25, 2010, approximately 13 months after the accident. Some confusion arose as to which of the insurers was highest in priority, but ultimately the Court of Appeals concluded that defendant was the highest-priority insurer. See *Perkovic v Hudson Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2012 (Docket No. 302868). The claims against the other insurers were then dismissed.

When the case returned to the trial court, defendant filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were barred by the one-year statute of limitations in MCL 500.3145(1) because defendant had not received written notice of the claim or paid any benefits before the limitations period expired. Plaintiff contended that the medical bills and records from The Nebraska Medical Center satisfied the notice requirements of MCL 500.3145(1), but the trial court disagreed and granted defendant's motion for summary disposition in an opinion and order dated February 20, 2014. The Court of Appeals affirmed the trial court's ruling in a published opinion. *Perkovic v Zurich American Ins Co*, 312 Mich App 244; 876 NW2d 839 (2015).

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation. *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016). When interpreting a statute, the primary rule of construction is to discern and give effect to the Legislature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute. *Id*. We enforce such language as written, giving effect to every word, phrase, and clause. *Id*. We also review de novo the grant or denial of a motion for summary disposition. *Id*.

III. ANALYSIS

The no-fault act allows a person injured in an automobile accident to recover PIP benefits for certain reasonably necessary expenses incurred for the care, recovery, and rehabilitation of the injured person. MCL 500.3107(1)(a). This recovery is limited by, among other provisions, MCL 500.3145(1), which provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Therefore, under MCL 500.3145(1), a claim for PIP benefits must be filed within one year after the accident causing the injury unless either of two exceptions applies: (1) the insurer was properly notified of the injury, or (2) the insurer had previously paid PIP benefits for the same injury. *Jesperson*, 499 Mich at 39. Here, defendant was not added to the complaint until 13 months after plaintiff's accident. It is undisputed that the second exception does not apply in this case. The issue is whether the first exception applies in this case—that is, whether defendant was properly notified of plaintiff's injuries by the medical bills and records provided to defendant by The Nebraska Medical Center.

The Court of Appeals considered the first exception in a string of cases published in the 1980s. In *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 128;

290 NW2d 408 (1980), the Court of Appeals held that substantial compliance with the written-notice provision can preserve a claim under MCL 500.3145(1).[2] In reaching this conclusion, the *Dozier* panel relied on the need to construe notice provisions in favor of the insured. *Id*. at 129. The panel stated that the purpose of the notice provision was " 'to provide time to investigate and to appropriate funds for settlement purposes.' " *Id*. at 128, quoting *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978). A subsequent Court of Appeals panel relied on *Dozier* in holding that an "Auto Accident Notice" that did not indicate the nature of the plaintiff's injury nonetheless constituted notice under MCL 500.3145(1) because it substantially complied with the notice provision. *Walden v Auto Owners Ins Co*, 105 Mich App 528, 534; 307 NW2d 367 (1981). Similarly, in *Lansing Gen Hosp, Osteopathic v Gomez*, 114 Mich App 814, 825; 319 NW2d 683 (1982), the Court of Appeals held that written notification provided by an insurance agent to the defendant insurance company was sufficient to preserve the plaintiff medical provider's claim under MCL 500.3145(1). Although the notice did not name one of the injured parties, it "was sufficient to provide time for defendant Auto-Owners to investigate the accident." *Id*. By contrast, in *Heikkinen v Aetna Cas & Surety Co*, 124 Mich App 459, 463-464; 335 NW2d 3 (1981), the Court of Appeals held that a death certificate transmitted by the plaintiff to her insurance agent for the purpose of filing a tax return did not create sufficient notice under MCL 500.3145(1) that a claim might be filed. Even though

[2] However, the *Dozier* Court did not address whether notice had actually been given in compliance with MCL 500.3145(1) because the Court determined that the defendant had waived its right to assert insufficiency of the notice. *Dozier*, 95 Mich App at 130.

the certificate contained all of the information required by MCL 500.3145(1), it was not presented under circumstances suggesting the existence of a claim for PIP benefits—rather, it was presented explicitly for the purpose of a tax return. *Id*. Therefore, under this line of cases, a claim for PIP benefits may be preserved if a plaintiff substantially complies with the *purpose* of the statute, even if all of the statutory requirements are not met. However, as seen in *Heikkinen*, fulfilling all of the stated requirements of the statute may not necessarily preserve a claim if the purpose of the statute is not fulfilled.

The Court of Appeals in this case concluded that the medical bills and records sent to defendant did not constitute notice for the purposes of MCL 500.3145(1) because these documents did not evince an intent to make a claim for PIP benefits. The Court of Appeals held that, although the medical bills and records included all of the information required by the final sentence of MCL 500.3145(1),[3] they did not serve the purpose of a notice provision—" 'to provide time to investigate and to appropriate funds for settlement purposes.' " *Perkovic*, 312 Mich App at 254, quoting *Dozier*, 95 Mich App at 128 (quotation marks omitted). The Court of Appeals reasoned that, unlike the notice provided in *Dozier*, *Walden*, or *Gomez*, nothing about the medical records and bills sent to defendant in this case would have alerted defendant to the possible pendency of a no-fault claim. Therefore, as in *Heikkinen*, the documents provided in this case did not fulfill the purposes of the notice statute. *Perkovic*, 312 Mich App at 258.

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[3] Specifically, "the name and address of the claimant and . . . the name of the person injured and the time, place and nature of his injury." MCL 500.3145(1).

We disagree with the Court of Appeals' reliance on the perceived purpose of the notice requirement of MCL 500.3145(1) because such reliance runs contrary to our established canons of statutory interpretation. The first sentence of MCL 500.3145(1) creates an exception to the one-year statute of limitations when "written notice of injury as provided herein has been given to the insurer" within the appropriate time frame. The penultimate sentence provides the method of notice—it "may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf"—while the final sentence defines the substance of the notice—it "shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury." MCL 500.3145(1). Nothing in MCL 500.3145(1) suggests that a notice provision's purpose is "to provide time to investigate and to appropriate funds for settlement purposes," *Dozier*, 95 Mich App at 128, or that such a purpose overrides the requirements enshrined in the statutory language itself. (Quotation marks and citation omitted.) The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language. "When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted." *Pace v Edel-Harrelson*, 499 Mich 1, 6; 878 NW2d 784 (2016).

As stated in note 3 of this opinion, the plain language of the statute lists what information the written notice must include in the final sentence: "The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury."

MCL 500.3145(1). The provision does not mandate any particular format for this notice, nor does it require language explicitly indicating a possible claim for benefits. The Legislature could have elected to include such language, but did not.

While MCL 500.3145(1) includes the word "claimant," this alone does not require a statement that a claim is forthcoming. A "claimant" is "one that asserts a right or title[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).[4] The person who asserts a right or title is the party that ultimately makes a claim—in this case, plaintiff, whose name and address appeared on the bills and records received by defendant. The statute contains no temporal requirement that the insured be claiming benefits at the time the notice of injury is transmitted to the insurer. The dissent reads such a temporal requirement into the sentence providing that notice "may be given to the insurer . . . by a person claiming to be entitled to benefits therefor, or by someone in his behalf," arguing that the use of the present participle "claiming" means that the insured must be making a claim at the time that notice is sent to the insurer. But this language appears in the penultimate sentence of the statute, which describes who is permitted to transmit notice; it is not a part of the final sentence that mandates the contents of the notice. It is a strained reading of the statute to import into the final sentence describing what the notice "shall give" an additional requirement that the insured be making an active claim of benefits, which the dissent infers from the preceding sentence that merely sets out who may give notice.

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[4] Similarly, *Black's Law Dictionary* (10th ed) defines "claimant" as "[s]omeone who asserts a right or demand . . . ."

The fact that plaintiff might have been unaware of The Nebraska Medical Center's transmission of notice to defendant is not detrimental to his claim. The penultimate sentence of MCL 500.3145(1) provides that notice may be given "by a person claiming to be entitled to benefits therefor, or by someone *in his behalf*." (Emphasis added.) The Legislature's use of "*in* his behalf" here is telling, and it renders insignificant the fact that the notice was sent to defendant by The Nebraska Medical Center, a nonparty. "The phrase *in behalf of* traditionally means 'in the interest, support, or defense of'; *on behalf of* means 'in the name of, on the part of, as the agent or representative of.' " *Black's Law Dictionary* (10th ed), p 184 (defining the word "behalf"). Therefore, while "*on* his behalf" might have suggested the need for an agency relationship between plaintiff and The Nebraska Medical Center, the Legislature's chosen phrase—"*in* his behalf"—has no such connotation. That is, the category of those who may send notice "in his behalf" is broader than those who may send notice "on his behalf." While the distinction may be fading in modern usage, see *Merriam-Webster's Collegiate Dictionary* (11th ed), p 110 (defining the word "behalf"), the fact that the Legislature elected to use the broader phrase "*in* his behalf," rather than the narrower phrase "*on* his behalf," demonstrates that the provision of notice need only have been in plaintiff's interest to satisfy MCL 500.3145(1).

That the "in his behalf" language of MCL 500.3145(1) means that the notice can be provided to the insurer without the knowledge or direction of the insured further refutes the dissent's contention that the insured must be actively claiming benefits at the time the notice is sent to the insurer. The "or by someone in his behalf" clause allows someone to

provide notice in behalf of the "person claiming to be entitled to benefits." There is no language in this clause suggesting that "someone" would have to label the notice as a claim for no-fault benefits, and it would be strange if the language were to create a distinction between the notice requirements based on the notice provider. In sum, the plain language of this sentence regarding the provision of notice does not impose any unarticulated requirements as to the form of the notice, such as an explicit request for no-fault benefits.

Therefore, we conclude that the notice given in this case satisfied the first exception of MCL 500.3145(1) so that the one-year statute of limitations does not bar plaintiff's claim. The documents transmitted to defendant contained all of the information required by MCL 500.3145(1) and were sent in behalf of plaintiff by The Nebraska Medical Center. The statute does not require any additional information about the possible pendency of a claim.

IV. CONCLUSION

We hold that, under the circumstances of this case, plaintiff satisfied the notice requirements of MCL 500.3145(1). Therefore, plaintiff's claim was not barred by the no-fault act's one-year statute of limitations. Accordingly, we reverse the judgment of the Court of Appeals, vacate the trial court's grant of summary disposition in defendant's favor, and remand to the trial court for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

YOUNG, J. (*dissenting*). Although I largely agree with the reasoning of the majority opinion, I respectfully dissent from the result. I would hold that defendant is entitled to summary disposition, affirming on alternative grounds the judgment of the Court of Appeals. I disagree with the majority that the alleged notice sent to defendant by The Nebraska Medical Center was given to an insurer by or in behalf of "a person claiming to be entitled to" personal protection insurance benefits under the no-fault act for accidental bodily injury, as required by MCL 500.3145(1). Neither the medical bill nor the medical records sent to defendant indicated that the documents were sent in behalf of a person claiming at that time to be entitled to no-fault benefits, as opposed to other benefits payable under the insurance contract.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, a Michigan resident, was in an automobile accident on February 28, 2009, while operating a semitruck in Nebraska. He was taken by ambulance to The Nebraska Medical Center (NMC), where he received emergency medical treatment. At the time of the accident, the company for which plaintiff worked had an insurance policy with defendant. On April 30, 2009, NMC sent defendant a bill for the medical services it provided to plaintiff, along with plaintiff's medical records. Defendant denied payment for these services, stating that there was "[n]o injury report on file for this person."

Plaintiff filed suit on August 11, 2009, seeking unpaid personal protection insurance (PIP) benefits. Plaintiff named only his personal insurer in the original complaint. Plaintiff did not amend his complaint to add defendant until March 25, 2010. After being adju-

dicated the highest-priority insurer, defendant moved for summary disposition under MCR 2.116(C)(7). Defendant argued that plaintiff's claims were barred by the one-year statute of limitations in MCL 500.3145(1), because defendant was not added to the case until more than one year after the accident. Plaintiff claimed the period of limitations had been extended because "written notice of injury" was "given to the insurer within 1 year after the accident."[1] The Wayne Circuit Court granted defendant's motion for summary disposition, and the Court of Appeals affirmed.[2]

II. ANALYSIS

I would affirm the grant of summary disposition to defendant, but, like the majority, I disagree with the reasoning of the Court of Appeals. The critical holding of the Court of Appeals was that "the medical bill and medical records, although sufficient in content, did not fulfill the purposes of the statute."[3] As the majority opinion explains, the Court of Appeals erroneously elevated its perception of the statute's "purpose" over the plain statutory text.[4] To the extent that this holding was based on previous Court of Appeals cases that deviated from the text of MCL 500.3145(1) and created something akin to an "actual notice" or a "substantial

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[1] MCL 500.3145(1).

[2] *Perkovic v Zurich American Ins Co*, 312 Mich App 244, 258; 876 NW2d 839 (2015).

[3] *Id.*, citing *Heikkinen v Aetna Cas & Surety Co*, 124 Mich App 459, 464; 335 NW2d 3 (1981).

[4] *People v Allen*, 499 Mich 307, 315; 884 NW2d 548 (2016) ("The Legislature is presumed to have intended the meaning it plainly expressed in the statute. When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (citations omitted).

compliance" requirement, I would take this opportunity to clearly disavow that precedent.[5]

Instead, as the majority holds, what is required is actual compliance with the statute.[6] MCL 500.3145(1) reads as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury *unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident* or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. *The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a*

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[5] See *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 128; 290 NW2d 408 (1980) ("[S]ubstantial compliance with the written notice provision which does in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund, is sufficient compliance under § 3145(1)."); *Heikkinen*, 124 Mich App at 463-464 (noting that the plaintiff "had strictly complied with the contents requirements" of MCL 500.3145, but holding that notice was nonetheless insufficient because it did not " '*in fact* apprise the insurer of the need to investigate and to determine the amount of possible liability' "), quoting *Dozier*, 95 Mich App at 128.

The majority opinion *implicitly* disapproves of *Dozier*, 95 Mich App 121, but ultimately only distinguishes that case and *Heikkinen*, 124 Mich App 459. I would *explicitly* hold that these cases are no longer good law.

[6] See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005) ("Statutory . . . language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.").

> *person claiming to be entitled to benefits therefor, or by someone in his behalf.* The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.[7]

To toll the statute of limitations, MCL 500.3145(1) requires that notice be given "to the insurer . . . by a person claiming to be entitled to benefits therefor, or by someone in his behalf." I agree with the majority opinion that NMC was acting "in [plaintiff's] behalf" and that the notice satisfied the relevant substantive requirements defined in the final sentence of MCL 500.3145(1). However, the majority opinion also holds that the notice must be given by or in behalf of the party that *ultimately* makes a claim under the no-fault act—that is, by "a person claiming to be entitled to benefits" at the time *the action is commenced*. I believe instead, on the basis of the statutory context, that this clause requires that the notice be given by "a person claiming to be entitled to benefits" at the time *the notice is given*. As I will explain, the notice sent by NMC in this case was insufficient because it was not sent by or in behalf of a person claiming to be entitled to PIP benefits.

Under the last antecedent rule, the descriptive clause, "claiming to be entitled to benefits," modifies the noun "person."[8] The present participle "claiming" does not immediately connote the exact time at which the statutory "person" must be claiming entitlement to no-fault benefits. The ordinary meaning of the verb "claim" is "to ask for [especially] as a right."[9] Again,

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[7] Emphasis added.

[8] MCL 500.3145(1).

[9] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *The American Heritage Dictionary of the English Language* (5th ed) (defining "claim" as "[t]o demand, ask for, or take as one's own or one's due").

this definition could lend itself to either interpretation: a person can assert a right to no-fault benefits at the time the action is initiated or the time the notice is given. A person could "claim" to be entitled to no-fault benefits either by filing a no-fault action or by asserting that "right" in a letter to an insurer.[10]

The statutory context more clearly shows that the most reasonable reading of this provision is that the person must be claiming "personal protection insurance benefits . . . for accidental bodily injury" at the time the notice is given. MCL 500.3145(1) elsewhere uses the term "claimant,"[11] but in the disputed clause specifies that notice must be given "by a person claiming to be entitled to benefits." The fact that the Legislature chose to use this descriptive clause, rather than merely saying that notice must be given "by a claimant," suggests that the person giving notice must in fact *be* "claiming to be entitled to benefits" at the time that person notifies the insurer.[12]

Plaintiff argues that because the disputed sentence states that notice "*may* be given to the insurer . . . by a person claiming to be entitled to benefits therefor,"[13] this clause cannot define a *requirement* for the statutory notice of injury. "May" generally denotes something that is permissive rather than mandatory, in

[10] See *Merriam-Webster's Collegiate Dictionary* (11th ed).

[11] Specifically, the third sentence of MCL 500.3145(1) states, "However, the *claimant* may not recover benefits . . . ." (Emphasis added.) The fifth sentence states, "The notice shall give the name and address of the *claimant* . . . ." *Id*. (emphasis added).

[12] This requirement is the same regardless of who is providing notice, contrary to the majority's suggestion that this reading of the statute creates "a distinction between the notice requirements based on the notice provider." *Ante* at 56.

[13] MCL 500.3145(1) (emphasis added).

contrast to the word "shall," which is used in the second sentence.[14] However, in the context of the sentence and this statutory provision, "may" is more reasonably read as stating that notice may be given *either* "by a person claiming to be entitled to benefits" *or* "by someone in his behalf," but notice *must* be given by someone claiming no-fault benefits.[15] The word "may" is permissive with regard to which of the two defined categories of persons may give the notice, but the sentence as a whole creates a mandatory requirement. Indeed, to read this sentence as plaintiff suggests would render it surplusage.[16] If notice could be given by the two specified categories of persons, but need not be given by either, it is unclear what purpose this language would accomplish.

NMC sent defendant a bill for the services NMC had rendered to plaintiff along with plaintiff's medical records. The parties agree on appeal that these are the only documents that could possibly constitute notice under MCL 500.3145(1). There is no indication that the bill stated that plaintiff, or NMC acting "in his behalf," was seeking payment of PIP benefits, rather than payment of other benefits under the insurance policy.[17] NMC did not otherwise contact

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[14] See, e.g., *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.").

[15] See MCL 500.3145(1).

[16] See *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) ("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.").

[17] MCL 500.3145(1) ("An action *for recovery of personal protection insurance benefits payable under this chapter for accidental bodily*

defendant at the time this notice was sent to apprise defendant that it was acting in behalf of a person "claiming to be entitled to benefits therefor."[18] MCL 500.3145(1) may not have required NMC to have included in the bill a statement containing the exact language "these documents are sent in behalf of a person claiming PIP benefits under the no-fault act," but it did require that the notice be sent by or in behalf of a person actively claiming PIP benefits. That was not the case here.

Plaintiff argues that because the insurance policy covered no-fault benefits, defendant was notified that this claim for benefits under the policy could lead to a no-fault claim. However, the insurance policy that defendant issued to plaintiff's employer did not solely cover no-fault PIP benefits; conceivably, the documents sent to defendant by NMC could have been claiming other benefits due under the policy. MCL 500.3145(1) requires notice that a person *is claiming* no-fault benefits, not that a person *could claim* or *might possibly be claiming* no-fault benefits.

III. CONCLUSION

The medical bill was not given to defendant "by a person claiming to be entitled to benefits therefor, or by someone in his behalf." Therefore, the medical bill and records were insufficient to avoid operation of the statute of limitations in MCL 500.3145(1). On the

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injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident . . . . The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to *benefits therefor*, or by someone in his behalf.") (emphasis added).

[18] *Id*.

basis of this alternative analysis, I would affirm both the judgment of the Court of Appeals and the trial court's decision granting summary disposition to defendant.

SBC HEALTH MIDWEST, INC v CITY OF KENTWOOD

Docket No. 151524. Argued October 6, 2016 (Calendar No. 5). Decided May 1, 2017.

SBC Health Midwest, Inc., challenged the city of Kentwood's denial of its request for a personal property tax exemption in the Tax Tribunal. SBC Health, a Delaware for-profit corporation, had requested a tax exemption under MCL 211.9(1)(a) from Kentwood for personal property used to operate the Sanford-Brown College Grand Rapids. The tribunal, Steven H. Lasher, J., determined that the exemption provided by MCL 211.9(1)(a) applied only to nonprofit educational institutions. SBC Health appealed. The Court of Appeals, MURPHY, P.J., and METER and SERVITTO, JJ., reversed the tribunal in an unpublished per curiam opinion, issued March 19, 2015. The Court reasoned that the unambiguous language of MCL 211.9(1)(a) provides a tax exemption for the personal property of an educational institution operated in Michigan regardless of its for-profit status. The Court of Appeals remanded the case to the tribunal to determine whether SBC Health qualified for the exemption in MCL 211.9(1)(a). The Supreme Court granted Kentwood's application for leave to appeal the Court of Appeals' decision. 498 Mich 956 (2015).

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

The General Property Tax Act, MCL 211.1 *et seq*., mandates that all real and personal property in Michigan be subject to taxation unless expressly exempted. The plain and unambiguous language of MCL 211.9(1)(a) exempts from taxation the personal property of charitable, educational, and scientific institutions. The Tax Tribunal erred by concluding that MCL 211.7n, a statute specifically exempting from taxation the real or personal property owned and occupied by nonprofit educational institutions, controls over the more general statute, MCL 211.9(1)(a), which authorizes a tax exemption for educational institutions without regard to the institution's nonprofit or for-profit status. The rules of statutory interpretation require that statutory language be examined for legislative intent. MCL 211.7n sets forth the Legislature's intent to limit the content of that statute to nonprofit institutions. In

contrast, the Legislature omitted any requirement that the institutions referred to in MCL 211.9(1)(a) be nonprofit institutions. The absence of that requirement is presumed to be intentional. Reading the two statutes together and recognizing that each addresses a tax exemption for an educational institution's personal property means only that a nonprofit educational institution has two paths to tax exemption, while a for-profit educational institution is limited to the path in MCL 211.9(1)(a). The nonprofit requirement in MCL 211.7n does not prevent a for-profit educational institution like SBC Health from pursuing an exemption under MCL 211.9(1)(a). Further, the tax exemption available under MCL 211.9(1)(a) does not conflict with the constitutional mandate that nonprofit educational organizations be exempt from real and personal property taxes. The constitutional mandate guarantees tax exemption for nonprofit educational institutions. It does not prevent the Legislature from passing laws that provide tax benefits for other organizations. The tax exemption outlined in the unambiguous language in MCL 211.9(1)(a) applies to all educational institutions, for-profit or nonprofit, that meet the requirements specified in MCL 211.9(1)(a).

Affirmed and remanded to the Tax Tribunal to determine whether SBC Health satisfies the requirements of MCL 211.9(1)(a), which would entitle it to the tax exemption it seeks.

TAXATION — EXEMPTION FOR PERSONAL PROPERTY OF EDUCATIONAL INSTITUTIONS — PROFIT-MAKING STATUS.

Absent express exception, all real and personal property in Michigan must be taxed, MCL 211.1 *et seq*.; the unambiguous language of MCL 211.9(1)(a) exempts from taxation the personal property of an educational institution without regard to its profit-making status.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Stewart L. Mandell*, and *Daniel L. Stanley*) for SBC Health Midwest, Inc.

Bloom Sluggett Morgan, PC (by *Crystal L. Morgan*), for the city of Kentwood.

Amici Curiae:

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Daniel R. Shirey*) for the Building Owners and Managers Association of Metropolitan Detroit.

Allen L. Amber for the Apartment Association of Michigan.

Bush Seyferth & Paige PLLC (by *Stephanie A. Douglas* and *Jessica R. Vartanian*) for the Michigan Manufacturers Association.

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall*), for the Michigan Municipal League, the Michigan Townships Association, the Michigan Association of Counties, and the Michigan Assessors Association.

ZAHRA, J. Petitioner, SBC Health Midwest, Inc., is a Delaware for-profit corporation that operated a college. Petitioner requested a tax exemption under MCL 211.9(1)(a) for personal property used to operate the college. Respondent, the city of Kentwood, denied the exemption. Petitioner appealed in the Tax Tribunal, which also rejected the claim of exemption. The tribunal concluded that MCL 211.9(1)(a) only provides an exemption to nonprofit educational organizations. Undeterred by repeated rejection, petitioner appealed in the Court of Appeals, which reversed the Tax Tribunal. We granted leave to address whether the personal property tax exemptions set forth under MCL 211.9(1)(a) are available to for-profit educational institutions. We hold that the text of MCL 211.9(1)(a) plainly exempts from taxation "[t]he personal property of charitable, educational, and scientific institutions incorporated under the laws of this state."[1] Nothing in this language requires that an educational institution

[1] The parties agreed in the lower courts that the incorporated-in-this-state requirement did not apply. The requirement that to be tax exempt an institution must be incorporated within the state has been found unconstitutional. See *American Youth Foundation v Benona Twp*, 37 Mich App 722, 724; 195 NW2d 304 (1972), citing *WHYY v Glassboro*, 393 US 117; 89 S Ct 286; 21 L Ed 2d 242 (1968).

demonstrate nonprofit status to claim the exemption. We decline to import a nonprofit requirement into MCL 211.9(1)(a), because it would contravene a well-established rule of statutory construction preventing this Court from reading into a statute words that the Legislature has not included.[2] The judgment of the Court of Appeals is affirmed.

I. FACTS AND PROCEEDINGS

The facts of this case are simple and uncontroverted. Petitioner operated Sanford-Brown College Grand Rapids. Notwithstanding its name, this educational institution was actually operated in respondent, the city of Kentwood. Respondent assessed the personal property at the school pursuant to MCL 211.1.[3] Petitioner requested a personal property tax exemption under MCL 211.9(1)(a)[4] for the tax years 2011 through 2013. Respondent denied the tax exemption.

Petitioner challenged respondent's denial of the tax exemption before the Tax Tribunal, maintaining that the property was exempt under MCL 211.9(1)(a) because it was the personal property of an educational institution. Respondent answered that granting a tax exemption to a for-profit corporation under MCL 211.9(1)(a) would conflict with the remainder of the statutory scheme regarding other tax exemptions for educational institutions, most notably MCL 211.7n, which provides an exemption for real or personal prop-

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[2] *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002).

[3] MCL 211.1 provides "[t]hat all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

[4] MCL 211.9(1)(a) exempts from taxation "[t]he personal property of charitable, educational, and scientific institutions incorporated under the laws of this state."

erty owned and occupied by a nonprofit educational institution.[5] Respondent also claimed that its narrow interpretation of MCL 211.9(1)(a) is supported by the Michigan Constitution, which expressly authorizes a tax exemption for nonprofit educational organizations.[6]

The Tax Tribunal agreed with respondent, relying on the *in pari materia* canon of statutory construction. More specifically, the tribunal determined that when the two statutes are read together, the most recent and specific statute—that is, MCL 211.7n—must prevail if there is any conflict between the two statutes. The tribunal concluded that because MCL 211.7n provides a tax exemption only for real estate and personal property owned and occupied by *nonprofit* institutions, petitioner was not entitled to an exemption under the more general provisions of MCL 211.9(1)(a).

In an unpublished per curiam opinion, the Court of Appeals reversed the Tax Tribunal. Pertinent to the issue before this Court, the Court of Appeals panel held

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[5] MCL 211.7n provides:

> Real estate or personal property owned and occupied by nonprofit theater, library, educational, or 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 the institutions were incorporated is exempt from taxation under this act. In addition, real estate or personal property owned and occupied by a nonprofit organization organized under the laws of this state devoted exclusively to fostering the development of literature, music, painting, or sculpture which substantially enhances the cultural environment of a community as a whole, is available to the general public on a regular basis, and is occupied by it solely for the purposes for which the organization was incorporated is exempt from taxation under this act.

[6] Const 1963, art 9, § 4, provides that "[p]roperty owned and occupied by non-profit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes."

that when applying the unambiguous language of MCL 211.9(1)(a), the personal property of an educational institution operated in this state is exempted from taxation.[7] The panel remanded the case to the Tax Tribunal to consider whether petitioner met the criteria for exemption under MCL 211.9(1)(a), regardless of its for-profit status; we granted respondent's application for leave to appeal.[8]

II. STANDARD OF REVIEW

Absent a claim of fraud, this Court reviews decisions from the Tax Tribunal for the misapplication of law or the adoption of a wrong legal principle.[9] "We deem the tribunal's factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.' "[10] This Court reviews de novo the tribunal's interpretation of a tax statute.[11] "When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute."[12] "This requires us to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme."[13]

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[7] *SBC Health Midwest, Inc v City of Kentwood*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2015 (Docket No. 319428), p 3.

[8] *SBC Health Midwest, Inc v City of Kentwood*, 498 Mich 956 (2015).

[9] *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006).

[10] *Id*., quoting *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994), citing Const 1963, art 6, § 28.

[11] *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

[12] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[13] *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014) (quotation marks and citation omitted).

This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute to avoid rendering any part of the statute nugatory or surplusage.[14] Though this Court will generally "defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer," that deference will not extend to cases in which the tribunal makes a legal error.[15] Thus, agency interpretations are entitled to "respectful consideration" but cannot control in the face of contradictory statutory text.[16]

III. ANALYSIS

Under the General Property Tax Act,[17] "all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."[18] This Court has historically required that tax exemptions be narrowly or strictly construed in favor of the government.[19] Yet at the same time, we have held that this requirement does not permit a "strained construction" that is contrary to the Legislature's intent.[20]

Petitioner sought its tax exemption under MCL 211.9(1)(a), which provides:

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[14] *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

[15] *Wexford Med Group*, 474 Mich at 221 (quotation marks and citation omitted).

[16] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

[17] MCL 211.1 *et seq*.

[18] MCL 211.1.

[19] *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008); *Mich Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 670; 242 NW2d 749 (1976).

[20] *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664-665; 378 NW2d 737 (1985).

> *The following personal property*, and real property described in subdivision (j)(*i*), *is exempt from taxation*:
>
> (a) *The personal property of charitable, educational, and scientific institutions incorporated under the laws of this state*.[21]

When construing a statute, courts are to effect the intent of the Legislature.[22] To do so, we begin with an examination of the language of the statute.

> If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).[23]

MCL 211.9(1)(a) is unambiguous. This statute allows the exemption of personal property from taxes imposed on institutions that are educational in nature.

Conspicuously absent from the statute is any language indicating that the tax exemption applies only to nonprofit entities. "We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. 'It is not within the province of this Court to read therein a mandate that the [L]egislature has not seen fit to incorporate.' "[24] Further, the Legislature knows how to require that an

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[21] Emphasis added.

[22] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[23] *Id*.

[24] *People v Feeley*, 499 Mich 429, 439; 885 NW2d 223 (2016) (citation omitted), quoting *Jones v Grand Ledge Pub Sch*, 349 Mich 1, 11; 84 NW2d 327 (1957).

institution be a nonprofit for an exemption to apply, as evidenced by the express imposition of that requirement in MCL 211.7n and in other portions of MCL 211.9(1)(a).[25] We must presume that the Legislature's failure to limit the tax exemption found in MCL 211.9(1)(a) to nonprofit educational institutions was intentional. Therefore, we will not write a nonprofit requirement into the applicable portion of MCL 211.9(1)(a).

We are guided by the plain language of the statute and find no merit in the arguments asserted by respondent that would have us import a nonprofit requirement into this statutory tax exemption. Contrary to respondent's claim, use of the *in pari materia* canon of construction does not aid respondent's cause.[26] Specifically, respondent claims that the nonprofit requirement of MCL 211.7n can be imported into MCL 211.9(1)(a)

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[25] MCL 211.9(1)(a) continues:

> This exemption does not apply to secret or fraternal societies, but the personal property of all charitable homes of secret or fraternal societies and *nonprofit* corporations that own and operate facilities for the aged and chronically ill in which the net income from the operation of the *nonprofit* corporations or secret or fraternal societies does not inure to the benefit of a person other than the residents is exempt. [Emphasis added.]

[26] Although the Court of Appeals properly reversed the Tax Tribunal, it nonetheless erred in its narrow utilization of the *in pari materia* canon of construction. *In pari materia* (or the related-statutes canon) provides that "laws dealing with the same subject . . . should if possible be interpreted harmoniously." See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 252. The application of *in pari materia* is not necessarily conditioned on a finding of ambiguity. See, e.g., *Int'l Bus Machines Corp v Dep't of Treasury*, 496 Mich 642, 651-653; 852 NW2d 865 (2014) (opinion by VIVIANO, J.) (a plurality opinion in which the Court suggested the application of *in pari materia* to resolve a patent conflict between two unambiguous statutes).

when MCL 211.9(1)(a) is read *in pari materia* with MCL 211.7n. MCL 211.7n provides, in pertinent part:

> Real estate or personal property owned and occupied by nonprofit theater, library, educational, or 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 the institutions were incorporated is exempt from taxation under this act.

We agree that, in evaluating petitioner's claim for an exemption under MCL 211.9(1)(a), it is proper to consider MCL 211.7n, given that both statutory provisions address whether and to what extent the personal property of an educational institution is exempt from taxation. We disagree, however, that MCL 211.7n somehow requires or justifies rewriting the unambiguous language of MCL 211.9(1)(a), as respondent urges.

According to respondent, the term "nonprofit" must be read into MCL 211.9(1)(a) because otherwise the Legislature's inclusion of the term in MCL 211.7n—and more generally, the Legislature's enactment of a personal property tax exemption for educational institutions in MCL 211.7n—would be rendered meaningless. We are not convinced. First, while MCL 211.7n and MCL 211.9(1)(a) both offer a personal property tax exemption to educational and scientific institutions, the statutes otherwise differ significantly in the scope of property and entities that each exempts from taxation.[27] Beyond its discrete point of overlap with MCL

[27] For instance, the exemption in MCL 211.9(1) focuses predominantly on personal property; the only real property falling within its purview is that "described in subdivision (j)(*i*)," which pertains to certain "methane digester[s] and . . . methane digester electric generating system[s]" used in agricultural operations. MCL 211.9(1)(j)(*i*). Meanwhile, MCL 211.7n is part of a subchapter, running from MCL 211.7 through MCL 211.7ww, addressing tax exemptions for real estate, and it correspondingly

211.7n, MCL 211.9(1)(a) cannot be said to have any bearing on the force and effect of the "nonprofit" requirement in MCL 211.7n. Second, while it is true that an educational institution may avoid this requirement by pursuing a personal property tax exemption under MCL 211.9(1)(a), this fact alone does not place the statutes in intolerable interpretive conflict or disharmony with each other. Rather, it simply means that, at their discrete point of overlap, the two statutes present alternative paths to tax exemption. Of course, by choosing one path, the exemption's claimant could avoid the restrictions of the other. But there is nothing to indicate that the Legislature did not intend to offer this choice, or that it intended to narrow the scope of MCL 211.9(1)(a) through the enactment of MCL 211.7n. To the contrary, and as discussed, the Legislature's express inclusion of "nonprofit" in MCL 211.7n only underscores its intent in omitting that term from the first sentence of MCL 211.9(1)(a). MCL 211.9(1)(a) is clear on its face, and we see nothing in MCL 211.7n that would warrant reading terms into MCL 211.9(1)(a) that the Legislature saw fit to exclude.

Respondents also argue that this Court is bound by *Wexford Med Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), to hold that the exemption found in MCL 211.9(1)(a) cannot inure to the benefit of a for-profit institution. We disagree. In *Wexford*, this

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reaches "[r]eal estate or personal property" that otherwise meets the requirements of MCL 211.7n. One such requirement is that the property, real or personal, be "owned and occupied by" the provision's listed entities; MCL 211.9(1)(a), however, does not impose this same "owned and occupied" limitation on its personal property tax exemption. And regarding the entities exempted by each provision, the exemption in MCL 211.9(1)(a) is available to "charitable, educational, and scientific institutions" (subject to certain qualifications set forth in the provision), whereas MCL 211.7n extends its exemption to "nonprofit theater, library, educational, or scientific institutions."

Court concluded that the petitioner, a § 501(c)(3)[28] nonprofit corporation, was a "charitable institution" under MCL 211.7o.[29] Relying on caselaw, this Court concluded that certain factors come into play in determining whether an entity is a charitable institution, including:

> (1) A "charitable institution" must be a *nonprofit* institution.
>
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.
>
> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.[30]

Significantly, the nonprofit status of the medical-corporation petitioner in *Wexford* was not pertinent to this Court's holding because it was undisputed that the

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[28] 26 USC 501(c)(3).

[29] *Wexford*, 474 Mich at 221.

[30] *Id*. at 215 (emphasis added).

Wexford petitioner was a nonprofit § 501(c)(3) corporation under federal law.[31] Thus, any reference to the petitioner's nonprofit status in *Wexford* was not essential to the Court's holding and is obiter dictum. Moreover, *Wexford* is distinguishable from the instant case. The issue in *Wexford* turned on whether the § 501(c)(3) medical corporation was a charitable institution, and in explaining select factors for determining whether an institution is charitable, the *Wexford* Court acknowledged that the factors were based on the definition of "charity."[32] However, characteristics inherent in the definition of "charity" are not necessarily or equally inherent in the definition of "educational," and these distinctions are relevant in attempting to define the attributes of an institution listed in MCL 211.9(1)(a). Profit-making status may have little to do with defining an "educational institution," as such status, in and of itself, may be seen as largely irrelevant to the educational mission. By contrast, the mission of a "charitable institution" might well be seen as incompatible with profit-making. *Wexford* did not address or purport to interpret the requirements for an educational institution, which is a separate category of institution at issue here, nor does the definition of "charity" have any bearing on the instant case. As a result, *Wexford* does not control whether petitioner's for-profit status precludes it from receiving an exemption as an educational institution.

Finally, we see no merit in respondent's claim that reading MCL 211.9(1)(a) without a nonprofit requirement renders either statute in violation of Michigan's

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[31] *Id*. at 196, 204.

[32] *Id*. at 215 ("In light of this definition, certain factors come into play when determining whether an institution is a 'charitable institution' . . . .").

Constitution. Const 1963, art 9, § 4, provides, "Property owned and occupied by non-profit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes."

On the basis of the inclusion of the word "nonprofit" in this constitutional provision, respondent argues that exemptions may only inure to the benefit of nonprofit organizations. This provision mandates an exemption from tax for nonprofit "religious or educational organizations." It in no way limits tax exemptions created by law that benefit other organizations. Moreover, the Legislature is constitutionally vested with the broad power to tax, and with that power comes the power to exempt from tax.[33] The Legislature was free to enact the exemption at issue in this case.

IV. CONCLUSION

We hold that tax exemption under MCL 211.9(1)(a) is available to a for-profit educational institution. MCL 211.9(1)(a), by its plain and unambiguous language, does not require an educational institution to demonstrate nonprofit status in order to claim the personal property tax exemption.

We affirm the judgment of the Court of Appeals, remand the case to the Tax Tribunal, and direct the Tax Tribunal to consider whether petitioner meets the requirements of MCL 211.9(1)(a) and thus is entitled to an exemption.

MARKMAN, C.J., and MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with ZAHRA, J.

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[33] See, e.g., Const 1963, art 9, § 3 ("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.").

In re HICKS

Docket No. 153786. Argued on application for leave to appeal December 7, 2016. Decided May 8, 2017.

The Department of Health and Human Services (the Department) petitioned the Wayne Circuit Court, Family Division, to terminate the parental rights of respondent, a person with an intellectual disability. The proceedings began on January 29, 2013, when the court took jurisdiction over respondent's infant daughter and instituted a service plan provided by the Department. Respondent gave birth to a son in February 2013, and the court took jurisdiction over him as well. For most of 2013, respondent appeared to have inconsistently participated in the services required by the plan, but respondent's attorney later alleged that the services did not meet respondent's needs. At a January 2014 hearing, respondent's attorney asked how respondent could obtain more individualized assistance, and on at least five occasions between August 2014 and the trial for termination of parental rights in July 2015, respondent's attorney asked about the Department's efforts to ensure that respondent was receiving services that accommodated her intellectual disability. Respondent's attorney had specifically requested services through a community mental health agency called the Neighborhood Service Organization (NSO), and the court ordered the Department to assist respondent in obtaining the requested NSO services; however, respondent never received these court-ordered services. On July 27, 2015, the court, Christopher D. Dingell, J., terminated respondent's parental rights to the two children, concluding that two grounds for termination were established and that termination was in the children's best interests. Respondent appealed in the Court of Appeals, arguing that the Department's reunification efforts had failed to accommodate her intellectual disability and that this failure should have prevented the termination of her parental rights. The Department and the children's lawyer-guardian ad litem argued that respondent did not timely raise the disability-based objection because *In re Terry*, 240 Mich App 14, 26 (2000), required that respondent raise the objection when the service plan was adopted or soon afterward. The Court of Appeals, GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ., held

that respondent had preserved her claim by objecting sufficiently in advance of the termination proceedings and that the termination order was premature because the Department had failed to provide respondent with reasonable accommodations and thus had failed to make reasonable efforts to reunify the family unit. 315 Mich App 251 (2016). The children's lawyer-guardian ad litem sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 499 Mich 982 (2016).

In a unanimous opinion by Justice LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

1. Under Michigan's Probate Code, MCL 710.21 *et seq*., the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights. As part of these reasonable efforts, the Department must create a service plan outlining the steps that both the Department and the parent will take to rectify the issues that led to court involvement and to achieve reunification. Under the Americans with Disabilities Act (ADA), 42 USC 12132, the Department also has an obligation to ensure that no qualified individual with a disability is excluded from participation in or denied the benefits of the services of the Department. Additionally, under 28 CFR 35.130(b)(7) (2016), the Department must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the modifications would fundamentally alter the services provided. Absent reasonable modifications to the services or programs offered to a parent with a disability, the Department has failed in its duty under the ADA to reasonably accommodate a disability and thus has failed to comport with the requirement in MCL 712A.18f(3)(d) that the Department offer services designed to facilitate the child's return to his or her home, resulting in the Department's failure to make reasonable efforts at reunification under MCL 712A.19a(2). Efforts at reunification cannot be reasonable under the Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA. However, before the Department can be required under the ADA to provide reasonable accommodations, the Department must have knowledge that the individual has a disability. In this case, it was clear that the Department had knowledge of respondent's disability; the record showed that the Department had knowledge of respondent's disability since at least January 2013. Therefore, the Department was required under the ADA to provide reason-

able accommodations for respondent. Respondent's attorney had specifically requested services through the NSO, and the circuit court ordered that the Department provide those services for respondent, but the services were never provided. The circuit court erred by concluding that the Department had made reasonable efforts at reunification because the court did not conduct a complete analysis of whether reasonable efforts were made: the court did not consider the fact that the Department had failed to provide the court-ordered NSO services, nor did the court consider whether, despite this failing, the Department's efforts nonetheless complied with its statutory obligations to reasonably accommodate respondent's disability. The Court of Appeals correctly determined that termination of respondent's parental rights was improper without a finding of reasonable efforts. Remand was necessary for an analysis of whether the Department reasonably accommodated respondent's disability as part of its reunification efforts in light of the fact that respondent never received the court-ordered services.

2. With regard to the Department's argument that respondent did not timely raise the disability-based objection, neither the Department nor the children's lawyer-guardian ad litem raised a timeliness concern in the circuit court, and the circuit court did not find the request untimely because the court granted the request and ordered the Department to assist respondent in obtaining the requested services. Therefore, there was no occasion to decide whether the objection was timely.

3. The portion of the Court of Appeals' opinion outlining steps that courts and the Department "must" complete "when faced with a parent with a *known or suspected* intellectual, cognitive, or developmental impairment" was vacated because those steps would not necessarily be implicated in every disability case and because trial courts are in the best position to determine whether the steps taken by the Department in individual cases are reasonable.

Affirmed in part; vacated in part; case remanded to the Wayne Circuit Court for further proceedings.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — PARENTS WITH DISABILITIES — REASONABLE ACCOMMODATIONS.

Under Michigan's Probate Code, MCL 710.21 *et seq*., the Department of Health and Human Services (the Department) has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights; under the Ameri-

cans with Disabilities Act (ADA), 42 USC 12132, the Department has an obligation to ensure that no qualified individual with a disability is excluded from participation in or denied the benefits of the services of the Department; under 28 CFR 35.130(b)(7) (2016), the Department must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the modifications would fundamentally alter the services provided; efforts at reunification cannot be reasonable under the Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Lesley Carr Fairrow*, Assistant Attorney General, for the Department of Health and Human Services.

Child Welfare Appellate Clinic (by *Vivek S. Sankaran* and *Joshua B. Kay*) for respondent.

Michigan Children's Law Center (by *William Ladd*) for the minor children.

Amici Curiae:

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Courtney F. Kissel*), *Daniel S. Korobkin*, and *Michael J. Steinberg* for the National Disability Rights Network, the American Civil Liberties Union of Michigan, The Arc Michigan, and The Arc of the United States.

Bodman PLC (by *James J. Walsh* and *Amanda J. Frank*) for the National Association of Counsel for Children.

LARSEN, J. Respondent Brown is an intellectually disabled person whose parental rights to two children

were terminated. Before a court may enter an order terminating parental rights, Michigan's Probate Code, MCL 710.21 *et seq*., requires a finding that the Department of Health and Human Services (the Department) has made reasonable efforts at family reunification. Brown argues that the Department's efforts at family reunification were not reasonable because they failed to reasonably accommodate her disability. This case presents two questions: whether Brown timely raised her claim for accommodation before the circuit court and, if so, whether the Department's efforts at family reunification were reasonable. For the reasons stated, we affirm in part the judgment of the Court of Appeals, vacate in part the opinion of the Court of Appeals, and remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion.

I

In April 2012, respondent Brown brought her infant daughter to the Department, stating that she could not care for her. On April 10, the Wayne Circuit Court granted the Department's motion to place the child in protective custody. The court took jurisdiction over the daughter on January 29, 2013, and instituted a service plan provided by the Department.[1] At the time, Brown was pregnant with a son. After he was born in February 2013, the court took jurisdiction over him as well.

[1] The plan required Brown to participate in and benefit from parenting classes, attend individual counseling sessions, visit her daughter in a supervised setting, remain in regular contact with the Department, complete high school or obtain a GED, find a suitable home, find a legal source of income, and attend a clinic that would evaluate her sociological and psychological ability to care for a child. The Department's treatment plan included a goal that Brown would "obtain the intellectual capacity to fully be able to care for herself and her daughter."

For most of 2013, Brown appears to have inconsistently participated in the services required by the plan, but her attorney later argued that the services did not meet her needs. At a January 2014 hearing, Brown's attorney asked how her client could obtain more individualized assistance. On at least five occasions between August 2014 and the trial for termination of parental rights in July 2015, Brown's attorney inquired about the Department's efforts to ensure that her client receive services through a community mental health agency called the Neighborhood Services Organization (NSO) to accommodate her intellectual disability. Brown never received these services.

On June 18, 2015, the Department filed a petition to terminate Brown's parental rights to both children, alleging three grounds for termination.[2] On July 27, 2015, the circuit court granted the petition, finding that two grounds for termination had been established[3] and that termination was in the children's best interests.

Brown sought relief in the Court of Appeals, arguing that the Department's reunification efforts had failed to accommodate her intellectual disability as required by the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., and that this failure should have pre-

[2] The petition alleged that (1) the conditions leading to adjudication continued to exist, and there was no reasonable likelihood that the conditions would be rectified within a reasonable time, MCL 712A.19b(3)(c)(*i*); (2) respondent failed to provide proper care or custody for the children, and there was no reasonable expectation that she would be able to provide proper care or custody within a reasonable time, MCL 712A.19b(3)(g); and (3) there was a reasonable likelihood that the children would be harmed if returned to the home of respondent, MCL 712A.19b(3)(j).

[3] The judge found grounds for termination under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g). The judge did not rule regarding MCL 712A.19b(3)(j).

vented the termination of her parental rights. The Department and the children's lawyer-guardian ad litem argued that Brown had waived any claim stemming from her disability because she had not raised her objection "when [the] service plan [was] adopted or soon afterward." See *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). The Court of Appeals panel rejected this argument, holding that Brown had preserved her claim by objecting sufficiently in advance of the termination proceedings to comply with *Terry*'s preservation requirements. *In re Hicks*, 315 Mich App 251, 269-271; 890 NW2d 696 (2016). On the merits, the panel concluded that because "the case service plan never included reasonable accommodations to provide respondent a meaningful opportunity to benefit," the Department had "failed in its statutory duty to make reasonable efforts to reunify the family unit." *Id*. at 255. Any termination order was therefore premature. *Id*. at 286.

The children's lawyer-guardian ad litem sought leave to appeal in this Court. We ordered oral argument on the application. *In re Hicks/Brown*, 499 Mich 982 (2016).

II

Under Michigan's Probate Code, the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights. MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2).[4] As part of these reasonable efforts, the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led

[4] There are certain enumerated exceptions to this rule, see MCL 712A.19a(2), none of which applies to this case.

to court involvement and to achieve reunification. MCL 712A.18f(3)(d) (stating that the service plan shall include a "[s]chedule of services to be provided to the parent . . . to facilitate the child's return to his or her home").

The Department also has obligations under the ADA that dovetail with its obligations under the Probate Code. Title II of the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. Public entities, such as the Department, must make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . the modifications would fundamentally alter . . . the service" provided. 28 CFR 35.130(b)(7) (2016).

Absent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability. In turn, the Department has failed in its duty under the Probate Code to offer services designed to facilitate the child's return to his or her home, see MCL 712A.18f(3)(d), and has, therefore, failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2). As a result, we conclude that efforts at reunification cannot be reasonable under the Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA. The Department seems to agree. See the Department's Supplemental Brief, p 19, quoting Michigan Department of Health and Human Services,

Children's Foster Care Manual, FOM 722-06F (2016) ("[W]here a parent is suffering from a disability, the Department recognizes as a matter of policy and federal law that it must 'make all programs and services available and fully accessible to persons with disabilities.' . . . [I]n a case with a disabled parent, the Department's obligation to make reasonable accommodations for the disabled parent will be a part of the statutory duty to make 'reasonable efforts' unless one of the enumerated exceptions apply.").

The Department, of course, cannot accommodate a disability of which it is unaware. See *Robertson v Las Animas Co Sheriff's Dep't*, 500 F3d 1185, 1196 (CA 10, 2007) ("[B]efore a public entity can be required under the ADA to provide [reasonable accommodations], the entity must have knowledge that the individual is disabled, either because that disability is obvious or because that individual (or someone else) has informed the entity of the disability."). In the instant case, however, it is clear that the Department knew of Brown's disability.[5] Once the Department knew of the

[5] The Department's January 2013 treatment plan included a goal that Brown would "obtain the intellectual capacity to fully be able to care for herself and her daughter." At a preliminary hearing the following month, a Department caseworker observed that Brown had barriers to overcome, including emotional and cognitive impairments. The Department's initial service plan in her son's case, dated March 2013, noted that Brown "appear[ed] to have some intellectual impairments" and that she struggled to understand complex tasks and terms. A functional assessment conducted in April 2013 by the Wayne County Department of Children and Family Services concluded that Brown had a "moderate to severe" cognitive performance problem, noting that she had impaired judgment. And a psychological assessment conducted the following month described Brown's "immediately observ[able]" cognitive defects and reported that she had an IQ of 70, within the borderline of intellectual functioning. A court-ordered psychiatric evaluation concluded, in an apparent recognition of Brown's cognitive disability, that she could benefit from receiving services through a community mental

disability, its affirmative duty to make reasonable efforts at reunification meant that it could not be "passive in [its] approach . . . as far as the provision of accommodations is concerned." *Pierce v Dist of Columbia*, 128 F Supp 3d 250, 269 (D DC, 2015).[6]

The Department and the children's lawyer-guardian ad litem argue that Brown did not timely raise in the circuit court her disability-based objection and that she has therefore forfeited that argument on appeal. Relying on dictum in *Terry*,[7] they argue that objections to a service plan are always untimely if not raised "either when a service plan is adopted or soon afterward." *Terry*, 240 Mich App at 26. With the exception of the panel below, the Court of Appeals has treated this language as the rule since the *Terry* decision.[8] While

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health agency. Thus, the record shows that the Department had knowledge of Brown's disability since at least January 2013.

[6] We agree with the Court of Appeals that the Department had an affirmative duty to accommodate Brown's disability. We disagree, however, with its prescription of steps that courts and the Department "must" complete "when faced with a parent with *a known or suspected* intellectual, cognitive, or developmental impairment." *In re Hicks*, 315 Mich App at 281-282. While the Court of Appeals reasonably identified measures the Department should consider when determining how to reasonably accommodate a disabled individual, we do not believe these steps will necessarily be implicated in every disability case. Trial courts are in the best position, in the first instance, to determine whether the steps taken by the Department in individual cases are reasonable. Accordingly, we vacate this portion of the Court of Appeals' opinion.

[7] *Terry*'s holding with respect to timeliness was that the objection in that case came too late because the objection was not raised until closing arguments at the hearing to terminate parental rights. See *Terry*, 240 Mich App at 27 ("In the present case, respondent did not raise a challenge to the nature of the services or accommodations offered until her closing argument at the hearing regarding the petition to terminate her parental rights. This was too late in the proceedings to raise the issue.").

[8] See, e.g., *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012); *In re Hawkins*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 332957), p 6.

skeptical of this categorical rule,[9] we have no occasion to decide whether the objection in this case was timely because neither the Department nor the children's lawyer-guardian ad litem raised a timeliness concern in the circuit court.

Brown's counsel argued at a hearing held over a year after adoption of the initial service plan—but roughly 11 months before the termination hearing—that the services offered by the Department did not sufficiently accommodate her client's intellectual disability. She specifically requested services through the NSO—services that she argued would provide support for Brown's disability. The Department did not object to counsel's request as untimely; nor, apparently, did the circuit court find the request untimely because the court granted the request and ordered the Department to assist Brown in obtaining the requested services. The Department registered no objection when the NSO services were discussed at four subsequent hearings, instead explaining its attempts (and failures) to provide Brown with the court-ordered services. In short, the Department and the circuit court operated as if Brown's request had been timely; the Department cannot now complain otherwise.[10]

Despite the recommendations of the Department's medical professionals that Brown could benefit from

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[9] Certainly, a service plan deficient on its face should produce an immediate objection. But it will not always be apparent at the time a service plan is adopted, or even soon afterward, that the service plan is insufficient, either in design or execution, to reasonably accommodate a parent's disability. This is perhaps especially true with respect to intellectual disabilities, which may present in subtle ways and require fine-tuned, albeit reasonable, accommodations.

[10] The lawyer-guardian ad litem participated in the circuit court proceedings but similarly raised no objection to the timing of the request.

services tailored to her disability through an organization such as the NSO, and despite the Department's failure to provide those court-ordered services, the circuit court nonetheless concluded that the Department had made reasonable efforts at reunification and terminated Brown's parental rights. The circuit court seemed not to have considered the fact that the Department had failed to provide the specific services the court had ordered to accommodate Brown's intellectual disability; nor did it consider whether, despite this failing, the Department's efforts nonetheless complied with its statutory obligations to reasonably accommodate Brown's disability. This was error. As stated earlier, efforts at reunification cannot be reasonable under the Probate Code unless the Department modifies its services as reasonably necessary to accommodate a parent's disability. And termination is improper without a finding of reasonable efforts.

Accordingly, we vacate the termination order, which was predicated on an incomplete analysis of whether reasonable efforts were made, and remand to the circuit court for further proceedings. On remand, the circuit court should consider whether the Department reasonably accommodated Brown's disability as part of its reunification efforts in light of the fact that Brown never received the court-ordered NSO services.[11]

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[11] The Department argues that, even if it failed to make reasonable efforts at reunification, we should still reverse the Court of Appeals because the circuit court concluded, as an independent ground for termination, that Brown lacked the motivation to be reunited with her children. This argument sits uncomfortably with the Department's concession in its brief before this Court that "[w]here the Department fails to [make reasonable accommodations for a disabled parent], this failure will ordinarily foreclose the Department's ability to prove that the grounds for termination were established." The circuit court's reasonable-efforts determination in this case was incomplete. Remand is, therefore, the only proper course.

For the reasons stated in this opinion, we affirm in part the judgment of the Court of Appeals, vacate in part the Court of Appeals' opinion, and remand to the Wayne Circuit Court for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with LARSEN, J.

PEOPLE v FRANKLIN

Docket No. 152840. Argued on application for leave to appeal January 12, 2017. Decided May 12, 2017.

Darius L. Franklin was charged in the Wayne Circuit Court with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*); carrying a firearm during the commission of a felony, MCL 750.224f; and being a felon in possession of a firearm, MCL 750.227b(1). The charges against defendant arose after police officers found a handgun and 350 grams of marijuana in defendant's home during the execution of a search warrant. The search warrant was issued on the basis of an affidavit stating that the affiant, a police officer, received information from an unregistered confidential informant (CI) that significant drug trafficking was taking place at defendant's home. According to the affiant's sworn affidavit, he surveilled defendant's home and observed five unknown individuals approach the home within a 30-minute time span. The affiant further averred that a young man let the individuals into defendant's home and that each individual was inside defendant's home for less than one minute. The magistrate found that there was probable cause to believe that illegal drugs would be found in defendant's home and issued the search warrant. Before trial, defendant moved to quash the search warrant and for a hearing under *Franks v Delaware*, 438 US 154 (1978), to challenge the veracity of the affidavit on which the warrant was based. The court, Bruce U. Morrow, J., denied defendant's motion to quash the warrant, concluding that the information in the affidavit, if taken as true, supported the magistrate's finding of probable cause. Notwithstanding this conclusion, the court expressed concern regarding the veracity of the information provided to the affiant by the unregistered CI and granted defendant's motion for a *Franks* hearing. Ultimately the court found the information in the affidavit not credible and the affidavit insufficient to support the warrant. According to the court, the affiant acted with reckless disregard for the truth by including an unregistered CI's information in the affidavit without confirming or corroborating it and without providing evidence, in accordance with MCL 780.653, that the CI had personal knowledge of the information given to the affiant. The court

granted defendant's motion to suppress and dismissed all charges against defendant. The prosecution appealed, and the Court of Appeals, FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ., reversed the trial court's order dismissing the charges against defendant in an unpublished per curiam opinion issued October 20, 2015. The Court of Appeals held that the trial court abused its discretion by holding an evidentiary hearing because defendant had failed to make the substantial preliminary showing required under *Franks* to merit a hearing. Defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 499 Mich 886 (2016).

In a unanimous opinion by Chief Justice MARKMAN, in lieu of granting leave to appeal, the Supreme Court *held*:

The United States and Michigan Constitutions, US Const, Am IV and Const 1963, art 1, § 11, prohibit the issuance of a warrant to search any place or seize any person or property without probable cause supported by oath or affirmation. Under certain circumstances, a criminal defendant has a constitutional right to a *Franks* hearing—an evidentiary hearing to review the veracity of an affidavit on which a search warrant is based and determine whether the affidavit is sufficient to support a magistrate's conclusion that probable cause existed to believe that evidence of a crime would be found in a particular place. A trial court must hold a *Franks* hearing at a defendant's request whenever the defendant's offered evidence constitutes a substantial preliminary showing that the affiant made a false statement—knowingly and intentionally, or with reckless disregard for the truth—and the false statement was necessary to the finding of probable cause required to issue the warrant. *Franks* governs whether the Fourth Amendment demands that an evidentiary hearing be held; that is, *Franks* concerns when a trial court may not deny a defendant an evidentiary hearing. However, nothing prevents a trial court from holding a hearing to examine the veracity of a warrant affidavit even without a substantial preliminary showing by a defendant. Given the absence of any identified prohibition in the federal Constitution or federal law and the latitude that Michigan trial courts generally have regarding motion practice and evidentiary hearings, a trial court may exercise its discretion and hold an evidentiary hearing to review the veracity of an affidavit and determine whether a search warrant was supported by probable cause. A trial court's decision to hold an evidentiary hearing is reviewed for an abuse of discretion. In this case, the trial court did not abuse its discretion by granting

defendant's motion for a hearing, and the prosecution did not challenge the trial court's ruling following the hearing—that the warrant was not supported by probable cause. Accordingly, the trial court order dismissing the charges against defendant was reinstated.

Reversed.

Justice WILDER took no part in the decision of this case.

CONSTITUTIONAL LAW — SEARCH WARRANTS — AFFIDAVITS — RELIABILITY OF AFFIANT'S STATEMENTS.

Franks v Delaware, 438 US 154 (1978), mandates an evidentiary hearing to evaluate the veracity of an affidavit in support of a search warrant when a defendant makes a substantial preliminary showing that the affidavit contained a false statement made knowingly or intentionally or with reckless disregard for the statement's truth; in the absence of a substantial preliminary showing, a trial court may order an evidentiary hearing to determine whether an affidavit in support of a search warrant contains reliable information sufficient to justify a magistrate's finding of probable cause to issue the warrant; the trial court's decision is reviewed for an abuse of discretion.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

Randall P. Upshaw for defendant.

MARKMAN, C.J. This case concerns whether a trial court in its discretion may hold an evidentiary hearing to collaterally review a magistrate's finding of probable cause on the basis of a defendant's challenge to the veracity of a warrant affidavit in light of the United States Supreme Court's holding in *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). *Franks* held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disre-

gard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id*. at 155-156. The Court of Appeals interpreted *Franks* as barring a trial court from granting a defendant an evidentiary hearing to challenge the veracity of a search warrant affidavit following the warrant's execution "*unless* the defendant makes '[the] substantial preliminary showing' " as set forth in *Franks*. *People v Franklin*, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2015 (Docket No. 322655), p 2 (emphasis added), quoting *Franks*, 438 US at 155-156. We reverse the judgment of the Court of Appeals, and we hold that *Franks* controls the circumstances under which "the Fourth Amendment *requires* that a hearing be held at the defendant's request," *Franks*, 438 US at 156, but *Franks* does not bar a trial court from exercising its discretion to grant evidentiary hearings concerning the veracity of search warrant affidavits under other circumstances. (Emphasis added.) Because the prosecutor did not appeal the trial court's conclusion that the warrant affidavit was not supported by probable cause, the only issue before the Court is whether the trial court abused its discretion by holding the evidentiary hearing. We reverse the judgment of the Court of Appeals and conclude that the trial court did not abuse its discretion when it granted defendant's motion for an evidentiary hearing.

I. FACTS AND HISTORY

On March 21, 2014, Police Officer Lynn Moore signed an affidavit in support of a search warrant for defendant Darius Franklin's house, alleging illegal

drug activity based on both Moore's own surveillance earlier that day and information from a confidential informant (CI). The affidavit stated in relevant part:

> 3.) On **03/11/2014**, Affiant was contacted by an unregistered confidential informant, whom Affiant has used numerous time[s] prior, advising Affiant on the location of [address omitted] being involved in a high amount of marijuana trafficking. Affiant has used this informant numerous (over 10 times) in the past resulting in confiscations of narcotics, weapons and multiple felony arrests.
>
> 4.) Upon Affiant researching the Narcotics Complaint Data Base, Affiant found no open Narcotics Complaints stemming from this location.
>
> 5.) On **03/21/2014** Affiant set up a surveillance operation on the above location mentioned. At this time Affiant observed 5 unknown individuals within a (30) minute period walk up to the above described location front main entry door. These unknown individuals were then met by the above mentioned seller from inside of the above location by opening the front main entry door and security gate. After a brief conversation with each unknown individual, the above mentioned seller would then let these individuals inside of the location. The above mentioned individuals would then exit the location and walk off in different directions. Each transaction took less than (1) minute to complete. Upon the last individual leaving the area Affiant engaged this person in conversation. Affiant questioned if the above location was open for sales of marijuana. Unknown individual then stated "Yah, they up right now just go to the front door and they will hook you up". Unknown individual then walked away. Affiant ended surveillance operation.[1]

The proposed search warrant described the alleged seller as a 25- to 27-year-old black male. After reviewing the affidavit, the magistrate determined that there

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[1] We have omitted the street address of defendant's house from where it appeared in several spots in the quoted affidavit.

was probable cause to believe that defendant's home contained illegal drugs, and the magistrate issued a search warrant. During the subsequent search of defendant's home, the police found a handgun and two bags of marijuana (about 350 grams in total), but they did not find a scale, baggies, or packaging equipment. Defendant was the only person home. He was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), carrying a firearm during the commission of a felony, MCL 750.224f, and being a felon in possession of a firearm, MCL 750.227b(1).

Before trial, defendant moved for an evidentiary hearing pursuant to *Franks*, 438 US 154, to quash the search warrant, and to suppress the evidence seized. Under *Franks*, a defendant is constitutionally entitled to an evidentiary hearing to attack the veracity of a warrant affidavit when the defendant offers a "substantial preliminary showing" that the affiant allegedly acted with "deliberate falsehood or [with] reckless disregard for the truth . . . ." *Id.* at 171. Defendant's offer of proof in this case consisted of his own affidavit stating that his front door had a locked security gate that required a key and had not been used in approximately six months.[2]

At the hearing held on defendant's motion for a *Franks* hearing, the trial court denied defendant's

[2] On the day of defendant's motion for a *Franks* hearing, he faxed his own affidavit to the court to be attached to his motion. Whether the trial court reviewed the affidavit before making its ruling is unclear. In defendant's application for leave to appeal in this Court, he asserted that the trial court possessed his affidavit, an affidavit from his neighbor, and photographs of the front entrance to defendant's home before the court granted defendant's motion. The prosecutor moved under MCR 2.115(B) to strike defendant's application for leave to appeal, alleging breaches of MCR 7.212(C)(6) and MCR 7.305(A)(1)(d) for failure to accurately portray the facts of the case. We are not convinced that any misrepresentations defendant may have made of the

motion to quash the search warrant, concluding that the information in Paragraph 5 was sufficient to demonstrate probable cause; the court nonetheless granted the motion to hold a *Franks* hearing. The court opined that the affiant had failed to supply sufficient information to demonstrate that the CI was credible. At the conclusion of the motion hearing the court ordered the prosecutor to provide more detailed information in preparation for the *Franks* hearing regarding the CI, including "all the times [the] affiant has used this unregistered [CI] on search warrants and . . . whatever field notes that are used so that this Court can be assured that the unregistered [CI] is the same one." The prosecutor objected to the *Franks* hearing, arguing that defendant had not made the requisite showing to merit the hearing.

At the evidentiary hearing, the affiant testified that he generally does not keep logs or records of his unnamed and unregistered informants and that he pays them an undisclosed amount of money from his personal funds. In addition, the affiant acknowledged that he never witnessed an exchange of money or drugs at defendant's house despite referring in his affidavit to a "seller" and "transactions." Defendant also provided photographs of the front of his house taken from the vantage point of his next door neighbor's house, and his neighbor testified that visitors did not frequently come and go from defendant's home at short intervals and that she never saw anyone "go in and out" of his front door. Defendant testified that there is a locked steel gate in front of his front door and that no one uses his front door. He further testified that he was

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record were intentional, and the misrepresentations have not influenced this Court's evaluation. We therefore deny the prosecutor's motion to strike.

41 years old, that he lived alone, and that no young man had ever stayed in his home.

Following the hearing, the trial court granted defendant's motion to suppress, finding that the information in support of the affidavit for the search warrant was not credible. More specifically, the court found that there was no evidence that the unregistered CI had provided information from his personal knowledge. The trial court concluded that the affiant had acted with "reckless disregard for the truth" when he included the CI's information in his affidavit without confirming its reliability or otherwise corroborating it. The trial court ultimately dismissed all charges against defendant.

The prosecutor appealed, and the Court of Appeals reversed, holding that the trial court abused its discretion by ordering an evidentiary hearing when defendant had failed to make an adequate showing under the standard set out in *Franks*, 438 US at 155-156, that is, a substantial preliminary showing that a hearing was necessary. *Franklin*, unpub op at 4. The prosecutor did not appeal the suppression order issued at the conclusion of the evidentiary hearing. Rather, she argued only that the decision to hold an evidentiary hearing regarding the warrant affidavit constituted an abuse of discretion. Consequently, the Court of Appeals reversed the trial court's order dismissing the charges but did not address the substance of the trial court's decision concerning defendant's motion to suppress. *Id*. Defendant then appealed in this Court, and we directed that oral argument be heard on defendant's application for leave to appeal. *People v Franklin*, 499 Mich 886 (2016). Having heard oral argument on January 12, 2017, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals.

II. STANDARD OF REVIEW

"A trial court's decision to hold an evidentiary hearing is generally reviewed for an abuse of discretion." *People v Danto*, 294 Mich App 596, 613; 822 NW2d 600 (2011). An abuse of discretion occurs when a trial court's decision "falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). The facts supporting the grant or denial of an evidentiary hearing are reviewed for clear error, and the application of the law to those facts is reviewed de novo. *People v Martin*, 271 Mich App 280, 309; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). A trial court's factual finding "is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012) (quotation marks and citation omitted).

III. ANALYSIS

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. Similarly, the Michigan Constitution provides, "No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11.[3]

[3] "[T]his Court need not interpret a provision of our Constitution in the same manner as a similar or identical federal constitutional provision . . . ." *People v Tanner*, 496 Mich 199, 256; 853 NW2d 653 (2014).

A magistrate shall only issue a search warrant when he or she finds that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). A magistrate's finding of probable cause and decision to issue a search warrant are reviewed to ensure that the magistrate possessed a " 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing . . . ." *Id.* at 236 (citation omitted; alteration in original). A magistrate's finding of probable cause and his or her decision to issue a search warrant should be given great deference and only disturbed in limited circumstances. *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007). Judicial deference to a magistrate's issuance of a warrant is a legal principle found throughout United States Supreme Court caselaw intended to emphasize the magistrate's role as an independent judicial officer and to encourage law enforcement officers to secure warrants. See *Gates*, 462 US at 236 ("[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' ") (citation omitted); *United States v Ventresca*, 380 US 102, 108; 85 S Ct 741; 13 L Ed 2d 684 (1965) ("A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.").

Over time, however, the United States Supreme Court has established exceptions to this general rule; that is, it has identified exceptional circumstances in

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However, neither party argues that the Michigan Constitution should be interpreted differently from the federal Constitution in the present context.

which a magistrate's warrant for search may be challenged. For example, a warrant affidavit may be defective if it was insufficient. *Nathanson v United States*, 290 US 41, 46; 54 S Ct 11; 78 L Ed 159 (1933) (holding that a warrant cannot be supported by "a mere affirmation of suspicion and belief without any statement of adequate supporting facts").[4] The instant case concerns another circumstance in which an affidavit may be deemed defective upon review by a trial court. In particular, it concerns when a warrant affidavit may be challenged in the manner established by the United States Supreme Court in *Franks*, 438 US 154.

A. *FRANKS v DELAWARE*

Franks, 438 US at 155-156, concerned whether an individual may be constitutionally entitled to challenge the *veracity* of a warrant affidavit after the warrant has been issued. *Franks* concluded that in particular circumstances the Fourth and Fourteenth Amendments, and the exclusionary rule derived from

[4] See also *Jones v United States*, 362 US 257, 269; 80 S Ct 725; 4 L Ed 2d 697 (1960) (concluding that a sufficient warrant affidavit may contain hearsay "so long as a substantial basis for crediting the hearsay is presented" and the statements are "reasonably corroborated by other matters within the [affiant's] knowledge"), overruled on other grounds by *United States v Salvucci*, 448 US 83, 85; 100 S Ct 2547; 65 L Ed 2d 619 (1980); *Aguilar v Texas*, 378 US 108, 114; 84 S Ct 1509; 12 L Ed 2d 723 (1964) (stating that a warrant affidavit must provide the magistrate with at least "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable' "), abrogated on other grounds by *Gates*, 462 US at 238; *Spinelli v United States*, 393 US 410, 418-419; 89 S Ct 584; 21 L Ed 2d 637 (1969) (holding that the "assertion of police suspicion" cannot save an otherwise insufficient warrant affidavit), abrogated on other grounds by *Gates*, 462 US at 238; *Gates*, 462 US at 236-246 (explaining, on the basis of prior Supreme Court decisions, the proper method of examining an affidavit for sufficiency).

those amendments, require the trial court to hold an evidentiary hearing to review the magistrate's finding of probable cause and the warrant affidavit on which it is based. *Id*. at 171-172. The instant case concerns the breadth of the Court's holding in *Franks*.

Franks held that a defendant is entitled to an evidentiary hearing in order to show that the affidavit is void when the defendant makes a substantial preliminary showing of a deliberate falsehood or reckless disregard for the truth by the affiant. *Id*. at 155-156. *Franks* explained the proofs necessary to entitle a defendant to an evidentiary hearing on the defendant's challenge to an affidavit's veracity:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, *no hearing is required*. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his

> hearing. Whether he will prevail at that hearing is, of course, another issue. [*Id*. at 171-172 (emphasis added).]

Franks further held that "[i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided . . . ." *Id*. at 156. In sum, *Franks* created a single basis for both the inquiry concerning an affidavit's veracity and the inquiry into whether the warrant should be voided. That basis—when a deliberate falsehood or reckless disregard for the truth is contained in the affidavit—entitles a defendant to first secure an evidentiary hearing to challenge the veracity of a search warrant affidavit (by making a "substantial preliminary showing" of deliberate falsehood or reckless disregard for the truth). *Id*. at 155-156. On this same basis, the defendant may then be entitled to have the warrant voided (when the deliberate falsehood or reckless disregard for the truth is established by a "preponderance of the evidence" and the affidavit's remaining content is insufficient to establish probable cause). *Id*. at 156.

Significantly, nothing in *Franks* speaks to when a trial court is *prohibited* from holding an evidentiary hearing to review a warrant affidavit. Rather, *Franks* established only when a defendant possesses the right to a hearing, i.e., when a trial court may not *deny* a hearing to the defendant. *Id*. When the Court was presented with the Supreme Court of Delaware's prior holding "that a defendant under *no* circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant," *Franks* responded that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment *requires* that a hearing be held at the defendant's request. [*Id*. (emphasis added).]

Franks principally relied on the Fourth Amendment's pronouncement that " 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .' " *Id*. at 164, quoting US Const, Am IV. The Court reasoned that an oath or affirmation can only logically establish probable cause if it is truthful, meaning that "the information put forth is believed or appropriately accepted by the affiant as true." *Id*. at 165. The Court concluded that "it would be an unthinkable imposition upon [a magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Id*.

In recognition of the "competing values" at issue—namely deference to the magistrate's exercise of judgment in issuing a warrant and the need to safeguard Fourth Amendment guarantees—the Court imposed limitations upon a defendant's constitutional *right* to a *Franks* veracity hearing.[5] *Id*. "[A] hearing on allegations of misstatements *must* be accorded" only when the defendant has made the required substantial pre-

[5] We note that the latter of these "competing values" is firmly grounded in the Constitution while the former appears to be rooted in practical policy concerns. See, e.g., *Gates*, 462 US at 236 ("If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches."); *Ventresca*, 380 US at 108 ("A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.").

liminary showing, and "exclusion of the seized evidence is *mandated*" only if the content of the affidavit that has survived the veracity hearing is insufficient to establish probable cause. *Id*. at 167 (emphasis added). Regarding all other circumstances that might arise in the context of a challenge to a warrant affidavit, the Court was silent. In particular, *Franks* was silent concerning when a trial court might be *barred* from exercising its own discretion to hold a veracity hearing. In short, the focus of *Franks* was on the defendant's constitutional *right* to a hearing and not on *limiting* the trial court's *discretion* to hold a veracity hearing.[6]

The Tenth Circuit has concluded similarly: "*Franks* speaks only of the showing a defendant must make to 'mandate' an evidentiary hearing. Nothing in the opinion or the logic on which it rests suggests that a district court must forswear an evidentiary hearing unless the defendant's motion makes one constitutionally compulsory." *United States v Herrera*, 782 F3d 571, 573 (CA 10, 2015) (citation omitted). *Herrera* further emphasized the discretionary authority of trial courts in motion practice:

> [D]istrict courts generally enjoy a fair amount of discretion in choosing the procedures they find most helpful for resolving pretrial motions, including whether to take the matter on the briefs, hear oral argument, or hold an evidentiary hearing. And often enough courts will choose to err on the side of granting more process than might be strictly necessary in order to ensure not only that justice is done but that justice is seen to be done. [*Id*. at 573-574.]

Similarly, the Massachusetts Supreme Court has stated that a trial court may hold an evidentiary hearing on the veracity of a search warrant affidavit at its discre-

[6] Indeed, we see no language in *Franks* that purports to impose such a procedural limitation on state judiciaries.

tion. *Commonwealth v Douzanis*, 384 Mass 434, 443; 425 NE2d 326 (1981) ("A *Franks*-type hearing was not constitutionally mandated. The judge could, nevertheless, determine in his discretion to hold a *Franks*-type hearing . . . ."). These cases closely mirror the legal question here and support our understanding of *Franks* as a constitutional *floor* safeguarding a defendant's rights rather than a *ceiling* on trial court discretion. Therefore, the Court of Appeals erred when it held that "under *Franks*, an evidentiary hearing challenging the validity of a search warrant *may not be granted unless* the defendant makes a substantial preliminary showing . . . ." *Franklin*, unpub op at 2 (quotation marks omitted; emphasis added).

B. OTHER FEDERAL CONSTRAINTS

We next consider whether federal law in *any other regard* prohibits states from holding veracity hearings concerning warrant affidavits. Generally, a state is free to act as long as the state does not contravene the federal Constitution. US Const, Am X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). See also, e.g., *Oregon v Hass*, 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").

We are unable to identify any federal constitutional protection that is violated when a state trial court allows a defendant an evidentiary hearing on the veracity of a search warrant affidavit even when the defendant has not made a substantial preliminary showing of deliberate falsehood or reckless disregard

for the truth pursuant to *Franks*, nor have the parties pointed us to any restraint. See, e.g., *Herrera*, 782 F3d at 573-574 (stating that the government provided no "potential source of authority" or "compelling reason" why a trial court's decision to grant an evidentiary hearing should be limited by more than review for an abuse of discretion). And Michigan, if it chooses, possesses the sovereign authority to allow its own trial courts to provide a defendant with additional process through an evidentiary hearing held in the reasonable exercise of the trial court's discretion. *Herb v Pitcairn*, 324 US 117, 125-126; 65 S Ct 459; 89 L Ed 789 (1945) ("[The United States Supreme Court's] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal *rights*.") (emphasis added). Having failed to identify any federal law that binds Michigan on this question, we turn to state law.[7]

C. TRIAL COURT DISCRETION

In accordance with *Franks*, Michigan *requires* trial courts to dispense with the offending parts of a search warrant affidavit when, at a *Franks* hearing, a defendant demonstrates "by a preponderance of the evidence that [the affiant] recklessly or intentionally made false statements in the affidavit upon which the search warrant was based." *People v Reid*, 420 Mich 326, 336; 362 NW2d 655 (1984). Michigan, however, has not addressed under what circumstances a trial court *may conduct* an evidentiary hearing concerning the veracity of a search warrant affidavit following the warrant's execution.

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[7] Neither party argues that the discretionary evidentiary hearings at issue violate the Michigan Constitution or Michigan law, and therefore we do not address such arguments.

In general, trial courts in our state possess reasonable discretion regarding whether to hold hearings concerning the range of motions that typically come before them. See, e.g., MCR 2.119(F)(2) (authorizing a trial court to hold oral arguments although none are ordinarily permitted on a party's motion for reconsideration); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 405; 651 NW2d 756 (2002) ("[W]here the party requesting relief fails to provide specific allegations of fraud relating to a material fact, the trial court need not proceed to an evidentiary hearing."); *Mich Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 643; 419 NW2d 439 (1988) (ruling that a trial court had discretion to refuse to hold an evidentiary hearing on a motion to intervene when one might ordinarily be required). The Court of Appeals has explained why trial courts are best suited to determine whether an evidentiary hearing on a given motion should be held:

> [W]e believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing. [*Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995).]

There are instances in which trial courts are *obligated* to hold evidentiary hearings. See, e.g.,

MCR 7.208(B) (the trial court shall hear and decide a motion for "a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence"); MCR 2.119(E)(1) ("Contested motions should be noticed for hearing . . . ."); *Craig v Oakwood Hosp*, 471 Mich 67, 83; 684 NW2d 296 (2004) (requiring a trial court to conduct a hearing to determine whether the expert's opinion was "based on generally accepted methodology"); *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998) (holding that while a motion to suppress evidence generally requires an evidentiary hearing, the parties may agree to have the motion decided on the basis of the record of a preliminary examination); *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990) ("[W]here a party alleges that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing into the allegations."). Yet, we have not found any Michigan constitutional provision, court rule, or caselaw—nor have the parties pointed us to any such authority—*prohibiting* a trial court from holding an evidentiary hearing on a motion, as long as doing so is not an abuse of the trial court's discretion.[8] See *Unger*, 278 Mich App at 216-217 ("[A] trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion."). Given the absence of any identified prohibition, and given the latitude Michigan trial courts enjoy regarding motion practice and evidentiary hearings generally, we conclude that trial courts possess the authority to grant discretionary evidentiary hearings on the veracity of search warrant affidavits and that a

[8] Even when the parties have agreed to the entry of a proposed order or waived notice and hearing, the trial court may decline to enter the order and instead hold a hearing on the motion. See MCR 2.119(D)(3).

trial court's decision to hold a veracity hearing is subject to review only for an abuse of discretion.

Our holding today—that even in the absence of the substantial preliminary showing required by *Franks* a trial court may conduct an evidentiary hearing concerning the veracity of a search warrant affidavit—does not purport to address *Franks*'s holding regarding *when* "the search warrant must be voided" after an evidentiary hearing. *Franks*, 438 US at 156. Rather, the exercise of discretion addressed in this case is simply whether to *convene* an evidentiary hearing concerning the veracity of a search warrant affidavit; therefore, our decision does not affect or alter the standards that govern the *outcome* of those hearings. At an evidentiary hearing, before the court may void the warrant pursuant to *Franks* or order suppression of evidence, the defendant must still meet his or her full burden of establishing by a preponderance of the evidence that the affidavit contains a reckless or deliberate falsehood and that with this material "set to one side, the affidavit's remaining content is insufficient to establish probable cause."[9] *Franks*, 438 US at 156. See also *Reid*, 420 Mich at 336 ("At a *Franks* hearing, evidence may be suppressed only upon a showing that false material essential to probable cause was knowingly or recklessly included.").

D. APPLICATION

The record demonstrates that the trial court did not rely on, or even refer to, defendant's offer of proof purportedly satisfying the requirements of *Franks* as a reason for its decision. See *Franks*, 438 US at 171.

[9] Of course, the defendant could also meet this burden by setting forth other grounds established under Michigan law for holding the warrant affidavit defective, such as insufficiency. See, e.g., *Keller*, 479 Mich 467.

Rather, it stated that it was granting the hearing because of its *own* concern regarding the credibility of the CI and whether the CI's information was based on personal knowledge. See MCL 780.653 (stating that a search warrant affidavit may be based on information supplied by an unnamed CI if it contains affirmative allegations that allow a magistrate to conclude that the CI possessed personal knowledge of the information and either that the CI is credible or the information is reliable). The trial court in this case stated that, if taken as true, the information "contained in number five [of the affidavit] is sufficient for the issuance based on there being a fair probability that drugs would be found . . . ."[10] The trial court granted the hearing nonetheless and directed the affiant to bring further information regarding the CI to the hearing because the court was troubled by the credibility and reliability of the CI.[11] Nothing in the trial court's reasoning indicated that it relied in any way on defendant's offer of proof as opposed to its own independent concerns. Therefore, the court exercised its discretion to grant the hearing without expressly deciding that defendant had satisfied the *Franks* standard.

The question is whether the trial court properly exercised its discretion by deciding to hold a hearing. As already noted, nothing in federal or Michigan law prevents a trial court from exercising its judgment in this manner, short of engaging in an abuse of discre-

[10] Paragraph 5 of the affidavit pertained to the affiant's observation of persons coming to and going from defendant's front door for alleged illegal purposes.

[11] The trial court also emphasized that despite the affiant's claimed observation of five illegal drug "transactions" earlier in the day, no evidence of drug sales, such as drug packaging, a scale, or money, was found during the search. We make no judgment about whether it was proper for the court to give consideration to this lack of evidence.

tion. Because the Court of Appeals incorrectly assumed that the trial court could not conduct an evidentiary hearing on the veracity of the search warrant affidavit absent defendant's making of a substantial preliminary showing under *Franks*, the Court of Appeals incorrectly concluded that the trial court abused its discretion by conducting the hearing. The trial court's decision to grant an evidentiary hearing was not outside the range of reasonable and principled outcomes, i.e., an abuse of discretion, given the reasons the trial court articulated for its decision.[12] *Duncan*, 494 Mich at 722-723. Further, the prosecutor has not challenged the court's subsequent ruling that the warrant was not supported by probable cause.[13]

IV. CONCLUSION

The circumstances under which an evidentiary hearing regarding a warrant affidavit *must* be held as directed by *Franks* are not the only circumstances under which such a hearing *may* be held. A trial court's decision to hold an evidentiary hearing on the veracity of the search warrant affidavit should be reviewed, as trial court decisions regarding whether to hold an evidentiary hearing are reviewed in a wide variety of

[12] To facilitate appellate review, we encourage trial courts to state on the record their reasons for granting a *Franks* hearing.

[13] Given that the warrant affidavit was ultimately deemed defective, we question whether there would be a proper remedy that could be afforded the prosecutor if the motion to hold the hearing had been granted in error. See generally *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003) ("If defendant went to trial and were found guilty, any subsequent appeal would not consider whether the evidence adduced at the preliminary examination was sufficient to warrant a bindover."); *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010) (stating that the "standard [of probable cause for a bindover] is less rigorous than the requirement to find guilt beyond a reasonable doubt to convict a criminal defendant").

other matters, for an abuse of discretion. The judgment of the Court of Appeals is reversed, and we reinstate the trial court's order dismissing the charges against defendant.

ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MARKMAN, C.J.

WILDER, J., took no part in the decision of this case.

NICKOLA v MIC GENERAL INSURANCE COMPANY

Docket No. 152535. Argued on application for leave to appeal January 10, 2017. Decided May 12, 2017.

George and Thelma Nickola brought a declaratory action in the Genesee Circuit Court against their no-fault insurer, MIC General Insurance Company (MIC), in April 2005, asking the court to compel arbitration in connection with the Nickolas' efforts to obtain underinsured-motorist (UIM) benefits from MIC. The Nickolas had been injured in a car accident caused by Roy Smith, whose no-fault insurance policy provided the minimum liability coverage allowed by law: $20,000 per person, up to $40,000 per accident. Smith's insurer settled with the Nickolas and paid them the limits of Smith's policy. The court, Richard B. Yuille, J., ordered the case to arbitration while retaining jurisdiction. The Nickolas' insurance policy provided that each side would select an arbitrator, and those two arbitrators would then select a third. If a third arbitrator could not be selected by agreement, then either side could ask the court to select the third arbitrator. The two arbitrators selected by the parties could not agree on a third arbitrator, and neither side asked the court to appoint a third arbitrator until 2012. In 2013 the case proceeded to arbitration, and the arbitration panel awarded $80,000 for George's injuries and $33,000 for Thelma's injuries. The award specified that the amounts included any interest arising as an element of damage from the date of injury to the date of suit but did not include any other interest, fees, or costs that the court could award. The Nickolas' son, Joseph G. Nickola, who was made personal representative of the Nickolas' estates and substituted as plaintiff after the Nickolas died, moved for entry of judgment on the arbitration award. Plaintiff also asked the court to assess 12% penalty interest under the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq*. The court affirmed the arbitration awards but declined to award penalty interest under the UTPA, ruling that penalty interest did not apply because the UIM claim was reasonably in dispute for purposes of MCL 500.2006(4). Plaintiff appealed. The Court of Appeals, GADOLA, P.J., and JANSEN and BECKERING, JJ., affirmed the trial court, holding that the "reasonably in dispute" language applied to plaintiff's UIM claim because

a UIM claim essentially places the insured in the shoes of a third-party claimant. 312 Mich App 374 (2015). Plaintiff applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 499 Mich 935 (2016).

In a unanimous opinion by Justice ZAHRA, in lieu of granting leave to appeal, the Supreme Court *held*:

The second sentence of MCL 500.2006(4), which provides that third-party tort claimants are not entitled to penalty interest under the UTPA if their claim was reasonably in dispute, does not apply to claims made by an insured. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc (On Remand)*, 287 Mich App 248 (2010), was overruled to the extent it was inconsistent with this opinion.

1. MCL 500.2006(1) requires insurance claims to be paid on a timely basis and provides that, if they are not, penalty interest will be imposed under the UTPA. As it relates to the imposition of penalty interest, MCL 500.2006(1) refers to MCL 500.2006(4), which, at the time of the trial court's decision, provided that if benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. MCL 500.2006(4) further provided that if the claimant is a third-party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith, and the bad faith was determined by a court of law. Subsection (4) consists of two sentences, which divide insurance claimants into two distinct classes. The first sentence creates a class of claimants who are insureds or an individual or entity directly entitled to benefits under an insured's insurance contract. The second sentence creates a class of third-party tort claimants. The first sentence contains no "reasonably in dispute" exemption from the imposition of penalty interest for the untimely payment of benefits due under an insurance contract. The second sentence, which addresses situations in which the claimant is a third-party tort claimant, expressly states that third-party tort claimants are not entitled to penalty interest under the UTPA if their claim is reasonably in dispute. Because the "reasonably in dispute" limitation is contained only in the second

sentence of MCL 500.2006(4), this limitation applies only to third-party tort claimants, not to insureds.

2. The Nickolas were directly entitled to benefits and are therefore within the class of claimants identified in the first sentence of MCL 500.2006(4). Defendant's argument to the contrary presumes that the phrase "directly entitled to benefits" modifies "insured," whereas a more natural reading suggests that the phrase modifies "individual or entity." Furthermore, even if the phrase modifies "insured," the Nickolas would still be directly entitled to benefits. While defendant relies on definitions of "directly" that indicate that something must "happen quickly or without delay," "directly" is alternatively defined as "in a direct line, way, or manner; straight," and "direct" is similarly defined as "proceeding in a straight line or by the shortest course; straight." In the present context, the latter meaning is the most appropriate one and, therefore, the Nickolas were directly entitled to benefits in the sense that they were entitled to benefits in a straight line from the insurance company. The Nickolas were not third-party tort claimants; rather, they were parties to the insurance contract, and they chose to pay higher insurance premiums in order to obtain protection from underinsured motorists. Therefore, the first sentence of MCL 500.2006(4) is applicable, and the "reasonably in dispute" language contained in the second sentence does not apply to plaintiff's claim for UIM benefits. This conclusion is consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341 (1998), and *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551 (2007).

3. The Court of Appeals in this case erroneously focused on the nature of a UIM claim. The panel rationalized that while plaintiff is seeking UIM benefits provided under the Nickolas' insurance policy, he is doing more than making a "simple first-party claim." Yet the plain language of MCL 500.2006(4) distinguishes only the identity of the claimant, not the nature of the claim. The proofs required for a UIM claim do not transform the insured into a third-party tort claimant when seeking to enforce the insured's own insurance contract. The insured by definition is a party to the insurance contract, not a third party. The fact that the Nickolas' UIM coverage requires a particular set of proofs in order to recover UIM benefits does not transform plaintiff's claim for benefits under the insurance policy into a tort claim. Nothing in MCL 500.2006(4) permits an insurer to avoid payment of penalty interest when the insured has not been paid benefits within 60 days of submitting to the insurer satisfactory proof of loss.

Court of Appeals' decision denying plaintiff penalty interest under the UTPA reversed; case remanded for further proceedings.

INSURANCE — UNIFORM TRADE PRACTICES ACT — PENALTY INTEREST — UNDERINSURED-MOTORIST CLAIMS.

Under the Uniform Trade Practices Act, MCL 500.2001 *et seq*., a person must pay on a timely basis to its insured, a person directly entitled to benefits under its insured's insurance contract, or a third-party tort claimant the benefits provided under the terms of its policy or must pay 12% interest on claims not paid on a timely basis; the second sentence of MCL 500.2006(4), which provides that third-party tort claimants are not entitled to penalty interest for benefits not paid on a timely basis if their claim was reasonably in dispute, does not apply to claims for underinsured-motorist benefits made by an insured (MCL 500.2006(1), (4)).

John D. Nickola and *Bendure & Thomas* (by *Mark R. Bendure*) for plaintiff.

Harvey Kruse PC (by *Nathan Peplinski* and *Michael F. Schmidt*) for defendant.

ZAHRA, J. The issue presented in this case is whether an insurer's untimely payment of underinsured motorist (UIM) benefits is subject to penalty interest under the Uniform Trade Practices Act (UTPA).[1] We hold that an insured making a claim under his or her own insurance policy for UIM benefits cannot be considered a "third party tort claimant" under MCL 500.2006(4), a provision of the UTPA. This holding is required by the plain language of MCL 500.2006(4) and is entirely consistent with this Court's opinion in *Yaldo v North Pointe Ins Co*[2] and the Court of Appeals' opinion in *Griswold Props, LLC v Lexington Ins Co*.[3] We overrule the Court of Appeals' opinion in *Auto-Owners Ins Co v*

[1] MCL 500.2001 *et seq*.

[2] *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998).

[3] *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007).

Ferwerda Enterprises, Inc (On Remand)[4] to the extent it is inconsistent with this opinion. We reverse the opinion of the Court of Appeals denying plaintiff penalty interest under the UTPA and remand to the trial court for further proceedings consistent with this opinion.[5]

I. FACTS AND PROCEEDINGS

On April 13, 2004, George Nickola and his wife, Thelma, were injured in a car accident. The driver of the other car who caused the accident, Roy Smith, was insured by Progressive Insurance Company. Smith's automobile no-fault insurance policy provided the minimum liability coverage allowed by law: $20,000 per person, up to $40,000 per accident.[6]

On May 7, 2004, the Nickolas' son, Joseph G. Nickola, then acting as their attorney,[7] penned a letter to the Nickolas' insurer, defendant MIC General Insurance Company, doing business as GMAC Insurance. The letter explained that Smith's "liability insurance policy is insufficient to cover the . . . injuries sustained by both [the Nickolas]." The letter also advised that the Nickolas "are claiming [UIM] benefits under the provisions of their automobile policy . . . ." The Nickolas' policy provided for UIM limits of $100,000 per person,

[4] *Auto-Owners Ins Co v Ferwerda Enterprises, Inc (On Remand)*, 287 Mich App 248; 797 NW2d 168 (2010), vacated in part 488 Mich 917 (2010).

[5] We deny plaintiff's application for leave to appeal the trial court's decision not to impose sanctions on defendant.

[6] See MCL 257.520(b)(2).

[7] George and Thelma Nickola were the original plaintiffs in this case. During the pendency of this case, the couple passed away, requiring that Joseph Nickola, who was named personal representative of both estates, be substituted as plaintiff. For ease of reference, George and Thelma are collectively referred to as "the Nickolas."

up to $300,000 per accident, and they sought payment of UIM benefits in the amount of $160,000; $80,000 for each insured.[8]

On February 8, 2005, the Nickolas again demanded payment of $160,000, the full UIM limits available to George and Thelma. On February 17, 2005, an adjuster for defendant denied the claim, asserting that the Nickolas could not establish a threshold injury for noneconomic tort recovery. Defendant's adjuster explained:

> We believe your client's [sic] were adequately compensated for their pre-existing injuries, which were aggravated in the accident. Your client's [sic] appear to be able to lead their normal life as described in the *Kreiner* [*v Fischer*][9] decision. If however, you have some additional information that you want me to review, please forward the medical records and I will be happy to review the matter again.

On February 22, 2005, the Nickolas demanded arbitration of the UIM claim. Their policy provided that if defendant and the insured did not agree about whether the insured was entitled to recover damages under the UIM endorsement, or did not agree about the amount of damages, then "[*e*]*ither* party may make a written demand for arbitration."[10] Despite the standardized arbitration language, defendant advised the Nickolas

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[8] Progressive extended an offer to the Nickolas to settle for Smith's policy limits ($40,000 total—$20,000 each). Defendant provided the Nickolas written permission to accept the offer. The demand of $160,000 ($80,000 each for George and Thelma) was arrived at by taking the UIM policy limits of $200,000 ($100,000 for each insured) and deducting $40,000, the amount paid to the Nickolas by Progressive under the tortfeasor's no-fault insurance policy.

[9] *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180, 214; 795 NW2d 517 (2010).

[10] Emphasis added.

that the policy required both parties to agree to arbitration, and defendant refused to arbitrate the claim.

Accordingly, on April 8, 2005, the Nickolas filed suit, asking the trial court to refer the matter to arbitration. The court ordered the case to arbitration while retaining jurisdiction. The UIM endorsement provided that each side would select an arbitrator, and those two arbitrators would then select a third. If a third arbitrator could not be selected by agreement, then either side could ask the court to select the third arbitrator. The two arbitrators selected by the parties could not agree on a third arbitrator. Remarkably, for the next six years this case remained stagnant with neither side asking the court to appoint a third arbitrator.[11]

Finally, in 2012, plaintiff asked the trial court to appoint a neutral arbitrator. The court agreed and the case proceeded to arbitration, where the arbitration panel awarded $80,000 for George's injuries and $33,000 for Thelma's injuries. The award specified that the amounts were "inclusive of interest, if any, as an element of damage from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court."

Plaintiff then filed a motion in the trial court for entry of judgment on the arbitration award. Plaintiff also asked the court to assess 12% penalty interest under the UTPA. The court affirmed the arbitration awards but declined to award penalty interest under the UTPA, finding that penalty interest did not apply because the UIM claim was "reasonably in dispute" for purposes of MCL 500.2006(4). Plaintiff appealed.

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[11] It was during this period of inactivity that George and Thelma died. Neither death was caused by the injuries suffered in the car accident.

The Court of Appeals affirmed the trial court, holding that the "reasonably in dispute" language applied to plaintiff's UIM claim because a UIM claim "essentially" places the insured in the shoes of a third-party claimant.[12] Plaintiff sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action.[13]

II. STANDARD OF REVIEW

Matters of statutory and contractual interpretation present questions of law, which this Court reviews de novo.[14]

III. ANALYSIS

A. PENALTY INTEREST UNDER MCL 500.2006(4)

UIM policies are not mandated by statute. Individuals seeking UIM coverage contract for it freely, voluntarily, and at arm's length.[15] When the UIM insured is injured by a tortfeasor motorist whose policy is insufficient to cover all of the insured's damages, the insured makes a claim for the shortfall against his or her UIM insurer.[16] Notwithstanding the fact that the Nicko-

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[12] *Nickola v MIC Gen Ins Co*, 312 Mich App 374, 387; 878 NW2d 480 (2015). The panel further determined that plaintiff's UIM claim was reasonably in dispute. *Id*. at 388-389.

[13] *Nickola v MIC Gen Ins Co*, 499 Mich 935 (2016).

[14] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002); *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014).

[15] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 194; 747 NW2d 811 (2008).

[16] *Id*. The insured generally must first determine how much of the damages will be covered by the tortfeasor and only then seek further recovery under his or her UIM coverage from the insurer.

las' UIM coverage was governed by contract, this case presents a statutory claim for penalty interest under the UTPA, which applies to all insurers doing business in Michigan. The UTPA provides for 12% penalty interest on certain claims not timely paid by an insurer.[17]

We begin all matters of statutory interpretation with an examination of the language of the statute.[18] "The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written."[19] "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[20]

In this matter, the relevant statutory provisions of the UTPA are Subsections (1) and (4) of MCL 500.2006. Subsection (1) requires insurance claims to be paid on a timely basis, or penalty interest will be imposed under the UTPA.[21] As it relates to the imposition of

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[17] See MCL 500.2006(4); *Yaldo*, 457 Mich at 348.

[18] *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

[19] *Cruz*, 466 Mich at 594.

[20] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), citing *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

[21] MCL 500.2006(1) specifically provides:

> A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.

penalty interest, Subsection (1) directs us to Subsection (4), which, at the time of the trial court's decision, provided:

> If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, *if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant*, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum *if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law*. [Emphasis added.][22]

Subsection (4) consists of two sentences, which together create a straightforward scheme. These sentences divide insurance claimants into two distinct classes. The first sentence creates a class of claimants who are insureds or an individual or entity directly entitled to benefits under an insured's insurance contract. The second sentence creates a class of third-party tort claimants.

The first sentence contains no "reasonably in dispute" exemption from the imposition of penalty interest for the untimely payment of benefits due under an insurance contract. The Legislature cast a broad net when defining circumstances under which insurers would be subject to penalty interest. All claims made by an insured or an individual or entity directly entitled to benefits under a policy of insurance must be timely paid under the policy or the insurer risks the

[22] This provision has since been amended by 2016 PA 276; however, as we will explain further, the changes do not affect our analysis.

imposition of penalty interest. The UTPA encourages prompt payment of contractual insurance benefits.

The second sentence addresses situations in which "the claimant is a third party tort claimant."[23] In stark contrast to the first sentence, the second sentence of Subsection (4) expressly states that third-party tort claimants are not entitled to penalty interest under the UTPA if their claim is "reasonably in dispute."[24] The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional.[25] "We do not read requirements into a statute where none appear in the plain language and the statute is unambiguous. 'It is not within the province of this Court to read therein a mandate that the [L]egislature has not seen fit to incorporate.' "[26] Therefore, because the "reasonably in dispute" limitation is contained only in the second sentence of MCL 500.2006(4), this limitation applies only to third-party tort claimants, not claims made by an insured.[27]

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[23] MCL 500.2006(4).

[24] *Id*.

[25] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), pp 57-58 ("[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose.").

[26] *People v Feeley*, 499 Mich 429, 439; 885 NW2d 223 (2016), quoting *Jones v Grand Ledge Pub Sch*, 349 Mich 1, 11; 84 NW2d 327 (1957) (citation omitted).

[27] As a result of 2016 PA 276, the first sentence of MCL 500.2006(4) now refers to "the insured or *a person* directly entitled to benefits under the insured's insurance contract." (Emphasis added.) The Legislature's replacement of "individual or entity" with "person" does not alter this Court's analysis. Most importantly, the first sentence of amended Subsection (4) continues to omit the "reasonably in dispute" language that applies only to the insured or a person directly entitled to benefits,

We reject defendant's argument that the Nickolas were not "directly entitled to benefits" and therefore are not within the class of claimants identified in the first sentence of MCL 500.2006(4). This argument presumes that the phrase "directly entitled to benefits" modifies "insured," whereas a more natural reading suggests that the phrase modifies "individual or entity." Furthermore, even assuming the phrase modifies "insured," we believe the Nickolas were "directly entitled to benefits." While defendant relies on definitions of "directly" that indicate that something must "happen quickly or without delay," "directly" is alternatively defined as "in a direct line, way, or manner; straight," *Random House Webster's College Dictionary* (2001), def 1, and "direct" is similarly defined as "proceeding in a straight line or by the shortest course; straight," *id.*, def 14. In the present context, we believe the latter meaning is the most appropriate one and thus that the Nickolas were "directly" entitled to benefits in the sense that they were entitled to benefits in a "straight line" from the insurance company.

In this case, the claimants, George and Thelma Nickola, were parties to the insurance contract. The Nickolas chose to pay higher insurance premiums in order to obtain protection from underinsured motorists. The Nickolas were insureds, not third-party tort claimants. Therefore, the first sentence of MCL 500.2006(4) is applicable, and the "reasonably in dispute" language contained in the second sentence does not apply to plaintiff's claim for UIM benefits.[28]

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whereas the second sentence of amended Subsection (4) retains the "reasonably in dispute" language that applies only to a third-party tort claimant.

[28] Although neither defendant nor the Court of Appeals raised the issue, we observe that the closing sentence of MCL 500.2006(1) refers to whether a claim is "reasonably in dispute." But this reference in MCL 500.2006(1) does not affect this Court's analysis. No reasonable inter-

The Court of Appeals in this case erroneously focused on the nature of a UIM claim. The panel rationalized that while plaintiff is seeking UIM benefits provided under the Nickolas' insurance policy, he is doing more than making a "simple first-party claim."[29] The panel explained that "[i]n order for plaintiff to succeed on his UIM claim, he essentially has to allege a third-party tort claim" because UIM insurance permits an injured motorist to obtain coverage from his or her own insurer to the extent that a third-party claim would be permitted against the at-fault driver.[30] Yet the plain language of MCL 500.2006(4) distinguishes only the identity of the claimant, not the nature of the claim. The proofs required for a UIM claim do not transform "the insured" into a "third-party tort claimant" when seeking to enforce the insured's own insurance contract. The insured by definition is a party to the insurance contract, not a third party.[31] Simply because the Nickolas' UIM coverage requires a particular set of proofs in order to recover UIM benefits does not transform plaintiff's claim for benefits under the insurance policy into a tort claim.[32] In sum, the Nickolas were insureds who made a claim for

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pretation of Subsection (1) would require application of the "reasonably in dispute" language to all categories of claimants identified under Subsection (4)—insureds as well as third-party tort claimants. Had the Legislature intended this result, there would have been no need to separate the two types of claims in Subsection (4), thus rendering a portion of Subsection (4) superfluous. Further, we are guided by the fact that Subsection (1) specifically refers to claims paid "as provided in subsection (4)," which marks a clear distinction between claims made by an insured and claims made by third-party tort claimants.

[29] *Nickola*, 312 Mich App at 387.

[30] *Id*.

[31] See *Black's Law Dictionary* (10th ed) (defining "insured" as "[s]omeone who is covered or protected by an insurance policy").

[32] A fundamental principle of insurance law is that insurance policies are contracts. See, e.g., *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992); *Nash v New York Life Ins Co*, 272 Mich 680, 682; 262 NW 441 (1935).

benefits under their policy of insurance. Nothing in MCL 500.2006(4) permits an insurer to avoid payment of penalty interest when the insured has not been paid benefits within 60 days of submitting to the insurer satisfactory proof of loss.[33]

B. CASELAW APPLYING MCL 500.2006(4)

The Court of Appeals erroneously distinguished the present case from binding caselaw interpreting the UTPA's penalty-interest provision under MCL 500.2006(4). This Court, in *Yaldo*, addressed whether the "reasonably in dispute" language in MCL 500.2006(4) applied to the plaintiff's first-party claim.[34] *Yaldo* ruled, in part, that the trial court could have awarded the plaintiff insured 12% penalty interest for the defendant insurer's untimely payment under MCL 500.2006(4),[35] noting:

> Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. Where the action is based solely on contract, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute.[36]

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[33] Defendant argues that even if the Nickolas were entitled to penalty interest under MCL 500.2006(4), they never submitted a satisfactory proof of loss as required by the statute. Having determined that the Nickolas were not precluded from receiving penalty interest on the basis of the "reasonably in dispute" language, we leave it to the trial court on remand to decide any remaining questions pertaining to plaintiff's entitlement to penalty interest under MCL 500.2006(4).

[34] *Yaldo*, 457 Mich at 348.

[35] *Id*. at 348-349.

[36] *Id*. at 348 n 4. Defendant argues that the language "based solely on contract" in *Yaldo* supports its position that the Nickolas' claim for UIM

The Court concluded:

> We find that defendant misreads the Uniform Trade Practices Act. Clearly, plaintiff could have filed a claim under MCL 500.2006(4); MSA 24.12006(4). With respect to collection of twelve percent interest, reasonable dispute is applicable only when the claimant is a third-party tort claimant. Here, plaintiff is not such a claimant. Rather, he is seeking reimbursement for the loss of his business due to a fire. Therefore, plaintiff could have recovered interest at the rate of twelve percent per annum under the Uniform Trade Practices Act.[37]

Yaldo is clear that the "reasonably in dispute" language under MCL 500.2006(4) applies only to a third-party tort claimant, not insureds claiming benefits under their insurance contract.

Further, the Court of Appeals clarified any doubt *Yaldo* may have left on this issue via a conflict-panel resolution[38] in *Griswold*, which addressed the types of insurance claims subject to the "reasonably in dispute" language of MCL 500.2006(4).[39] The sole issue before the conflict panel was whether the Court was compelled to adhere to *Arco Indus Corp v American Motorists Ins Co (On Second Remand, On Rehear-*

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coverage is likened to a third-party tort claim because the UIM coverage requires plaintiff to effectively prove a tort claim against defendant. The "based solely on contract" language in *Yaldo*, however, does not alter our interpretation of MCL 500.2006(4). This language merely differentiated between "the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance" and third-party tort claimants. As stated, the Nickolas—the insureds—contracted with defendant for UIM coverage. The particular proofs required under the parties' insurance contract do not transform the contract into a third-party tort claim. Therefore, defendant's reliance on the "based solely on contract" language is misguided.

[37] *Id*. at 349.

[38] See MCR 7.215(J).

[39] *Griswold*, 276 Mich App at 553-554.

ing),[40] which concluded that *Yaldo* was not binding on this point and held that an insurer was not obligated to pay a claimant-insured penalty interest under the UTPA if the claim was reasonably in dispute.[41] The conflict panel in *Griswold* held:

> [T]he "reasonably in dispute" language of MCL 500.2006(4) applies only to third-party tort claimants; if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute.[42]

The Court of Appeals distinguished the instant case from *Griswold*.[43] The panel recognized that *Griswold* supported plaintiff's argument that he was entitled to penalty interest regardless of whether the UIM claim was "reasonably in dispute."[44] But, the panel reasoned, plaintiff here was "doing more than merely making a simple first-party claim, as was involved in *Griswold*."[45] Relying on *Ferwerda*,[46] the panel concluded that plaintiff's claim for UIM benefits was

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[40] *Arco Indus Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143; 594 NW2d 74 (1998), aff'd by equal division 462 Mich 896 (2000).

[41] *Griswold*, 276 Mich App at 558-559. In *Arco*, the Court of Appeals concluded that the *Yaldo* discussion of penalty interest was obiter dictum. *Arco*, 233 Mich App at 147. The *Arco* panel held that, even if the claimant was the insured, an insurer was not obligated to pay the penalty interest if the claim was reasonably in dispute. *Id*. at 148-149, relying on *Siller v Employers Ins of Wausau*, 123 Mich App 140, 143-144; 333 NW2d 197 (1983).

[42] *Griswold*, 276 Mich App at 566 (quotation marks and citation omitted).

[43] *Nickola*, 312 Mich App at 386.

[44] *Id*.

[45] *Id*. at 387.

[46] *Ferwerda*, 287 Mich App 248. In *Ferwerda*, the Court of Appeals

specifically tied to the underlying third-party tort claim, making the "reasonably in dispute" language applicable.[47] The panel observed that a UIM claim requires the insured to make what is essentially a third-party tort claim against his or her own insurer.[48] In such cases, the panel explained, the insurer stands in the shoes of the alleged tortfeasor, and the insured seeks benefits from the insurer that arose from the tortfeasor's liability.[49] The panel thus concluded that a claim for UIM benefits is "fundamentally" different from a typical first-party claim.[50]

We reverse. As previously stated, the plain language of MCL 500.2006(4) distinguishes the identity of the claimant, not the nature of the claim. Thus, the Court of Appeals erred by holding that the "reasonably in dispute" language applied to the claim made by the insured. The panel should have instead applied this Court's decision in *Yaldo* and the Court of Appeals' decision in *Griswold*, both of which make clear that, under the plain language of MCL 500.2006(4), if the claimant is the insured and benefits are not paid on a timely basis, the claimant is entitled to 12% penalty interest per annum irrespective of whether the claim is reasonably in dispute.[51]

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held that penalty interest did not apply to a claim that the insurer breached the contractual duty to defend its insured against a third-party tort claim because the underlying tort claim was "reasonably in dispute." *Id*. at 260.

[47] *Nickola*, 312 Mich App at 388-389.

[48] *Id*. at 387.

[49] *Id*. at 389.

[50] *Id*. at 387, citing *Adam v Bell*, 311 Mich App 528, 535; 879 NW2d 879 (2015).

[51] *Yaldo*, 457 Mich at 348 n 4; see also *Griswold*, 276 Mich App at 566. We overrule *Ferwerda* to the extent it is inconsistent with this opinion.

IV. CONCLUSION

We hold that the "reasonably in dispute" language of MCL 500.2006(4) applies only to third-party tort claimants and not to an insured making a claim for UIM benefits. We reverse the Court of Appeals' decision regarding the penalty-interest provision under the UTPA. We overrule the Court of Appeals' decision in *Ferwerda* to the extent it is inconsistent with this opinion, and we remand this case to the trial court for further proceedings consistent with this opinion.

MARKMAN, C.J., and MCCORMACK, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with ZAHRA, J.

FRANK v LINKNER

Docket No. 151888. Argued December 8, 2016 (Calendar No. 4). Decided May 15, 2017.

Ivan Frank, Jeffrey Dwoskin, and others brought a shareholder-oppression action in the Oakland Circuit Court against Joshua Linkner, Brian Hermelin, and others, alleging that defendants had wrongfully distributed the proceeds from the sale of ePrize, LLC (ePrize) and ePrize Holdings, LLC, the limited liability companies in which the parties had varying interests. The operating agreement governing ePrize had been revised in March 2009 to prioritize the payment of company proceeds to those members who had acquired "Series C" membership units by loaning ePrize money in 2007 and 2008. Plaintiffs had not been offered the opportunity to acquire Series C membership units and, as a result, received nothing when ePrize was sold for more than $100 million in August 2012. Plaintiffs' complaint included claims alleging breach of fiduciary duty, breach of contract, and member oppression in violation of MCL 450.4515, a provision of the Limited Liability Company Act, MCL 450.4101 *et seq*. Defendants moved for summary disposition on several grounds, including that the time periods set forth in MCL 450.4515 and MCL 450.4404 for bringing actions alleging member oppression and breach of fiduciary duty were statutes of repose rather than statutes of limitations and, as such, barred plaintiffs' claims because none of the alleged wrongful acts occurred after the Series C units were issued in March 2009, more than three years before the complaint was filed. The court, Colleen A. O'Brien, J., agreed and granted defendants' motion under MCR 2.116(C)(7), dismissing all plaintiffs' claims as untimely under MCL 450.4404 and MCL 450.4515. Plaintiffs appealed. The Court of Appeals, MARKEY, P.J., and MURRAY and BORRELLO, JJ., reversed, holding that MCL 450.4404 did not apply, that the three-year limitation period in MCL 450.4515(1)(e) was a statute of limitations rather than a statute of repose, and that plaintiffs' claims were timely because their claims did not accrue until they suffered a calculable financial injury when ePrize was sold in August 2012. 310 Mich App 169

(2015). The Supreme Court granted defendants' application for leave to appeal. 499 Mich 859 (2016).

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

MCL 450.4515(1)(e) provides alternative statutes of limitations, one based on the time of discovery of the cause of action and the other based on the time of accrual of the cause of action. A cause of action for member oppression within a limited liability company (LLC) accrues at the time an LLC manager has substantially interfered with the interests of a member as a member, even if that member has not yet incurred a calculable financial injury. In the instant case, plaintiffs' actions accrued when ePrize amended its operating agreement on March 1, 2009, to subordinate plaintiffs' common shares and not in 2012 when ePrize sold substantially all of its assets. As a result, plaintiffs' actions for damages under MCL 450.4515(1)(e) are barred by the three-year statute of limitations unless plaintiffs can establish on remand that they are entitled to tolling pursuant to a mechanism such as MCL 600.5855, the fraudulent-concealment statute.

1. The three-year limitation period set forth in MCL 450.4515(1)(e) constitutes a statute of limitations, not a statute of repose. A statute of limitations is defined as a statute that establishes a time limit for suing in a civil case, and it is generally measured from the date the claim accrues. In contrast, a statute of repose is a statute barring any suit that is brought after a specified time that is measured from some other particular event, such as the date of the last culpable act or omission of the defendant. A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed, while a statute of limitations prescribes the time limits in which a party may bring an action that has already accrued. Given that the three-year limitation in MCL 450.4515(1)(e) clearly runs from the date the cause of action has accrued, absent any indication to the contrary, the Legislature is presumed to have intended the three-year limitation period to constitute a statute of limitations.

2. MCL 450.4515(1)(e) provides that a plaintiff must bring a claim for damages within three years of accrual or two years after discovery of the cause of action, whichever occurs first. Read as a whole, MCL 450.4515(1)(e) provides alternative statutes of limitations. The two-year limitation period shortens the amount of time within which a plaintiff must bring a claim by providing only two years after discovery to bring a claim, even if that period terminates sooner than three years after accrual. Under this

provision, a plaintiff cannot bring a claim three years after accrual of the cause of action, even if he or she did not discover and reasonably would not have discovered the cause of action during that period. But if the plaintiff can show fraudulent concealment, he or she will still have two years within which to bring the claim from the time he or she discovers or reasonably should have discovered the claim, even if that happens more than three years after accrual.

3. An action for LLC member oppression accrues not when a plaintiff incurs a calculable financial injury, but when a plaintiff incurs the actionable harm under MCL 450.4515. Under MCL 600.5827, a period of limitations runs from the time the claim accrues, and the claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results. The date of the "wrong" referred to in MCL 600.5827 is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his or her duty. Therefore, in order to determine when a plaintiff's cause of action for LLC member oppression accrued, a court must determine the date on which the plaintiff first incurred the harms asserted. Under MCL 450.4515, a court may grant relief to a member of an LLC if the member can show that the managers' actions are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. "Willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Thus, the harm that is actionable under MCL 450.4515 is the substantial interference with the interests of the member as a member. Plaintiffs argue that their claims did not accrue until they first incurred a calculable financial injury after ePrize sold substantially all of its assets in 2012. However, plaintiffs' argument conflates monetary damages with harm. The actionable harm for a member-oppression claim under MCL 450.4515 consists of actions taken by the managers that substantially interfere with the interests of the member as a member, and monetary damages constitute just one of many potential remedies for that harm. Accordingly, even if plaintiffs did not incur a calculable financial injury until 2012, their actions could still have accrued at an earlier date if their interests as members had been the subject of substantial interference.

4. The alleged substantial interference with plaintiffs' interests as members in this case took place when their shares were

subordinated in 2009. At that point, plaintiffs could have sought a remedy under MCL 450.4515(1), including cancellation of provisions of the operating agreement, prohibition of enforcement of those provisions, or a buyout. The subsequent liquidation that occurred was only relevant to the extent plaintiffs could recover monetary damages. Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action. Because plaintiffs' actions accrued on March 1, 2009, the three-year limitation period in MCL 450.4515(1)(e) on claims for monetary damages expired before plaintiffs filed suit on April 19, 2013. Accordingly, plaintiffs' claims for monetary damages are barred unless they can show on remand under MCL 600.5855 that defendants fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim. The trial court should determine on remand whether plaintiffs are entitled to tolling of their claims for damages under this provision.

Court of Appeals judgment affirmed in part and reversed in part; case remanded to the trial court for further proceedings.

1. ACTIONS — SHAREHOLDER OPPRESSION — LIMITED LIABILITY CORPORATION ACT — STATUTE OF LIMITATIONS.

The three-year limitation period set forth in MCL 450.4515(1)(e) for bringing an action alleging member oppression within a limited liability company constitutes a statute of limitations, not a statute of repose.

2. ACTIONS — SHAREHOLDER OPPRESSION — LIMITED LIABILITY CORPORATION ACT — STATUTE OF LIMITATIONS — TOLLING.

The provision in MCL 450.4515(1)(e) that a plaintiff must bring a claim for damages for member oppression within a limited liability company within three years of accrual or two years after discovery of the cause of action, whichever occurs first, sets forth alternative statutes of limitations; the two-year limitation period shortens the amount of time within which a plaintiff must bring a claim by providing only two years after discovery to bring a claim, even if that period terminates sooner than three years after accrual; under this provision, a plaintiff cannot bring a claim three years after accrual of the cause of action, even if he or she did not discover and reasonably would not have discovered the cause of action during that period; if the plaintiff can show the application of a tolling mechanism such as fraudulent concealment, he or she will still have two years within which to bring the

claim from the time he or she discovers or reasonably should have discovered the claim, even if that happens more than three years after accrual.

3. ACTIONS — SHAREHOLDER OPPRESSION — LIMITED LIABILITY CORPORATION ACT — ACCRUAL OF CLAIMS.

An action for member oppression within a limited liability company accrues not when a plaintiff incurs a calculable financial injury but when a plaintiff incurs the actionable harm under MCL 450.4515; the harm that is actionable under MCL 450.4515 is the substantial interference with the interests of the member as a member.

Mantese Honigman, PC (by *Gerard V. Mantese*, *Douglas L. Toering*, and *Fatima Mansour*), for plaintiffs.

Morganroth & Morganroth, PLLC (by *Jeffrey B. Morganroth*), for Daniel Gilbert and Jay Farner.

Jaffe Raitt Heuer & Weiss, PC (by *Brian G. Shannon* and *R. Christopher Cataldo*), for all other defendants.

MARKMAN, C.J. This case involves a cause of action for member oppression within a limited liability company (LLC) under MCL 450.4515. Specifically, this Court granted leave to appeal to consider: "(1) whether MCL 450.4515(1)(e) constitutes a statute of repose, a statute of limitations, or both; and (2) when the plaintiffs' cause of action accrued." *Frank v Linkner*, 499 Mich 859 (2016). We hold that MCL 450.4515(1)(e) provides alternative statutes of limitations, one based on the time of discovery of the cause of action and the other based on the time of accrual of the cause of action. We further hold that a cause of action for LLC member oppression accrues at the time an LLC manager has substantially interfered with the interests of a member as a member, even if that member has not yet incurred a calculable financial injury. Accordingly,

plaintiffs' actions accrued here when ePrize LLC (ePrize) amended its operating agreement on March 1, 2009, to subordinate plaintiffs' common shares and not in 2012 when ePrize sold substantially all of its assets. We affirm in part and reverse in part the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND HISTORY

Defendant ePrize was founded by defendant Joshua Linkner in 1999 as a Michigan LLC specializing in online sweepstakes and interactive promotions. Plaintiffs are former employees of ePrize who acquired ownership units in ePrize. Plaintiffs allege Linkner orally promised them that their interests in ePrize would never be diluted or subordinated. In 2005, plaintiffs' shares in ePrize were converted into shares in ePrize Holdings, LLC (ePrize Holdings), whose sole assets were its ownership units in ePrize.[1] In 2007, ePrize ran into financial difficulties and required an infusion of cash. To remedy this problem, ePrize obtained $28 million in loans in the form of "B Notes" from various defendant-members of ePrize and other investors; plaintiffs were not invited to participate in these investments. In 2009, ePrize remained struggling to meet its loan obligations and therefore issued new "Series C Units." These units were offered to various investors, including those who had obtained B Notes.[2]

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[1] Plaintiff Ivan Frank worked at ePrize from 2001–2010, serving as ePrize's senior vice president beginning in 2005. As part of his employment, Frank obtained approximately 1% of all shares in ePrize and ePrize Holdings. Accordingly, unlike the other plaintiffs, Frank maintained shares in ePrize after 2005.

[2] With the exception of Frank, who invested approximately $4,200 in exchange for Series C Units, none of the plaintiffs was invited to purchase Series C Units.

In exchange for the Series C Units, investors were required, among other things, to make capital contributions, guarantee a portion of a $14.5 million loan from Charter One Bank, and convert their B Notes into "Series B Units."

On March 1, 2009, ePrize executed its fifth operating agreement (the Operating Agreement). Pursuant to the Operating Agreement, both the Series C and Series B Units carried distribution priority over the common units held by plaintiffs. The Operating Agreement further provided that if the company were ever sold, Series C Units would receive the first $68.25 million of any available distribution. On August 20, 2012, ePrize sold substantially all of its assets and, pursuant to the Operating Agreement, distributed nearly $100 million in net proceeds to the holders of Series C and Series B Units.[3] Plaintiffs received nothing for their common shares.

On April 19, 2013, plaintiffs brought various claims against defendants, including claims for LLC member oppression, breach of contract, and breach of fiduciary duty. The trial court granted defendants' motion for summary disposition, concluding that plaintiffs' claims were untimely. The Court of Appeals reversed. *Frank v Linkner*, 310 Mich App 169; 871 NW2d 363 (2015). The Court of Appeals first determined that the "gravamen" of plaintiffs' claims was member oppression under MCL 450.4515 and analyzed the timeliness of their

[3] It is unclear from the record exactly how much ePrize received in exchange for the sale of these assets. Plaintiffs claim ePrize was sold for $140 million, while the Court of Appeals states that it was sold for $120 million. However, the exact amount of the sale is largely immaterial, as it is undisputed that after paying its debts ePrize possessed approximately $100 million for distribution to its investors and plaintiffs received nothing for their common shares.

claims accordingly.[4] *Id*. at 181-182. Next, the Court held that the three-year limitation period in MCL 450.4515(1)(e) constitutes a statute of limitations, rather than a statute of repose, because the limitation period refers to the duration of time within which a plaintiff may bring a claim after the cause of action has accrued. *Id*. at 183-186. Finally, the Court held that plaintiffs' claims did not accrue until 2012, when ePrize sold substantially all of its assets, because until that sale plaintiffs had not incurred a calculable financial injury and any damage claim before that time would have been "speculative." *Id*. at 188-190. Accordingly, the Court concluded that plaintiffs' claims were timely filed before the expiration of the three-year limitation period. *Id*. at 172.

II. STANDARD OF REVIEW

Pursuant to MCR 2.116(C)(7), a party may move to dismiss a claim on the ground that the claim is barred by the applicable statute of limitations. "The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo. This Court also reviews de novo a trial court's decision regarding a summary disposition motion." *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009). "In reviewing whether a motion under MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008). An issue of statutory interpretation is a question of law

[4] Neither party contests this conclusion, so we decline to address the issue.

that is subject to review de novo. *Putkamer v Transamerica Ins Corp*, 454 Mich 626, 631; 563 NW2d 683 (1997).

III. ANALYSIS

A. THREE-YEAR LIMITATION PERIOD

The first issue presented is whether the three-year limitation period set forth in MCL 450.4515(1)(e) constitutes a statute of limitations or a statute of repose.[5] How it is properly characterized is relevant because the Court of Appeals has held that the latter, unlike the former, cannot be tolled pursuant to the fraudulent-concealment statute, MCL 600.5855. *Baks v Moroun*, 227 Mich App 472, 486-490; 576 NW2d 413 (1998), overruled in part on other grounds by *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270 (2002).

The Michigan Limited Liability Company Act, MCL 450.4515(1), provides:

> A member of a limited liability company may bring an action . . . to establish that acts of the managers or members . . . are illegal or fraudulent or constitute willfully unfair and oppressive conduct . . . . If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:
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> * * *
>
> (e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the

[5] Neither party argues that the two-year limitation period also set forth in MCL 450.4515(1)(e) constitutes a statute of repose.

> cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Defendants contend that the three-year limitation period constitutes a statute of repose while the two-year limitation period constitutes a statute of limitations. The Court of Appeals rejected this contention, concluding instead that MCL 450.4515(1)(e) contains two alternative statutes of limitations, one predicated upon *discovery* of the cause of action and the other predicated upon *accrual* of the cause of action. We agree with the Court of Appeals.

A "statute of limitations" is a "law that bars claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim *accrued*." *Black's Law Dictionary* (10th ed) (emphasis added). In contrast, a "statute of repose" is a "statute barring any suit that is brought after a specified time *since the defendant acted* . . . ." *Id*. (emphasis added). That is, a statute of limitations is generally measured from the date a claim accrues, while a statute of repose is measured from some other particular event, such as "the date of the last culpable act or omission of the defendant." *CTS Corp v Waldburger*, 573 US ___; 134 S Ct 2175, 2182; 189 L Ed 2d 62 (2014). Moreover, a statute of repose cuts off the liability of a defendant, and it may thereby "prevent[] a cause of action from ever accruing." *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980). In sum, "[a] statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitation[s], however, prescribes the time limits in which a party may bring an action that has already

accrued." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996), citing *O'Brien*, 410 Mich at 15.

MCL 450.4515(1)(e) provides, in part, "An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has *accrued* . . . ." (Emphasis added.) "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). Given that the three-year limitation in MCL 450.4515(1)(e) clearly runs from the date the cause of action *has accrued*, absent any indication to the contrary, we presume the Legislature intended the three-year limitation period to constitute a statute of limitations.

Defendants argue that this Court's decision in *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205; 106 NW2d 793 (1961), supports their argument that the three-year limitation period in MCL 450.4515(1)(e) constitutes a statute of repose. In our judgment, however, *Detroit Gray Iron* calls into question this argument and provides an apt illustration of the distinction between a statute of limitations and a statute of repose. In *Detroit Gray Iron*, this Court addressed a provision in the Michigan general corporation act (MGCA) that provided:

> "No director or directors shall be held liable for any delinquency under this section after 6 years from the date of such delinquency, or after 2 years from the time when such delinquency is discovered by one complaining thereof, whichever shall sooner occur." [*Id*. at 215 (citation omitted).]

The plaintiffs in *Detroit Gray Iron* argued that the limitation periods in this provision applied only to a

director's fiduciary obligations as set forth in the MGCA and not to the enforcement of other common-law rights; therefore, the statute of limitations for suits alleging a director's breach of a common-law duty could be tolled pursuant to the fraudulent-concealment statute. *Id*. at 213-214. We rejected that argument, holding that the limitation periods in the MGCA applied to these claims and noting that under the act a plaintiff "must sue within 2 years of its discovery of the wrong or within 6 years of its occurrence, whichever sooner occurs, or forever bear the loss." *Id*. at 218.

Assuming arguendo that *Detroit Gray Iron* can be interpreted as holding that the six-year limitation period in the MGCA constitutes a statute of repose, this holding does not support defendants' position that the three-year limitation period in MCL 450.4515(1)(e) constitutes a statute of repose. The six-year limitation period in the MGCA ran from the date of *delinquency*, which refers to the date on which defendant's "violation of a law or duty" occurred. *Black's Law Dictionary* (10th ed). Because the limitation period ran from the date of a particular wrongful act by a defendant, it constituted a statute of repose. *CTS Corp*, 573 US at ___; 134 S Ct at 2182. In contrast, the three-year limitation period in MCL 450.4515(1)(e) runs from the date of "accrual" of the cause of action and therefore constitutes a statute of limitations. *Sills*, 220 Mich App at 308. Accordingly, defendants' reliance on this Court's decision in *Detroit Gray Iron* is misplaced.[6]

[6] Defendants also rely on the Court of Appeals' decision in *Baks*, 227 Mich App 472, overruled in part on other grounds by *Estes*, 250 Mich App 270. In *Baks*, the Court of Appeals characterized an analogous provision in MCL 450.1541a as a statute of repose. *Id*. at 480, 485, 486. The Court of Appeals in the instant case held that *Baks*' characterization was "conclusory" and therefore that it was not bound by it. *Frank*,

Defendants also argue that despite the use of the word "accrue," the three-year limitation period constitutes a statute of repose. They note that an LLC member-oppression claim is distinct from other claims in that it can arise out of a series of actions, rather than just a single action. See MCL 450.4515(2) (" '[W]illfully unfair and oppressive conduct' means a *continuing course of conduct* or a significant action or *series of actions* that substantially interferes with the interests of the member as a member.") (emphasis added). Accordingly, they argue that in order to create a statute of repose for a claim that matures only after a *sequence* of events, the limitation period must necessarily be understood to commence upon "accrual" of the action.

This is simply not so. If the Legislature had intended to make the three-year period a statute of repose, it could have defined a period that runs from a defendant's final act of "illegal or fraudulent or . . . willfully unfair and oppressive conduct toward the [LLC] or the member." MCL 450.4515(1). Instead, the three-year period runs from the date the cause of action "accrues." MCL 450.4515(1)(e). The Legislature is "presumed to understand the meaning of the language it enacts into law . . . . Each word of a statute is presumed to be used for a purpose . . . . The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Because the three-year period runs from "accrual," rather than from a wrongful act of the defendant, we must presume the Legislature intended it to constitute a statute of limitations. See *CTS Corp*, 573 US at ___; 134 S Ct at 2182.

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310 Mich App at 186-188. Because this Court is not bound by *Baks*, we need not opine on whether it constituted binding precedent upon the Court of Appeals.

Finally, defendants argue that considering the two-year limitation period in *conjunction* with the three-year limitation period in MCL 450.4515(1)(e) indicates that the latter constitutes a statute of repose. MCL 450.4515(1)(e) provides that a plaintiff must bring a claim for damages within three years of accrual or two years after discovery of the cause of action, whichever "occurs first." Thus, the two-year limitation period shortens the amount of time within which a plaintiff must bring a claim by providing only two years after discovery to bring a claim, even if that period terminates sooner than three years after accrual. Therefore, defendants contend, if the three-year limitation period constitutes a statute of limitations, it is rendered nugatory, as that limitation period will never apply given that the two-year limitation period will always occur first. MCL 450.4515(1)(e); *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) ("[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.") (quotation marks and citation omitted).

This argument presumes that if the three-year limitation period constitutes a statute of limitations, it is necessarily subject to the common-law discovery rule. That rule provides that "a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389; 738 NW2d 664 (2007). Similarly, the two-year limitation period in MCL 450.4515(1)(e) commences only when a plaintiff "discovers or reasonably should have discovered the cause of action under this section[.]" Thus, if the three-year limitation period is subject to the common-law discovery rule, the action would accrue at the same

time the member discovered or reasonably should have discovered the cause of action. Accordingly, the three-year and two-year limitation periods would always commence at the same time and the former would obviously never apply, because the two-year limitation period would always "occur[] first." MCL 450.4515(1)(e).

However, *Trentadue* held that "courts may not employ an extrastatutory discovery rule to toll accrual . . . ." *Trentadue*, 479 Mich at 391-392. Accordingly, defendants' initial assumption that the common-law discovery rule would necessarily apply to the three-year limitation period if it constituted a statute of limitations is without grounding. Instead, accrual of the three-year limitation period is governed by statutory law. MCL 600.5827 provides that a claim generally accrues "at the time the wrong upon which the claim is based was done . . . ." This Court has held that the "wrong" in MCL 600.5827 is "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Moll v Abbott Laboratories*, 444 Mich 1, 12; 506 NW2d 816 (1993), citing *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146; 200 NW2d 70 (1982). However, the running of a statutory period of limitations may be tolled pursuant to the fraudulent-concealment statute, MCL 600.5855, which provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Allowing a plaintiff to toll the running of the three-year limitation period under MCL 600.5855 does not render the three-year limitation period nugatory. Although similar, there is a consequential difference between the commencement of the two-year limitation in MCL 450.4515(1)(e) and the period of tolling pursuant to MCL 600.5855. As discussed earlier, the two-year limitation period commences when a plaintiff "discovers or reasonably should have discovered the cause of action under this section[.]" By contrast, tolling pursuant to MCL 600.5855 requires a plaintiff to show that the defendant "fraudulently conceal[ed] the existence of the claim or the identity of any person who is liable for the claim[.]" Accordingly, while the two-year limitation period does not commence until a plaintiff discovered or reasonably should have discovered the cause of action, the running of the three-year limitation period can only be tolled if a plaintiff did not discover and reasonably would not have discovered the cause of action *and* the plaintiff can "prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Sills*, 220 Mich App at 310.

Considering these limitation periods in tandem, characterizing the three-year limitation period as a statute of limitations does not render it nugatory. A plaintiff has two years from the time he or she "discovers or reasonably should have discovered the cause of action" to bring a claim. MCL 450.4515(1)(e). However, a plaintiff cannot bring a claim three years after accrual of the cause of action, even if he or she did not discover and reasonably would not have discovered the cause of action during that period. MCL 600.5855. But if the plaintiff can show *fraudulent concealment*, he or she will still have two years within which to bring the claim from the time he or she discovers or reasonably

should have discovered the claim, even if that happens more than three years after accrual. *Id*. In other words, the three-year limitation period bars a claim if the defendant did not fraudulently conceal the claim and no other tolling mechanism applies, even if the plaintiff did not discover and reasonably would not have discovered the cause of action during that period.[7] As a result, concluding that the three-year limitation period constitutes a statute of limitations does not render it nugatory. Rather, a plaintiff must bring a claim within two years after he or she discovers or reasonably should have discovered a claim or within three years after accrual, whichever occurs first.

In sum, because the three-year limitation period in MCL 450.4515(1)(e) runs from the date the cause of action accrues, it is properly understood as a statute of limitations.[8] Read as a whole, MCL 450.4515(1)(e) provides alternative statutes of limitations, requiring a plaintiff to bring a claim seeking monetary damages for LLC member oppression within two years after discovery of the cause of action or three years after accrual of the cause of action, whichever occurs first.

B. ACCRUAL

The second issue presented concerns when plaintiffs' causes of action for LLC member oppression accrued. As discussed earlier, the relevant statute, MCL 600.5827, provides:

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[7] The trial court can determine on remand the applicability of tolling mechanisms such as the fraudulent-concealment statute.

[8] We note that this conclusion is consistent with two federal court opinions addressing this same issue, although they do not constitute binding authority. See *Techner v Greenberg*, 553 Fed Appx 495, 502-506 (CA 6, 2014); *Virginia M Damon Trust v Mackinaw Fin Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued January 2, 2008 (Case No. 2:03-cv-135), pp 9-10.

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

This Court has held that the date of the "wrong" referred to in MCL 600.5827 is "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Moll*, 444 Mich at 12, citing *Connelly*, 388 Mich 150 (1982). Therefore, in order to determine when plaintiffs' actions for LLC member oppression accrued, this Court must determine the date on which plaintiffs first incurred the harms they assert. The relevant "harms" for that purpose are the actionable harms alleged in a plaintiff's cause of action.

Plaintiffs allege that defendants engaged in "member oppression" pursuant to MCL 450.4515, which provides that a court may grant relief to a member of an LLC if the member can show:

> (1) . . . that acts of the managers or members in control of the [LLC] are illegal or fraudulent or constitute willfully unfair and oppressive conduct . . . . If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the limited liability company.
>
> (b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.
>
> (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.

> (d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.
>
> (e) An award of damages to the limited liability company or to the member. . . .
>
> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. . . . The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

In summary, MCL 450.4515(1) provides a cause of action for members of an LLC when the managers' actions are "illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." " '[W]illfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL 450.4515(2). Once a plaintiff has "establishe[d] grounds for relief" by proving that a defendant has engaged in one of these prohibited behaviors, "the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to," monetary damages. MCL 450.4515(1). Thus, the "harm" that is actionable under MCL 450.4515 is the "substantial[] interfer[ence] with the interests of the member as a member." The statute then enumerates a variety of remedies that a court might provide to a plaintiff once he or she has shown that the defendant substantially interfered with the plaintiff's interests as a member.

Plaintiffs argue that their claims did not accrue until they first incurred a calculable financial injury after ePrize sold substantially all of its assets in 2012. They cite this Court's decision in *Connelly*, 388 Mich at 151, in support of the argument that their actions did not accrue until they incurred a calculable financial injury. In *Connelly*, the plaintiff brought an action for damages for personal injury resulting from an industrial accident. *Id*. at 148. This Court held that "[i]n the case of an action for damages arising out of tortious injury to a person, the cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint," including monetary damages. *Id*. at 150-151. In the instant case, plaintiffs argue that no monetary damages occurred before 2012 when the company was liquidated, and therefore their causes of action for member oppression did not accrue until 2012.

However, plaintiffs' argument conflates monetary damages with "harm." While the actionable harm in a claim for tortious injury to a person typically consists of some personal injury inflicted by another that is remedied by monetary damages, see, e.g., *Connelly*, 388 Mich at 150-151, the actionable harm for a member-oppression claim under MCL 450.4515 consists of actions taken by the managers that "substantially interfere with the interests of the member as a member," and monetary damages constitute just one of many potential remedies for that harm, MCL 450.4515(1) ("If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following . . . .").[9] Accordingly, unlike an action for

[9] Other potential remedies include the dissolution of the LLC, the cancellation or alteration of a provision of the operating agreement, and

tortious injury to a person, an action for LLC member oppression does not necessarily accrue when a plaintiff incurs a calculable financial injury. Instead, it accrues when a plaintiff incurs the actionable harm under MCL 450.4515, i.e., when defendants' actions allegedly interfered with the interests of a plaintiff as a member, making the plaintiff eligible to receive some form of relief under MCL 450.4515(1).

The Court of Appeals erred by focusing on the availability of monetary damages, rather than on when plaintiffs incurred "harm." MCL 600.5827 states that, unless otherwise provided by statute, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." And, as explained previously, "the term 'wrong' . . . specifie[s] the date on which the defendant's breach harmed the plaintiff . . . ." *Moll*, 444 Mich at 12. Once a plaintiff proves that a manager engaged in an action or series of actions that substantially interfered with his or her interests as a member, the "harm" has been incurred, and therefore the claim has accrued. Under MCL 600.5827, this is true regardless of the time when monetary damages result. Thus, even if plaintiffs did not incur a calculable financial injury until 2012, their actions could still have accrued at an earlier date if their interests as members had been the subject of substantial interference.

To the extent that the Court of Appeals believed that an action for monetary damages has a different accrual date than an action involving another remedy under MCL 450.4515(1), the language of MCL 450.4515(1)(e) refutes this notion. MCL 450.4515(1)(e) provides in part: "An action seeking an award of damages must be

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the direction, alteration, or prohibition of an act by the LLC or its managers. MCL 450.4515(1)(a) through (c).

commenced within 3 years after the cause of action *under this section* has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action *under this section*, whichever occurs first." (Emphasis added.) That is, a cause of action "*under this section*" accrues when a manager has substantially interfered with a member's interests as a member. Had the Legislature intended to create an accrual date for a claim for monetary damages that was distinct from the accrual date for other forms of relief, the three-year and two-year limitation periods would run when a cause of action "*seeking an award of damages*" has accrued or been discovered. Plaintiffs' claims for monetary damages accrued at the same time as plaintiffs' claims for other forms of relief, at the time defendants' conduct substantially interfered with their interests as members.

C. APPLICATION

The alleged substantial interference with plaintiffs' interests as members in this case took place when their shares were subordinated in 2009. Plaintiffs allege that defendants' subordination of their shares violated MCL 450.4515 because defendants had promised that their shares would not be subordinated and defendants subsequently engaged in secretive self-dealing to ensure they profited at the expense of plaintiffs. The act of subordinating plaintiffs' shares constitutes the alleged "willfully unfair and oppressive act" that interfered with plaintiffs' interests as members. At *that* point plaintiffs could have sought a remedy under MCL 450.4515(1), including cancellation of provisions of the operating agreement, prohibition of enforcement of those provisions, or a buyout. MCL 450.4515(1)(b) through (d). The subsequent liquidation that occurred

was only relevant to the extent plaintiffs could recover monetary damages. Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action. See *Connelly*, 388 Mich at 151; *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 315; 399 NW2d 1 (1986). Accordingly, plaintiffs' actions accrued in 2009 at the point at which they could first have sought a remedy under MCL 450.4515 based on the substantial interference with their interests as members, not in 2012 when they first incurred a calculable financial injury.

Plaintiffs argue that they are alleging a "series of actions" that substantially interfered with their rights. Although the amendment of the Operating Agreement constituted one action in interference with plaintiffs' rights, the "series of actions" was incomplete until the shares were ultimately sold. Thus, plaintiffs assert, because the "series of actions" that substantially interfered with their interests as members did not culminate until the company was eventually liquidated, that liquidation was when their claims accrued.

Plaintiffs are correct that "willfully unfair and oppressive conduct" means either "a significant action *or series of actions* that substantially interferes with the interests of the member as a member." MCL 450.4515(2) (emphasis added). However, the alleged substantial interference with plaintiffs' interests as members consists of the *subordination* of their shares, not the ultimate sale of ePrize and the distribution of the proceeds of that sale. The distribution of the proceeds of the sale was done in *conformity* with the Operating Agreement and would not have breached plaintiffs' interests as members *absent* the prior subordination of their shares. See MCL 450.4515(2) (stating that willfully unfair and oppressive conduct "does

not include conduct or actions that are permitted by . . . an operating agreement"). Accordingly, defendants allegedly substantially interfered with plaintiffs' interests as members when the Operating Agreement was amended on March 1, 2009, to subordinate their shares, and plaintiffs' actions thus accrued on that date, even if they did not incur a calculable financial injury until 2012.

Because plaintiffs' actions accrued on March 1, 2009, the three-year limitation period in MCL 450.4515(1)(e) on claims for monetary damages expired before plaintiffs filed suit on April 19, 2013.[10] Accordingly, plaintiffs' claims for monetary damages are barred unless they can show on remand that defendants "fraudulently conceal[ed] the existence of the claim or the identity of any person who is liable for the claim[.]" MCL 600.5855. The trial court should determine on remand whether plaintiffs are entitled to tolling of their claims for damages under this provision.

IV. CONCLUSION

We hold that MCL 450.4515(1)(e) prescribes alternative statutes of limitations, one based on accrual of the action and the other on discovery of the action. We further hold that a cause of action for LLC member oppression accrues when a manager has substantially

[10] Plaintiffs argue that their claims for nonmonetary relief are not governed by MCL 450.4515(1)(e), but rather by a six-year statute of limitations. See *Estes*, 250 Mich App at 284 n 9; MCL 600.5813. Additionally, defendants argued in their original motion for summary disposition that certain individual plaintiffs lacked standing to bring suit because they only held interests in ePrize Holdings rather than ePrize. Because these issues were not addressed by the trial court or the Court of Appeals, we decline to address them here and instead leave them for the trial court to address on remand.

interfered with the interests of the member as a member, even if that member has not yet incurred a calculable financial injury. Because defendants here allegedly substantially interfered with plaintiffs' interests as members on March 1, 2009, when the company amended its Operating Agreement to subordinate plaintiffs' shares, this is the date on which plaintiffs' actions accrued. Accordingly, plaintiffs' actions for damages under MCL 450.4515(1)(e) are barred by the three-year statute of limitations unless plaintiffs are entitled to tolling, e.g., pursuant to MCL 600.5855. Therefore, we affirm in part and reverse in part the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with MARKMAN, C.J.

CITY OF COLDWATER v CONSUMERS ENERGY COMPANY

CITY OF HOLLAND v CONSUMERS ENERGY COMPANY

Docket Nos. 151051 and 151053. Argued on application for leave to appeal October 5, 2016. Decided May 18, 2017.

In Docket No. 151051, the city of Coldwater filed a complaint for declaratory relief in the Branch Circuit Court, seeking a determination that the Coldwater Board of Public Utilities (CBPU), a department of the city of Coldwater that operates a municipal electric utility, could provide power to a parcel of property within Coldwater Township that CBPU had purchased on July 21, 2011. Both CBPU and Consumers Energy Company were franchised to provide electric service within the township. At the time of the purchase, a vacant building on the property had an electric service drop that was connected to an electric meter owned by Consumers, but Consumers' service had been terminated 20 days before the purchase. Despite its objection to CBPU providing electric service for the parcel on the basis of Rule 460.3411 (Rule 411) of the Michigan Administrative Code and the Supreme Court's decision in *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27 (2011), Consumers removed its electric facilities from the property. Both parties moved for summary disposition, and the court, Patrick W. O'Grady, J., granted summary disposition in favor of Coldwater, finding that neither Rule 411 nor MCL 124.3 was applicable. Consumers appealed in the Court of Appeals.

In Docket No. 151053, the city of Holland filed a complaint for declaratory relief in the Ottawa Circuit Court, seeking a determination that the Holland Board of Public Works (HBPW), a department of the city of Holland that operates a municipal electric utility, could provide power to a parcel of property within Park Township that had been acquired by Benjamin's Hope, a nonprofit charitable corporation. Nine days after the complaint was filed, Consumers requested a declaratory ruling from the Michigan Public Service Commission (PSC) that Rule 411 gave Consumers the exclusive right to serve the property, and the court held Holland's action in abeyance pending the outcome of the PSC proceeding. Similar to the case in Docket No. 151051, both CBPU

and Consumers were franchised to provide electric service within the township. At the time of the purchase, the land was vacant, and no electric service was being provided on the land. Consumers had previously supplied power to the parcel, but its lines had been de-energized in 2008. In August 2011, CL Construction, the contractor for Benjamin's Hope, requested that Consumers provide single-phase electric service to a construction trailer that was temporarily located on the property. In October 2011, Benjamin's Hope solicited bids from Consumers and HBPW for three-phase electric service and selected HBPW as its electric provider. Although Consumers initially refused to remove its electric facilities, it eventually did so sometime before April 24, 2012, when CL Construction removed its trailer from the property. HBPW then began providing electric service to the parcel on April 30, 2012. On December 6, 2012, the PSC declined Consumers' request for a declaratory ruling on the ground that it had no jurisdiction over HBPW or Benjamin's Hope. The circuit court, Edward R. Post, J., thereafter ruled that Rule 411 was not applicable and that MCL 124.3 did not preclude HBPW from providing electric service. Consumers appealed, and the Court of Appeals consolidated Consumers' appeals in both the *City of Coldwater* and *City of Holland* cases. The Court of Appeals affirmed both decisions. 308 Mich App 675 (2015). Consumers sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 498 Mich 891 (2015).

In a unanimous opinion by Justice BERNSTEIN, in lieu of granting leave to appeal, the Supreme Court *held*:

Rule 411 of the Michigan Administrative Code is inapplicable when a municipal utility is involved, and *Great Wolf Lodge* was overruled to the extent it stated that Rule 411 applied to municipally owned utilities. In MCL 124.3(2), the word "customer" is defined as an entity that receives electric service, and the phrase "already receiving" means that service needs to continue into the present in order for MCL 124.3(2) to apply. In these consolidated cases, Rule 411 was inapplicable because the cases involved municipally owned utilities, and MCL 124.3(2) did not prevent either property owner from switching electric providers because Consumers had discontinued service before the provision of service by a municipally owned utility.

1. Rule 411 of the Michigan Administrative Code, sometimes referred to as a utility's right to first entitlement, provides that the first utility serving a customer, which is defined as the buildings and facilities served rather than the individual, asso-

ciation, partnership, or corporation served, is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load. MCL 460.6(1) provides, in relevant part, that the PSC is vested with complete power and jurisdiction to regulate all public utilities in the state *except a municipally owned utility*, the owner of a renewable resource power production facility as provided in MCL 460.6d, and except as otherwise restricted by law. PSC Rule 460.3102(*l*) (Rule 102(*l*)) defines "utility" as an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission. Under the plain language of MCL 460.6(1), the PSC is explicitly granted complete power and jurisdiction over public utilities that are not municipally owned utilities. The definition of "utility" in Rule 102(*l*) notably does not include municipally owned utilities; therefore, Rule 102(*l*) does not apply to municipal electric utilities because any other interpretation would render Rule 102(*l*) nugatory. In these cases, because the municipal electric utilities did not otherwise elect to operate in compliance with the rule, MCL 460.10y(3), Rule 411(11) was inapplicable.

2. In *Great Wolf Lodge*, 489 Mich at 41-42, the Supreme Court primarily held that a utility's right of first entitlement set forth in Rule 411 extended to the entire premises initially served, but the Court also addressed the applicability of Rule 411 to a dispute over whether a PSC-regulated utility and a municipal utility could provide electric service to the plaintiff's property. To the extent that *Great Wolf Lodge* could be read to hold that Rule 411 is applicable in cases involving disputes between PSC-regulated utilities and municipal utilities over which entity can provide electric service, *Great Wolf Lodge* was wrongly decided because it conflicts with the plain language of MCL 460.6(1). That a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate. Courts should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. *Great Wolf Lodge* defies practical workability because a holding that would purport to exercise PSC jurisdiction when there is none leaves municipally owned utilities in the dark as to when and how their status as non-PSC regulated utilities is legally significant. *Great Wolf Lodge* is also unsound in principle to the extent that it found this lack of jurisdiction irrelevant. Reliance interests weighed in favor of overruling this portion of *Great Wolf Lodge* because the case was decided only six years ago, meaning that any reliance on its holding has been relatively brief,

and because *Great Wolf Lodge* did not consider either MCL 460.6(1) or PSC Rule 102(*l*) in finding that Rule 411(11) may apply to municipally owned utilities. Finally, there was no substantive change in the law or the underlying facts. A reading of MCL 460.6(1) and PSC Rule 102(*l*) compelled the decision to overrule the portion of *Great Wolf Lodge* providing that Rule 411(11) applied to municipally owned utilities.

3. MCL 124.3(2) provides that a municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing. MCL 124.3(3)(a) further provides that "electric delivery service" has the same meaning as "delivery service" under MCL 460.10y. MCL 460.10y(2) provides that, except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. Additionally, MCL 460.10y(2) provides that, *for purposes of this subsection*, "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service. In these cases, determination of whether MCL 124.3(2) applied depended on the meaning of two phrases in the statute: "customers" and "already receiving." The Court of Appeals inappropriately relied on the definition of customer in MCL 460.10y(2) because the language "[f]or purposes of this subsection" in MCL 460.10y(2) explicitly confined that definition to MCL 460.10y(2). Additionally, MCL 124.3(3)(a) directs the reader to MCL 460.10y for a definition of "electric delivery service," and had the Legislature intended to do the same for the word "customer" as it is used in MCL 124.3(2), it could have done so, but it did not. A plain-language definition of "customer" is "one that purchases a commodity or service." Therefore, as used in MCL 124.3(2), "customer" refers to the entity that receives electric service and not the building or facilities on the land. In MCL 124.3(2), the present participle "receiving" is modified by "already." Although "already" can suggest a prior point in time, when read together, the phrase "already receiving" refers to an action that started in the past and continues into the present. Therefore, the phrase "already receiving" in MCL 124.3(2) means that service needs to continue into the present in order for MCL 124.3(2) to apply.

4. MCL 124.3(2) did not prevent either property owner from switching electric providers because Consumers had discontinued service before the provision of service by a municipally owned utility. In the case of Coldwater, CBPU was never a customer of Consumers and was not already receiving service from Consumers; it never received service from Consumers. In the case of Holland, it was CL Construction that had received service from Consumers, and because CL Construction was a different entity from Benjamin's Hope, Benjamin's Hope was never a customer of Consumers. Additionally, Benjamin's Hope was not "already receiving" service from Consumers because there was no electric service being provided on the land at that time; service had been discontinued in 2008. The existence of a break in service between when Consumers removed its electric facilities and when HBPW began providing service indicated that Benjamin's Hope was not "already receiving" service; at most, it would have "received" service, which was insufficient for the purpose of MCL 124.3(2).

Affirmed.

1. PUBLIC UTILITIES — ELECTRIC SERVICE — RIGHT TO FIRST ENTITLEMENT — INAPPLICABILITY OF RULE 460.3411 TO MUNICIPAL UTILITIES.

Rule 460.3411 of the Michigan Administrative Code provides that the first utility serving a customer, which is defined as the buildings and facilities served rather than the individual, association, partnership, or corporation served, is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load; Rule 460.3411 is inapplicable when a municipal utility is involved.

2. PUBLIC UTILITIES — ELECTRIC SERVICE — WORDS AND PHRASES — "CUSTOMER" — "ALREADY RECEIVING."

MCL 124.3(2) provides that a municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing; as used in MCL 124.3(2), the word "customer" is defined as an entity that receives electric service, and the phrase "already receiving" means that service needs to continue into the present in order for MCL 124.3(2) to apply.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffrey V. Stuckey*) for the city of Coldwater.

Dickinson Wright PLLC (by *Peter H. Ellsworth*) and *Cunningham Dalman PC* (by *Andrew Mulder*) for the city of Holland.

Warner Norcross & Judd LLP (by *Conor B. Dugan*), *Bursch Law PLLC* (by *John J. Bursch*), *Shaun M. Johnson*, and *Eric V. Luoma* for Consumers Energy Company.

Amici Curiae:

Jim B. Weeks for the Michigan Municipal Electric Association.

Clark Hill PLC (by *Roderick S. Coy*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Lauren D. Donofrio*, Assistant Attorneys General, for the Michigan Public Service Commission.

Dykema Gossett PLLC (by *Richard J. Aaron* and *Gary P. Gordon*) for the Michigan Electric Cooperative Association.

BERNSTEIN, J. In these consolidated cases, two municipalities seek to provide electric service through municipal electric utilities. This case requires us to resolve two issues. First, whether a utility's right of first entitlement to provide electric service is applicable when a municipal utility is involved. Mich Admin Code, R 460.3411(11). Second, whether in these cases a "customer[]" was "already receiving . . . service from another utility" so as to prevent a municipal utility from providing service under MCL 124.3(2).

We hold that Rule 460.3411 (Rule 411) of the Michigan Administrative Code is inapplicable when a municipal utility is involved and has not consented to the jurisdiction of the Michigan Public Service Commission (PSC). Additionally, under the circumstances of each case, we find that there was not a customer already receiving service from another utility; accordingly, MCL 124.3 does not prevent either plaintiff from providing electric service. Therefore, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The first of these consolidated cases involves the Coldwater Board of Public Utilities (CBPU), a department of plaintiff city of Coldwater (Coldwater) that operates a municipal electric utility. CBPU holds a franchise to provide electric power to Coldwater Township and provides electric service to customers throughout the township. Defendant Consumers Electric Company (Consumers) is also franchised to provide electric service within the township.

On July 21, 2011, CBPU purchased a parcel of property within the township. At the time of the purchase, the only structure on the property was a vacant building with an electric service drop that was connected to an electric meter owned by Consumers. Service had been discontinued before CBPU purchased the property; specifically, records indicate that Consumers received a request from the previous owner to turn off electricity before Coldwater purchased the parcel, and service was terminated on July 1, 2011—20 days before the purchase. Coldwater wrote to Consumers, asking whether Consumers would object to CBPU providing electric service to the parcel. Consumers objected on the basis of Rule 411 of the Michigan Administrative Code and this Court's decision in *Great*

Wolf Lodge of Traverse City, LLC v Pub Serv Comm, 489 Mich 27; 799 NW2d 155 (2011). Despite this objection, Consumers removed its electric facilities from the property so that the preexisting building could be demolished.

On April 2, 2013, Coldwater filed a complaint for declaratory relief in circuit court, seeking a determination that CBPU could provide power to the parcel. Both parties moved for summary disposition. On January 15, 2014, the circuit court granted summary disposition to Coldwater, finding that neither Rule 411 nor MCL 124.3 was applicable.

The second of these consolidated cases involves the Holland Board of Public Works (HBPW), a department of plaintiff city of Holland (Holland) that operates a municipal electric utility. HBPW holds a franchise from Park Township that requires it to provide electric service to any prospective customer in the township who requests it. Consumers is also franchised to provide electric service within the township.

In March 2011, Benjamin's Hope, a nonprofit charitable corporation, acquired a parcel of property within the township. At the time of purchase, the land was vacant because all of the buildings had been demolished by the previous owner. There was no electric service being provided on the land. Although Consumers had previously supplied power to the parcel, its lines were de-energized in 2008. Benjamin's Hope sought to build a multiunit facility on the property. In August 2011, the contractor for this construction project, CL Construction, requested that Consumers provide single-phase electric service to a construction trailer that was temporarily located on the property.[1]

[1] CL Construction directed Consumers to bill Benjamin's Hope for this temporary electric service. There is no indication in the record as to who paid these bills.

In October 2011, Benjamin's Hope solicited bids from Consumers and HBPW for three-phase electric service, which comes at a different voltage than the single-phase electric service that had been provided to CL Construction's trailer. Benjamin's Hope selected HBPW as its electric provider. When CL Construction removed its trailer from the property, CL Construction requested that Consumers remove its electric facilities as well. Although Consumers initially refused, it eventually complied by removing the line and meter sometime before April 24, 2012. HBPW began providing electric service to the parcel on April 30, 2012.

On March 20, 2012, Holland filed a complaint for declaratory relief in circuit court, seeking a determination that HBPW could provide power to the Benjamin's Hope parcel. On March 29, 2012, Consumers filed a request for a declaratory ruling from the PSC, claiming that Rule 411 gave it the exclusive right to serve the property. The PSC convened a proceeding and assigned a hearing officer. The circuit court held Holland's action in abeyance pending the outcome of the PSC proceeding.

On December 6, 2012, the PSC issued an order declining Consumers' request on the ground that it had no jurisdiction over HBPW or Benjamin's Hope. The circuit court ruled that Rule 411 was not applicable and that MCL 124.3 did not preclude HBPW from providing electric service.

Consumers appealed each of these cases in the Court of Appeals, and the appeals were consolidated. On January 6, 2015, the Court of Appeals affirmed both of the circuit courts' decisions in a published opinion, holding that Rule 411 was not applicable in either case and that MCL 124.3 did not prevent either property owner from switching electrical providers.

City of Holland v Consumers Energy Co, 308 Mich App 675, 687, 689, 698; 866 NW2d 871 (2015).

II. STANDARD OF REVIEW

This case concerns the interpretation of both administrative rules and statutes. "In construing administrative rules, courts apply principles of statutory construction." *Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 185; 428 NW2d 335 (1988). Statutory interpretation is a question of law that this Court reviews de novo. *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). "The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). We begin by examining the language of the statute, which provides " 'the most reliable evidence of its intent[.]' " *Id*., quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

> If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [*Sun Valley Foods Co*, 460 Mich at 236 (citations omitted).]

See also *Boyle v Gen Motors Corp*, 468 Mich 226, 229; 661 NW2d 557 (2003) ("If the language of the statute is clear, no further analysis is necessary or allowed."). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or

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

III. ANALYSIS

A. RULE 411

We first consider whether a public utility has a right of first entitlement under Rule 411, even when the competing utility is a municipal utility. Rule 411 provides, in relevant part:

> (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load. [Mich Admin Code, R 460.3411.]

This rule is sometimes referred to as a utility's right of first entitlement.

We previously considered the applicability of a utility's right of first entitlement in *Great Wolf Lodge*, 489 Mich 27. In *Great Wolf Lodge*, the plaintiff purchased a parcel of property. Although electric service had been turned off, the prior owner had continued to make a minimum monthly payment to Cherryland Electric Cooperative (Cherryland) to maintain the option to have service turned on in the future. The plaintiff planned new construction on the property and solicited bids from electric utilities. A municipal electric utility was the winning bidder. However, when Cherryland

was asked to remove its service line so that a building could be demolished, it conditioned removal on being named the electricity provider. This Court held:

> Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of all buildings on the property or division of the property by a public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities. [*Id*. at 39.]

This Court noted that it was undisputed that Cherryland was the first utility to provide electric service to buildings on the property. Rule 411(11) therefore gave Cherryland the right to first entitlement. "That right was unaffected by subsequent changes in the 'customer,' because the right extends to the 'premises' of the 'buildings and facilities' that existed at the time service was established. Later destruction of the buildings and facilities on the property did not extinguish that right." *Id*. at 41.

This Court found it "irrelevant" that the winning bidder was a municipal electric utility that was not subject to PSC regulation. *Id*.

> Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while limiting the right of the owner of the premises to contract with another provider for electric service. Plaintiff put that limitation directly at issue by seeking a declaratory ruling that it is free to contract for electric service with any electricity provider. Assuming arguendo that MCL 124.3 does not restrict [the municipal electric utility] from contracting with plaintiff to provide electric service, Rule 411(11)

> restricts plaintiff from seeking that service from any entity other than Cherryland. Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. Thus, MCL 124.3 has no application to the instant dispute. [*Id*. at 41-42.]

Leaving aside, for now, the potential application of MCL 124.3, we turn to the language in *Great Wolf Lodge* concerning the jurisdiction of the PSC. The *Great Wolf Lodge* Court noted that a municipal corporation is not subject to PSC regulation. *Id*. at 42. This is correct. MCL 460.6(1) states, "The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state *except a municipally owned utility*, the owner of a renewable resource power production facility as provided in [MCL 460.6d], and except as otherwise restricted by law." (Emphasis added.) Under the plain language of MCL 460.6(1), the PSC is explicitly granted complete power and jurisdiction over public utilities that are not municipally owned utilities.

Furthermore, PSC Rule 102(*l*) defines "utility" as "an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission." Mich Admin Code, R 460.3102(*l*). This definition notably does not include municipally owned utilities. The application of the canon of statutory interpretation *expressio unius est exclusio alterius*[2] directs us to read this absence as meaningful, especially in light of the lack of any language that would suggest that this was intended to be an illustrative,

[2] "[T]he doctrine of *expressio unius est exclusio alterius* . . . provides that 'the express mention in a statute of one thing implies the exclusion of other similar things.' " *People v Feeley*, 499 Mich 429, 438-439; 885 NW2d 223 (2016), quoting *People v Jahner*, 433 Mich 490, 500 n 3; 446 NW2d 151 (1989).

rather than an exclusionary, list.[3] Given that Rule 411(11) makes no specific reference to municipal electric utilities and speaks only to a "utility," a plain-language reading of that rule leads to the inevitable conclusion that it does not apply to municipal electric utilities. Any other interpretation would render Rule 102(*l*) nugatory.

Great Wolf Lodge originated as a rate dispute between a landowner and a PSC-regulated utility that was indisputably subject to the PSC's jurisdiction. The primary holding of that case was that "a utility's right of first entitlement set forth in Rule 460.3411 (Rule 411) of the Michigan Administrative Code extends to the entire premises initially served." *Great Wolf Lodge*, 489 Mich at 31. Yet after interpreting the language of Rule 411, the Court also proceeded to address its applicability to a dispute over whether a PSC-regulated utility and a municipal utility could provide electric service to the plaintiff's property. Although the Court's analysis of that issue was binding as to the parties in that case, it was not the focus of the Court's opinion.[4]

To the extent that *Great Wolf Lodge* can be read to hold that Rule 411 is applicable in cases involving disputes between PSC-regulated utilities and municipal utilities over which entity can provide electric service, it was wrongly decided because it conflicts with the plain language of MCL 460.6(1).[5] *Id*. at

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[3] For example, "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive." *Samantar v Yousuf*, 560 US 305, 317; 130 S Ct 2278; 176 L Ed 2d 1047 (2010).

[4] Notably, no party to *Great Wolf Lodge* was a municipal utility.

[5] Rule 411 may be applicable in cases in which a municipal electric utility either subjects itself to PSC jurisdiction or elects to operate in compliance with the rule. MCL 460.10y(3) ("With respect to any electric utility regarding delivery service to customers located outside of the

41-42.[6] We further conclude that it is at best an incomplete analysis of the issue. See, e.g., *People v McKinley*, 496 Mich 410, 422; 852 NW2d 770 (2014) (in considering whether to overrule our prior decision, noting that the analysis in that prior decision was "incomplete").

That a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate. *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000). Generally, in order to "avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them[.]" The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), p 471. Indeed, under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365;

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municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with [Rule 411] of the Michigan administrative code . . . .").

[6] Specifically, we disavow the following reasoning from *Great Wolf Lodge*:

> Given that Cherryland is entitled to the benefit of the first entitlement in Rule 411(11), it is irrelevant that [Traverse City Light & Power (TCLP)] is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while limiting the right of the owner of the premises to contract with another provider for electric service. Plaintiff put that limitation directly at issue by seeking a declaratory ruling that it is free to contract for electric service with any electricity provider. Assuming arguendo that MCL 124.3 does not restrict TCLP from contracting with plaintiff to provide electric service, Rule 411(11) restricts plaintiff from seeking that service from any entity other than Cherryland. Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. Thus, MCL 124.3 has no application to the instant dispute. [*Great Wolf Lodge*, 489 Mich at 41-42.]

550 NW2d 215 (1996), overruled on other grounds by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007) (citation and quotation marks omitted). "However, stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Robinson*, 462 Mich at 463. Instead, courts should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. *Id*. at 464.

First, we consider whether *Great Wolf Lodge* defies practical workability. *Great Wolf Lodge* held that a PSC rule may be applied to entities over which the PSC itself is not vested with jurisdiction by statute. *Great Wolf Lodge*, 489 Mich at 41-42. A holding that would purport to exercise PSC jurisdiction when there is none inherently defies practical workability because it leaves municipally owned utilities in the dark as to when and how their status as non-PSC regulated utilities is legally significant. To the extent that *Great Wolf Lodge* found this lack of jurisdiction irrelevant, this holding is also unsound in principle.

Second, we consider whether reliance interests weigh in favor of overruling this portion of *Great Wolf Lodge*. They do. "[T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. *Great Wolf Lodge* was decided only six years ago, and any reliance on its holding has thus been relatively brief. It has never been cited by us or the Court of Appeals for the point of law on which we

overrule it, and the PSC has cited it only in its opinion in the *City of Holland* case in which it correctly determined that it lacked jurisdiction over HBPW. Furthermore, when discussing reliance, "it is to the words of the statute itself" that the public first looks for guidance, and these words must be at the center of our analysis. *Id*. at 467. *Great Wolf Lodge* did not consider either MCL 460.6(1) or PSC Rule 102(*l*) in finding that Rule 411(11) may apply to municipally owned utilities. Because MCL 460.6(1) states that the PSC has no jurisdiction over municipally owned utilities, and because PSC Rule 102(*l*) does not include a municipally owned utility within its definition of the word "utility," we find that "it is that court itself that has disrupted the reliance interest." *Id*.

Lastly, we consider whether changes in the law or facts no longer justify the decision. There has been no substantive change in the law or our underlying factual assumptions.

In sum, our reading of MCL 460.6(1) and PSC Rule 102(*l*) compels us to overrule the portion of *Great Wolf Lodge* that states that Rule 411(11) applies to municipally owned utilities. In these cases, because the municipal electric utilities have not otherwise elected to operate in compliance with the rule, MCL 460.10y(3), Rule 411(11) is inapplicable; it does not apply where municipal electric utilities are concerned.

B. MCL 124.3

Because we agree with the Court of Appeals that Rule 411 is inapplicable when the competing utility is a municipally owned utility that is not subject to PSC jurisdiction, we now turn to whether MCL 124.3 applies to prevent the property owner from switching electricity providers. MCL 124.3 states, in relevant part:

> (2) A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.
>
> (3) As used in this section:
>
> (a) "Electric delivery service" has the same meaning as "delivery service" under section 10y of 1939 PA 3, MCL 460.10y.

This rule is sometimes referred to as the no-switch rule.

Although MCL 124.3 is directed *at* municipal corporations, the prohibition against switching service also protects municipal corporations from this same behavior:

> Except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. *For purposes of this subsection*, "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service. [MCL 460.10y(2) (emphasis added).]

Because Consumers has not consented to plaintiffs' provision of electric service in either case, we must consider whether MCL 124.3(2) prevents either plaintiff from rendering service to the two parcels at issue. In order to determine whether the no-switch rule applies, we must first consider the meaning of two phrases in the statute, neither of which is defined by statute: "customers" and "already receiving."

The Court of Appeals relied on the definition of customer that is found in MCL 460.10y(2). This is

inappropriate. First, the definition of customer in MCL 460.10y(2) is explicitly confined to that subsection because the definition is preceded by the limiting phrase "[f]or purposes of this subsection." MCL 460.10y(2). See *People v Mazur*, 497 Mich 302, 314-315; 872 NW2d 201 (2015). Second, MCL 124.3(3)(a) explicitly directs the reader to MCL 460.10y for a definition of "electric delivery service." Had the Legislature intended to do the same for the word "customer," it could have done so in a similar fashion, but it did not.

Because MCL 124.3 does not define the word customer, and because we cannot rely on the definition found in MCL 460.10y(2), we instead turn to a dictionary for a plain-language definition of the word. A "customer" is "one that purchases a commodity or service." *Merriam-Webster's Collegiate Dictionary* (11th ed).[7] As used in MCL 124.3(2), "customer" therefore refers to the entity that receives electric service and not the building or facilities on the land.

The phrase "already receiving" is in the present tense; more specifically, "receiving" is a present participle modified by the adverb "already." "Already" is defined as "prior to a specified or implied past, present, or future time[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). To "receive" is "to come into possession of[.]" *Id*.[8] The verb tense is meaningful here because it indicates a present-tense lens is used in determining whether a switch is permissible. Although

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[7] *Black's Law Dictionary* (10th ed) similarly defines "customer" as "[a] buyer or purchaser of goods or services; esp., the frequent or occasional patron of a business establishment."

[8] *Black's Law Dictionary* (10th ed) defines "receive" as "[t]o take (something offered, given, sent, etc.); to come into possession of or get from some outside source[.]"

Rule 411(11) uses the verb "serving," this is modified by the phrase "the first utility," which suggests a focus on some point in the past. In MCL 124.3(2), the present participle "receiving" is modified by "already." Although "already" can suggest a prior point in time, when read together, the phrase "already receiving" refers to an action that started in the past and continues into the present. This can be contrasted against the past-tense verb "received," as here we are concerned both with whether service was received in the past and whether service has continued.

When MCL 124.3(2) is applied here, it becomes apparent that the no-switch rule does not prevent either plaintiff from providing electric service to the parcels at issue. In the case of Coldwater, the CBPU stands in the position of both property owner and municipal electric utility. Although a prior property owner received service from Consumers, CBPU has never contracted with Consumers. Indeed, Consumers ceased to provide electric service to the property in question before CBPU's acquisition of it. Therefore, CBPU was never a customer of Consumers and is not already receiving service from Consumers; it never received service from Consumers.

The case of Holland presents a closer question. In that case, the entity that requested service from HBPW was Benjamin's Hope; in contrast, it was CL Construction that received service from Consumers. As CL Construction is a different entity from Benjamin's Hope, Benjamin's Hope was never a customer of Consumers.[9] Additionally, when Benjamin's Hope purchased the parcel, there was no electric service being

[9] There is some suggestion that, while it was CL Construction that contracted for electric service with Consumers, Consumers was directed to seek payment from Benjamin's Hope. If Benjamin's Hope had paid for

provided on the land because electric service had been discontinued in 2008. Therefore, Benjamin's Hope was not "already receiving" service from Consumers; it had never received service in the first place.

To the extent it is argued that the provision of service to CL Construction should count under the statute, Consumers removed its electric facilities before April 24, 2012, and HBPW did not begin providing service until April 30, 2012. Admittedly, this break in service only spanned a few days, but the existence of a break still indicates that Benjamin's Hope was not "already receiving" service; at most, Benjamin's Hope would have merely *received* service, which is insufficient for the purpose of MCL 124.3(2). If the Legislature had intended that MCL 124.3(2) should still apply even when there have been breaks in service, it could have said so explicitly by using the past tense "received" rather than "receiving." That is not the case here.

Although it is argued that a plain-language reading of the statute would lead to significant amounts of gamesmanship, there are certainly many practical incentives for a customer to decide not to shut off service merely to switch utility providers. One can imagine many scenarios in which a property owner would not be able to weather such a break in electric service, no matter how temporary. Moreover, MCL 460.10y(2) is worded similarly, stating that a person may not provide service to a customer that "is receiving the service from a municipally owned utility." Accordingly, both public utilities and municipally owned utilities are bound by similar statutory restrictions against switching.

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electric service, this might support an argument that Benjamin's Hope was a customer of Consumers. However, there is no record evidence that this was the case.

IV. CONCLUSION

We hold that Rule 411(11) does not apply to municipally owned utilities. We also hold that the word "customer" in MCL 124.3(2) is defined as an entity that receives electric service and that the use of the phrase "already receiving" means that service needs to continue into the present in order for the no-switch rule to apply. Because these consolidated cases involve municipally owned utilities, Rule 411 is inapplicable. Moreover, MCL 124.3(2) did not prevent either property owner from switching electric providers because Consumers had discontinued service before the provision of service by a municipally owned utility. Accordingly, we affirm the judgment of the Court of Appeals.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, LARSEN, and WILDER, JJ., concurred with BERNSTEIN, J.

PEOPLE v CALLOWAY

Docket Nos. 153636 and 153751. Decided May 19, 2017.

Tiwaun M. Calloway was convicted of second-degree murder, MCL 750.317, on an aiding-and-abetting theory following a jury trial in the Wayne Circuit Court for his role in a man's death. The court, Megan Maher Brennan, J., sentenced Calloway to 20 to 50 years of imprisonment. At sentencing, the court scored Offense Variable 5 (OV 5), MCL 777.35, at 15 points for the serious psychological injury suffered by two of the victim's family members as a result of the victim's death. Calloway sought delayed leave to appeal. While his leave application was pending, Calloway moved in the trial court for reissuance of the judgment of sentence under MCR 6.428. The trial court granted the motion, and Calloway filed a claim of appeal from the reissued judgment. The Court of Appeals then granted Calloway's delayed application for leave. The appeals were consolidated. The Court of Appeals, GLEICHER, P.J., and JANSEN and SHAPIRO, JJ., affirmed Calloway's conviction in an unpublished per curiam opinion issued on March 22, 2016, but the Court vacated Calloway's sentence after it determined that OV 5 should have been scored at zero points. Both Calloway and the prosecution sought leave to appeal in the Supreme Court—Calloway to appeal his conviction, and the prosecution to appeal the Court of Appeals' decision regarding OV 5.

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

Points may be assessed for OV 5 even absent proof that a victim's family member has sought or received, or intends to seek or receive, professional treatment. OV 5 may also be scored when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment. Because there was adequate proof of such an injury in this case, the Court of Appeals' ruling that the trial court erred by assessing 15 points for OV 5 had to be reversed.

1. Pursuant to MCL 777.22(1), OV 5 must be scored for certain homicide or homicide-related offenses. MCL 777.35 specifies that 15 points should be assessed if a serious psychological

injury to a victim's family member may require professional treatment and that the fact that treatment has not been sought is not determinative. In scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and how it is likely to do so in the future, and whether professional treatment has been sought or received. Contrary to the suggestion of the Court of Appeals, points may be assessed for OV 5 even when the family member does not have a present intention to seek treatment. All that is required to assess points for OV 5 is the existence of a serious psychological injury that may require treatment. In this case, evidence was presented that two of the victim's family members suffered serious psychological injuries that may require professional treatment in the future. The trial court properly assessed 15 points for OV 5 because there was ample evidence of the seriousness of the injuries and their long-lasting effects. The Court of Appeals' contrary ruling had to be reversed.

2. Calloway's application for leave to appeal that portion of the Court of Appeals' judgment rejecting his challenges to his conviction was denied for failure to persuade the Court that the questions presented in his application should be reviewed.

3. Remand was required under *People v Lockridge*, 498 Mich 358 (2015), given the Court of Appeals' conclusion that the trial court engaged in judicial fact-finding in scoring two offense variables.

Reversed in part and remanded.

Justice WILDER took no part in the decision of this case.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 5 — SERIOUS PSYCHOLOGICAL INJURY TO A VICTIM'S FAMILY MEMBER.

Offense Variable 5 (OV 5) addresses serious psychological injury suffered by a victim's family member when the crime scored is homicide or a homicide-related offense; 15 points should be assessed for OV 5 when a family member's serious psychological injury may require treatment; OV 5 is not limited to situations in which a victim's family member has sought or received treatment; 15 points may also be assessed for OV 5 when the serious psychological injury may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment; in making this determination, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and how it is likely to do so in the future, and whether professional treatment has been sought or received (MCL 777.35).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Valerie M. Steer*, Assistant Prosecuting Attorney, for the people.

Tiwaun M. Calloway *in propria persona*.

PER CURIAM. At issue in this case is whether the trial court properly assessed 15 points for Offense Variable 5 (OV 5).[1] This question turns on whether the proofs were sufficient to establish that a "[s]erious psychological injury requiring professional treatment occurred to a victim's family."[2] We hold that 15 points may be assessed for OV 5 even absent proof that a victim's family member has sought or received, or intends to seek or receive, professional treatment. In particular, OV 5 may also be scored when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment. Because there was adequate proof of such an injury in this case, we reverse the Court of Appeals' ruling that the trial court erred by assessing 15 points for OV 5.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Tiwaun Calloway, and his friend Damian Jones were searching for the man they believed stole a cell phone from Jones's girlfriend. Defendant drove to Jones's residence, where Jones retrieved an AK-47 rifle. They later confronted the suspected thief. As the man tried to run away, Jones opened fire, killing

[1] MCL 777.35.

[2] MCL 777.35(1)(a).

him. Defendant then drove Jones away from the scene. Defendant was convicted of second-degree murder[3] on an aiding and abetting theory and was sentenced to 20 to 50 years in prison.

At sentencing, the trial court scored OV 5 at 15 points. The Court of Appeals summarized the evidence supporting this score as follows:

> The presentence investigation report (PSIR) reflects that the victim's stepfather was interviewed. He stated that the victim's mother was "having a very hard time dealing with this situation," and explained that the "incident has had a tremendous, traumatic effect on him and his family." He explained that the incident "will change them for the rest of their lives." The victim's stepfather expressed similar thoughts when he made a statement at sentencing.[4]

However, the Court of Appeals concluded that OV 5 should have been scored at zero points because

> there is no evidence indicating that any member of the victim's family intended to receive professional treatment in relation to the incident or required professional treatment because of the incident. See *People v Portellos*, 298 Mich App 431, 449; 827 NW2d 725 (2012) (affirming the trial court's refusal to assess points for OV 5 when there was no evidence that members of the victim's family intended to receive treatment).[5]

The prosecution now seeks leave to appeal in this Court from the Court of Appeals' holding that OV 5 was misscored.[6]

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[3] MCL 750.317.

[4] *People v Calloway*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2016 (Docket Nos. 323776 and 325524), p 7.

[5] *Id*.

[6] Defendant also seeks leave to appeal in Docket No. 153636 from the portion of the Court of Appeals' opinion rejecting defendant's challenges to his conviction. However, with respect to defendant's separate appli-

II. STANDARD OF REVIEW

A trial court's factual determinations must be supported by a preponderance of the evidence and are reviewed for clear error.[7] "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."[8]

In interpreting statutes, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language."[9] In doing so, "we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."[10]

III. ANALYSIS

OV 5 is scored when a homicide or homicide-related crime[11] causes psychological injury to a member of a victim's family. MCL 777.35, which governs OV 5, provides as follows:

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cation, leave to appeal is denied because we are not persuaded that the questions presented should be reviewed by this Court. Defendant's motion to remand for a new trial is also denied.

[7] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[8] *Id*.

[9] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

[10] *Id*. (quotation marks and citations omitted).

[11] In particular, OV 5 is scored for "homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder." MCL 777.22(1). This limitation may be contrasted with Offense Variable 4 (OV 4), which is scored for all crimes against a person, property, public order, public trust, and public safety when there is psychological injury to a victim. MCL 777.22.

> (1) Offense variable 5 is psychological injury to a member of a victim's family. Score offense variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim's family ..... 15 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim's family ... 0 points
>
> (2) Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Therefore, a trial court properly assesses 15 points for OV 5 when "[s]erious psychological injury requiring professional treatment occurred to a victim's family."[12] However, the very next subsection of the statute provides that 15 points should be assessed "if the serious psychological injury to the victim's family *may* require professional treatment," and that "[i]n making this determination, the fact that treatment has not been sought is not conclusive."[13]

At first blush, the second subsection of MCL 777.35 appears to contradict the first concerning whether professional treatment is required for points to be assessed. However, the more specific second subsection is clearly intended as a further explication of the circumstances justifying a 15-point score. "[W]e examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[14] In addition, when a statute contains a general provision and a specific provision, the specific

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[12] MCL 777.35(1)(a).

[13] MCL 777.35(2) (emphasis added).

[14] *Madugula*, 496 Mich at 696.

provision controls.[15] While MCL 777.35(1)(a) requires the injury to be one "requiring professional treatment," the statute does not require proof that a victim's family member has already sought or received, or intends to seek or receive, professional treatment. The second subsection makes this clear by stating that "the fact that treatment has not been sought is not conclusive," and by specifying that a 15-point score is appropriate if the injury "*may* require professional treatment."[16]

Although this threshold may seem low, trial courts must bear in mind that OV 5 requires a "*serious* psychological injury." In this context, "serious" is defined as "having important or dangerous possible consequences."[17] Thus, in scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received. However, even when professional treatment has not yet been sought or received, points are properly assessed for OV 5 when a victim's family member has suffered a serious psychological injury that may require professional treatment in the future.[18]

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[15] *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367 n 22; 817 NW2d 504 (2012).

[16] MCL 777.35(2) (emphasis added); see *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("[C]ourts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent . . . .").

[17] *Merriam-Webster's Collegiate Dictionary* (11th ed). To understand the meaning of words in a statute that are not otherwise defined, we may resort to dictionary definitions for guidance. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 559 n 41; 886 NW2d 113 (2016).

[18] See MCL 777.35(2) ("[T]he fact that treatment has not been sought is not conclusive."). By like token, the fact that treatment *has* been

We disagree with the Court of Appeals to the extent that it held that in order to properly assess points for OV 5 in the absence of evidence that a victim's family member sought or received treatment, there must at least be evidence that a victim's family member had a present intention to seek or receive professional treatment. The Court of Appeals' holding on this point is not entirely clear because, after reviewing some of the statements by the victim's stepfather, the Court simply concluded its analysis by stating that "there is no evidence indicating that any member of the victim's family intended to receive professional treatment in relation to the incident or required professional treatment because of the incident."[19]

Portellos, the case the Court of Appeals cited in its OV 5 analysis, is equally opaque. There, to support its conclusion that OV 5 was properly scored at zero, the Court of Appeals stated as follows:

> Though [the victim's grandmother] expressed her emotional response to the [victim's] death, she did not state that she intended to receive treatment. Nor did [the victim's father] state that he intended to receive treatment. [The victim's grandmother] only stated that she hoped that [the defendant] would be able to receive treatment while in prison.[20]

However, the Court of Appeals did not discuss any details regarding the victim's grandmother's "emotional response to the [victim's] death," or consider the letter she submitted "that spoke about her disbelief, grief, anger, and heartbreak at the loss of [the vic-

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sought or received will not always be dispositive—for example, when the treatment sought or received is not indicated by the injury.

[19] *Calloway*, unpub op at 7, citing *Portellos*, 298 Mich App at 449.

[20] *Portellos*, 298 Mich App at 449.

tim]."[21] As noted above, OV 5 is not limited to situations in which a victim's family member has already sought or received treatment, or expressed an intention to do so. Points are also properly assessed when the serious psychological injury may require professional treatment in the future, regardless of whether the victim's family member presently intends to seek treatment. We overrule *Portellos* to the extent it stated or implied otherwise.[22]

IV. APPLICATION

Applying the plain language of MCL 777.35 to the facts of this case, the statements by the victim's stepfather in the presentence investigation report and at the sentencing hearing demonstrate that the victim's family members suffered serious psychological injuries that may require professional treatment in the future.

In the presentence investigation report, the victim's stepfather stated that the victim's mother "is having a

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[21] *Id*. at 441, 449.

[22] Although our opinion interprets OV 5, we note that our interpretation is consistent with published Court of Appeals cases construing OV 4, which contains identical statutory language in pertinent part. See MCL 777.34(1)(a) (requiring trial courts to assess 10 points for OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim"); MCL 777.34(2) (providing that 10 points should be assessed "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive"). The Court of Appeals has held that OV 4 may properly be scored at 10 points even absent proof that a victim sought or received, or intended to seek or receive, professional treatment. See *People v Schrauben*, 314 Mich App 181, 197-198; 886 NW2d 173 (2016); *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012); *People v Earl*, 297 Mich App 104, 109-110; 822 NW2d 271 (2012); *People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010); *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

very hard time dealing with this situation." He indicated that he met and married the victim's mother when the victim was approximately four months old. He stated that "this incident has had a tremendous, traumatic effect" on him and his family. He indicated that the victim had just become a father four months earlier, and that the incident "will change them for the rest of their lives."

The victim's stepfather also addressed the trial court at sentencing, stating that "my family feels horrible about this incident," and that defendant "[does not] understand what he has done to our family and what he has done to my wife. And that's something that I can't change. I'll never be able to change it." After noting that the victim was only 24 years old when he was killed and that he had a four-month-old baby, the victim's stepfather stated:

> I want you to feel my pain, your Honor. I want you to feel my pain. Because something happened that was final, we can't change it. He'll never have another birthday. He'll never see his child. His child will never see him. This is something that I have to go through the rest of my life with, I have to teach my grandbaby about her father.

He further stated that "since [the day of the murder], I've thought about this every single day, every day. And I'll probably think about it for the rest of my life. But this is something that I have to live through. And I will go through this till the end."

After reviewing this evidence, we believe that the trial court correctly concluded that two members of the victim's family suffered serious psychological injuries that may require professional treatment in the future. There was ample evidence of the seriousness of the injuries and their long-lasting effects to support the trial court's decision to assess 15 points for OV 5.

V. CONCLUSION

We reverse the Court of Appeals' decision that the trial court improperly assessed 15 points for OV 5, and we remand this case to the trial court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*.[23]

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

WILDER, J., took no part in the decision of this case.

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[23] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). We remand under *Lockridge* given the Court of Appeals' conclusion that the trial court engaged in judicial fact-finding in scoring two offense variables. *Calloway*, unpub op at 5-6.

COVENANT MEDICAL CENTER, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 152758. Argued December 7, 2016 (Calendar No. 5). Decided May 25, 2017.

Covenant Medical Center, Inc., brought suit in the Saginaw Circuit Court against State Farm Mutual Automobile Insurance Company to recover payment under the no-fault act, MCL 500.3101 *et seq*., for medical services it provided to State Farm's insured, Jack Stockford, following an automobile accident in which Stockford was injured. Covenant sent bills totaling $43,484.80 to State Farm for healthcare services it provided to Stockford. State Farm denied payment on November 15, 2012. In the meantime, Stockford had filed suit against State Farm for no-fault benefits, including personal protection insurance (PIP) benefits. Without Covenant's knowledge, Stockford and State Farm settled Stockford's claim for $59,000 shortly before Covenant initiated its action against State Farm. As part of the settlement, Stockford released State Farm from liability for all allowable no-fault expenses and any claims accrued through January 10, 2013. State Farm moved for summary disposition under MCR 2.116(C)(7) (dismissal due to release) and MCR 2.116(C)(8) (failure to state a claim). The court, Robert L. Kaczmarek, J., granted State Farm's motion under MCR 2.116(C)(7), explaining that Covenant's claim was dependent on State Farm's obligation to pay no-fault benefits to Stockford, an obligation that was extinguished by the settlement between Stockford and State Farm. Covenant appealed by right in the Court of Appeals, and in a published per curiam opinion, the Court of Appeals, M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ., reversed the circuit court's decision. 313 Mich App 50 (2015). According to the Court, the settlement with Stockford did not discharge State Farm's liability to Covenant because State Farm had notice of Covenant's claim for no-fault benefits for the benefit of Stockford. Because State Farm had notice of Covenant's claim, State Farm's settlement with Stockford was not a good-faith payment of no-fault benefits it owed. The Court of Appeals concluded that the circumstances of this case were addressed in MCL 500.3112, which required State Farm to seek a court order directing the proper allocation of

benefits when, in addition to a first-party claim for benefits, there was also a third-party claim for payment of no-fault benefits. The Supreme Court granted State Farm's application for leave to appeal. 499 Mich 941 (2016).

In an opinion by Justice ZAHRA, joined by Chief Justice MARKMAN and Justices MCCORMACK, VIVIANO, and LARSEN, the Supreme Court *held*:

The plain language of the no-fault act, MCL 500.3101 *et seq.*, governs the administration of Michigan's no-fault laws regarding claims and benefits involving automobile accidents. Only two sections of the no-fault act mention healthcare providers, MCL 500.3157 and MCL 500.3158, and neither of those sections confers on a healthcare provider a right to sue for reimbursement of the costs of providing medical care to an injured person. Those sections address, respectively, the charges a healthcare provider may assess for treatment of an insured and the requirement that a healthcare provider make an insured's medical records and treatment information available to the insurer. Two additional relevant provisions, MCL 500.3105 and MCL 500.3107, address, respectively, an insurer's obligation to pay PIP benefits and the allowable expenses for which PIP benefits must be paid. Nothing in the language of those two provisions authorizes a healthcare provider to bring a direct action against an insurer for payment of PIP benefits. Nor does the language appearing in MCL 500.3107(1)(a), which makes benefits payable for allowable expenses consisting of all reasonable charges incurred, create a right of action on behalf of healthcare providers because healthcare providers do not incur the charges or become liable for them; charges for healthcare are incurred most commonly by patients, who are the ones that become liable for paying those charges. Furthermore, although MCL 500.3112 allows no-fault insurers to directly pay PIP benefits to a healthcare provider for expenses incurred by an insured, MCL 500.3112 does not entitle a healthcare provider to bring a direct action against an insurer for payment of PIP benefits. That statutory provision simply allows a no-fault insurer to satisfy its obligation to an insured by direct payment to the injured person or direct payment to the healthcare provider for the benefit of an injured person. MCL 500.3112 also provides that a no-fault insurer's payment made in good faith either to or for the benefit of an insured satisfies its obligation to the insured to the extent of the payment if the insurer did not previously receive written notice of a third-party's claim for benefits. The remainder of MCL 500.3112 addresses an interested party's right to apply to the circuit court for an order awarding

and apportioning payment to entitled persons, and it authorizes the circuit court to designate payees and make an equitable apportionment among those payees, including dependents and survivors of the injured person. Finally, no language appearing in MCL 500.3114 or MCL 500.3115 contemplates a statutory cause of action for healthcare providers against a no-fault insurer. MCL 500.3114 and MCL 500.3115 concern the priority of insurers from which an injured person is entitled to receive benefits when multiple insurers are involved. In short, under the language of the no-fault act, a healthcare provider does not possess a statutory cause of action against a no-fault insurer for the payment of no-fault benefits.

Reversed and remanded for entry of summary disposition in defendant's favor.

Justice BERNSTEIN, dissenting, concluded that although the no-fault act does not expressly grant a healthcare provider a direct cause of action against a no-fault insurer for the payment of PIP benefits, MCL 500.3112 supports the existence of such a cause of action. The language of the no-fault act nowhere expressly defines "claimant," but provisions of the no-fault act, such as MCL 500.3112, contemplate which parties may receive no-fault benefits, and the ability to receive benefits is necessary in order for a party to claim those benefits. MCL 500.3112 provides that PIP benefits are payable either to the injured person or to someone else for the benefit of the injured person; payment to a healthcare provider is payment for the benefit of the injured person. To conclude that injured persons are entitled to a claim for benefits and that healthcare providers are not is inconsistent with the language of MCL 500.3112. The language of the no-fault act does not expressly confer on *any* party the right to directly sue a no-fault insurer for no-fault benefits. If an express provision giving a party the right to sue an insurer is required, then no party—not even the injured person—is authorized to sue a no-fault insurer to compel payment of no-fault benefits. But to hold that an injured person is the only party entitled to make a claim to enforce his or her right to receive benefits renders surplusage the language in the no-fault act that permits payment to a third party.

Justice WILDER did not participate in the disposition of this matter.

INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — INJURED PERSON'S BENEFITS — HEALTHCARE PROVIDER'S ENTITLEMENT TO CLAIM.

Even though the no-fault act, MCL 500.3101 *et seq*., permits a healthcare provider to receive no-fault benefits directly from a

> no-fault insurer, nothing in the language of the no-fault act entitles a healthcare provider to bring a direct cause of action against a no-fault insurer for the payment of no-fault benefits for the benefit of an injured person treated by the healthcare provider and insured by the no-fault insurer.

Miller Johnson (by *Richard E. Hillary, II*, and *Christopher J. Schneider*) for Covenant Medical Center, Inc.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Courtney F. Kissel*) for State Farm Mutual Automobile Insurance Company.

Amici Curiae:

James G. Gross, PLC (by *James G. Gross*), for the Auto Club Insurance Association.

Garan Lucow Miller, PC (by *Daniel S. Saylor*), for the Insurance Institute of Michigan.

Mellon Pries, PC (by *James T. Mellon* and *David A. Kowalski*), for the Michigan Municipal Risk Management Authority.

Melvin Hollowell, Jr., *Charles N. Raimi*, and *Jacob M. Satin* for the city of Detroit.

Clark Hill PLC (by *Jennifer K. Green*) for the Michigan Health and Hospital Association and HealthCall of Detroit, Inc.

Sinas Dramis Brake Boughton & McIntyre, PC (by *George T. Sinas* and *Joel T. Finnell*), and *Miller & Tischler, PC* (by *Wayne J. Miller* and *Meri D. Kligman*), for the Coalition Protecting Auto No-Fault.

Dykema Gossett PLLC (by *Joseph P. Erhardt*) for the Michigan Catastrophic Claims Association.

Hewson & Van Hellemont, PC (by *Nicholas S. Ayoub*), for Michigan Defense Trial Counsel.

ZAHRA, J. This case presents the significant question of whether a healthcare provider possesses a statutory cause of action against a no-fault insurer to recover personal protection insurance benefits for allowable expenses incurred by an insured under the no-fault act, MCL 500.3101 *et seq*. Relying on several of its previous decisions, the Court of Appeals concluded that it is "well settled that a medical provider has independent standing to bring a claim against an insurer for the payment of no-fault benefits."[1] The insurer sought leave to appeal in this Court, and we granted the application to consider in part that conclusion, which this Court has never addressed.[2]

A thorough review of the statutory no-fault scheme reveals no support for an independent action by a healthcare provider against a no-fault insurer. In arguing that healthcare providers may directly sue no-fault insurers, plaintiff primarily relies on MCL 500.3112, which provides, in pertinent part, that "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents." While this provision undoubtedly allows no-fault insurers to directly pay healthcare providers for the benefit of an injured person, its terms do not grant healthcare providers a statutory cause of action against insurers to recover the costs of providing products, services, and accommodations to an injured

[1] See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50, 54; 880 NW2d 294 (2015), and cases cited therein.

[2] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 499 Mich 941 (2016).

person. Rather, MCL 500.3112 permits a no-fault insurer to discharge its liability to an injured person by paying a healthcare provider directly, on the injured person's behalf. And further, no other provision of the no-fault act can reasonably be construed as bestowing on a healthcare provider a statutory right to directly sue no-fault insurers for recovery of no-fault benefits. We therefore hold that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act. The Court of Appeals caselaw concluding to the contrary is overruled to the extent that it is inconsistent with this holding. We reverse the judgment of the Court of Appeals in this case and remand the case to the Saginaw Circuit Court for entry of an order granting summary disposition to defendant.

I. FACTS AND PROCEDURAL HISTORY

On June 20, 2011, Jack Stockford was injured in a motor vehicle accident. His no-fault insurer was defendant, State Farm Mutual Automobile Insurance Company. Stockford was treated on at least three occasions by plaintiff, Covenant Medical Center, a healthcare provider. Plaintiff sent defendant bills on July 3, August 2, and October 9, 2012, for medical services it provided to Stockford. It is undisputed that defendant received the bills, which totaled $43,484.80. Defendant denied coverage on or about November 15, 2012, and refused to pay the bills.

On June 4, 2012, Stockford filed suit against defendant for no-fault benefits, including personal protection insurance (PIP) benefits.[3] Stockford settled his case

[3] No-fault benefits are broader than PIP benefits. For instance, no-fault benefits include, *inter alia*, property-protection benefits and

with defendant on April 2, 2013, for $59,000. In connection with the settlement, Stockford executed a broad release, which encompassed all allowable no-fault expenses, including medical bills, and "any and all past and present claims incurred through January 10, 2013[.]"

Plaintiff brought the instant suit against defendant on April 25, 2013, seeking payment of its billed expenses.[4] Plaintiff asserted that it learned of the settlement and release when defendant answered its complaint in May 2013. In September 2013, defendant moved for summary disposition under MCR 2.116(C)(7) (dismissal due to release) and MCR 2.116(C)(8) (failure to state a claim). Defendant maintained that plaintiff's claim for benefits was derivative of Stockford's claim, which was extinguished by the release. Therefore, defendant argued, plaintiff no longer possessed a claim against it.

In an opinion dated May 15, 2014, the circuit court granted summary disposition to defendant pursuant to MCR 2.116(C)(7). The court agreed with defendant that Stockford's release was dispositive, holding that any claim plaintiff may have had against Stockford's insurer was "dependent on the insurer being obligated to pay benefits to the provider on behalf of its insured" and that the "release end[ed] the insurer's obligation to pay benefits to or on behalf of its insured under its contract of insurance."

Plaintiff appealed by right in the Court of Appeals. In a published per curiam opinion, the panel reversed

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work-loss benefits. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 30; 528 NW2d 681 (1995). The instant case concerns healthcare providers and, in turn, only PIP benefits.

[4] Though initially filed in the Kent Circuit Court, the case was transferred to the Saginaw Circuit Court in July 2013.

the circuit court's decision, concluding that defendant's liability to plaintiff could not be discharged by defendant's settlement with Stockford because defendant had received written notice of plaintiff's claim before the settlement, presumably from the bills that plaintiff mailed to defendant.[5] The panel opined that, in this situation, the settlement could not constitute a "good faith" payment covering the noticed third-party claim for purposes of MCL 500.3112. The panel reasoned in part:

> [W]hile a provider's right to payment from the insurer is created by the right of the insured to benefits, an insured's agreement to release the insurer in exchange for a settlement does not release the insurer with respect to the provider's noticed claims unless the insurer complies with MCL 500.3112.[6]

According to the panel, in order to discharge liability under these circumstances, MCL 500.3112 "requires that the insurer apply to the circuit court for an appropriate order directing how the no-fault benefits should be allocated."[7] The Court of Appeals therefore reversed the circuit court's order granting summary disposition in favor of defendant and remanded the case for further proceedings.

Defendant applied for leave to appeal in this Court. As previously mentioned, this Court granted leave to consider in part "whether a healthcare provider has an independent or derivative claim against a no-fault insurer for no-fault benefits[.]"[8]

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[5] *Covenant*, 313 Mich App at 53.

[6] *Id*. at 54.

[7] *Id*. at 53.

[8] *Covenant*, 499 Mich 941.

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

The circuit court granted summary disposition under MCR 2.116(C)(7), which applies when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of release . . . ." This Court reviews de novo a court's decision to grant summary disposition.[9]

This Court also reviews de novo questions of statutory interpretation.[10] The role of this Court in interpreting statutory language is to "ascertain the legislative intent that may reasonably be inferred from the words in a statute."[11] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[12] When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.[13] "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[14]

III. ANALYSIS

The Court of Appeals concluded that the release executed between Stockford and defendant did not release defendant from liability regarding plaintiff's claim. This conclusion was premised on the notion that

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[9] *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

[10] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014).

[11] *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[12] *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

[13] *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

[14] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

a healthcare provider who provides services to a person injured in a motor vehicle accident possesses its *own* statutory claim against the injured person's no-fault insurer to compel payment for services rendered on behalf of the insured. The Court of Appeals panel in the instant case did not critically dissect the pertinent statutory provisions of the no-fault act to find support for this premise but instead followed previous decisions of the Court of Appeals, which it was bound to do.[15] Plaintiff urges us to likewise follow the long line of cases from the Court of Appeals recognizing that a healthcare provider may sue a no-fault insurer to recover PIP benefits under the no-fault act. We decline plaintiff's invitation, relying instead on the language of the no-fault act to conclude that a healthcare provider possesses no statutory cause of action against a no-fault insurer for recovery of PIP benefits.

A. COURT OF APPEALS CASELAW

The foundation of any opinion interpreting a statutory provision is the parsing of the words of the pertinent act or statute under review. This case is no exception. Nonetheless, we are presented with decades of Court of Appeals caselaw concluding that a healthcare provider may assert a direct cause of action against a no-fault insurer to recover no-fault benefits. Although this Court is not in any way bound by the opinions of the Court of Appeals, we nevertheless tread cautiously in considering whether to reject a long line of caselaw developed by our intermediate appellate

[15] MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

court. That being said, the longevity of a line of Court of Appeals caselaw will not deter this Court from intervening when that caselaw clearly misinterprets the statutory scheme at issue. Correcting erroneous interpretations of statutes furthers the rule of law by conforming the caselaw of this state to the language of the law as enacted by the representatives of the people. And it is imperative that this Court aim to conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law.[16] We therefore begin our analysis with a brief discussion of how this issue developed in the Court of Appeals.

There are three cases on which the Court of Appeals has frequently relied when concluding that a health-care provider may directly sue a no-fault insurer. The first is *LaMothe v Auto Club Ins Ass'n*,[17] in which the panel opined that it could "anticipate that health care services providers, as practical litigants, would bypass the insured and directly sue, pursuant to third-party beneficiary theories, the entity with prospects identical to their own for engendering jury sympathy—the insurer." Significantly, the *LaMothe* parties did not litigate whether the no-fault act permits such a direct cause of action because the insurer had agreed via contractual provision "to fully defend and indemnify the insured from liability . . . ."[18]

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[16] *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000) (stating that "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions," because "the essence of the rule of law" is "to know in advance what the rules of society are").

[17] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

[18] *Id*. at 583. The Court of Appeals quoted a letter that the insurer sent the insured's attorney, which stated in part that "[i]f any of the medical providers bring a claim against [the insured], [the insurer] will defend

The following year, in *Munson Med Ctr v Auto Club Ins Ass'n*,[19] the Court of Appeals stated that the defendant insurer's "obligation to pay" and the plaintiff healthcare provider's "right to be paid for the injureds' no-fault medical expenses arise pursuant to MCL 500.3105, 500.3107, and 500.3157 . . . ." But there was no indication that this "right" was in dispute; the central issue in the case concerned the meaning of "customary charges." Moreover, while the panel cited particular statutory provisions, it did not parse the language of those provisions or provide any meaningful analysis to support the implication that a healthcare provider possesses a direct cause of action against a no-fault insurer for PIP benefits.

Also frequently cited for the proposition that a healthcare provider may directly sue a no-fault insurer is *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*.[20] But as in *LaMothe*, the issue was neither presented nor decided in *Lakeland* because the defendant insurer in *Lakeland* "did not dispute that plaintiff had the legal right to commence this action for payment of medical services rendered to defendant's insured."[21] Instead, the litigated issue was whether the provider could recover penalty interest under MCL 500.3142 and attorney fees under MCL 500.3148.[22]

None of these cases decided whether healthcare providers possess a statutory cause of action against

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and indemnify him. In fact, [the insurer] will waive any technical defects and allow the provider to sue the [insurer] directly so that [the insured] won't even have to be a party to the litigation." *Id*. at 583 n 4.

[19] *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 381; 554 NW2d 49 (1996).

[20] *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002).

[21] *Id*. at 37.

[22] *Id*. at 44.

no-fault insurers. Despite this, subsequent panels of the Court of Appeals have, in published and unpublished cases alike, consistently relied on one or more of the cases just discussed as if they had decided the issue, generally failing to engage in any statutory analysis of their own to ground a healthcare provider's cause of action in the text of the no-fault act. This is aptly illustrated by the cases cited by the Court of Appeals in the instant case for the proposition that "it is . . . well settled that a medical provider has independent standing to bring a claim against an insurer for the payment of no-fault benefits."[23] Like *LaMothe*, *Munson*, and *Lakeland*, none of the cases cited by the Court of Appeals provides any textual analysis of the no-fault act to support this proposition.[24]

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[23] *Covenant*, 313 Mich App at 54, citing *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 396-397; 864 NW2d 598 (2014); *Moody v Home Owners Ins Co*, 304 Mich App 415, 440; 849 NW2d 31 (2014), rev'd on other grounds sub nom *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211; 884 NW2d 238 (2016); *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 448 n 1; 830 NW2d 781 (2013); *Lakeland Neurocare*, 250 Mich App at 42-43; *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 733; 650 NW2d 129 (2002).

[24] The panel in the instant case cited *Wyoming Chiropractic*, 308 Mich App at 396-397, in which the Court of Appeals did not itself analyze any section of the no-fault act to conclude that the no-fault act established a cause of action for healthcare providers. Instead, the panel in *Wyoming Chiropractic* relied on prior cases leading back to *Munson* and *Lakeland* as already having established this premise as "fact." The instant panel also cited *Moody*, 304 Mich App 415, and *Regents of the Univ of Mich*, 250 Mich App 719, both of which stated in a cursory manner that healthcare providers possess a claim or cause of action against no-fault insurers without citing any statutes or otherwise substantively addressing the issue. In *Moody*, the Court of Appeals recognized, without analyzing, that a provider could "bring an independent cause of action against a no-fault insurer," but that the provider's claim was "completely derivative of and dependent on" the claim of the patient insured. *Moody*, 304 Mich App at 440. In *Regents of the Univ of Mich*, the panel concluded that while the claims of the medical providers were "deriva-

In sum, the Court of Appeals' decision in this case was premised on the notion that a healthcare provider possesses a statutory cause of action against a no-fault insurer for payment of no-fault benefits. The panel gleaned this notion not from the text of the no-fault act, but from previous decisions of the Court of Appeals that are likewise devoid of the statutory analysis necessary to support that premise. We find this case-law unconvincing, and unlike the Court of Appeals panel, we are not bound by the conclusion that a healthcare provider possesses a right to bring a direct cause of action against a no-fault insurer to recover PIP benefits under the no-fault act. We instead rely on the language of the no-fault act itself to answer the question presented in this case.

B. STATUTORY ANALYSIS

It bears repeating that completely absent from the analysis in the Court of Appeals cases discussed earlier is a meaningful explanation of what language in the no-fault act creates a cause of action for healthcare providers against insurers. And indeed, the no-fault act does not, in any provision, explicitly confer on

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tive claims, they also ha[d] direct claims for personal protection insurance benefits." *Regents of the Univ of Mich*, 250 Mich App at 733, citing *Munson*, 218 Mich App 375, and *LaMothe*, 214 Mich App at 585-586. This language in *Regents of the Univ of Mich* appears in a passage discussing whether MCL 600.5821(4) or MCL 500.3145(1) governs the statute of limitations applicable when a political subdivision of the state is the plaintiff in a no-fault action; the opinion did not itself analyze the issue of a provider's right to directly sue a no-fault insurer. The only other case cited by the Court of Appeals is *Mich Head & Spine Institute*, 299 Mich App at 448 n 1, but the panel in that case merely referred to the phrase "for the benefit of" in MCL 500.3112 and added "which this Court has recognized creates an independent cause of action for healthcare providers." The Court cited only *Lakeland*, without providing any statutory analysis of its own.

healthcare providers a direct cause of action against insurers. In fact, only two sections of the act, MCL 500.3157 and MCL 500.3158, even mention healthcare providers. MCL 500.3157 states:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

MCL 500.3158(2) states:

> A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment.

The former provision, MCL 500.3157, merely sets forth a limitation on the charges that may be assessed by a healthcare provider for treatment of an injured person. That a provider has the right to charge a reasonable amount for its products, services, or accommodations in no way obligates an insurance carrier to directly reimburse the provider for those charges. The latter provision, MCL 500.3158(2), simply requires

that a healthcare provider make the injured person's medical records and certain treatment information available to the insurer. Neither of these provisions, by their express terms or by implication, confers on a healthcare provider a right to sue a no-fault insurer for reimbursement of the amounts it charged for treatment. Therefore, any such statutory right must be found in the sections of the no-fault act that do not explicitly refer to healthcare providers.

Plaintiff urges us to find support for a healthcare provider's direct cause of action in MCL 500.3105 and MCL 500.3107. MCL 500.3105(1) makes a no-fault insurer liable for the payment of PIP benefits. MCL 500.3105(1) states that "[u]nder 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." MCL 500.3107 provides that "personal protection insurance benefits are payable for" certain costs, including "[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," MCL 500.3107(1)(a), and "[w]ork loss consisting of loss of income from work," MCL 500.3107(1)(b). According to plaintiff, because benefits are payable for "reasonable charges" under MCL 500.3107(1)(a), including charges incurred for services rendered by healthcare providers under MCL 500.3157, the no-fault insurer must directly pay the provider's reasonable charges.

MCL 500.3105 and MCL 500.3107, when taken together, provide that an insurer is liable to pay benefits for certain listed costs. Yet these provisions do nothing more than define the scope and nature of the

requisite coverage. They do not identify to whom the insurer is liable or who has the right to assert a claim for benefits. Further, the language of MCL 500.3107(1)(a), which pertains to allowable expenses like those at issue here, is not amenable to an interpretation that would allow a healthcare provider to sue an insurer for reimbursement. MCL 500.3107(1)(a) provides that benefits are "payable" for "[a]llowable expenses consisting of all reasonable charges *incurred* . . . ." In the context of the no-fault act, this Court has defined "incur" as " '[t]o become liable or subject to, [especially] because of one's own actions.' "[25] Charges for healthcare services rendered are not "incurred" by a healthcare provider because a provider is not subject to charges for the products, services, and accommodations it delivers to others. Nor do providers become "liable" for allowable expenses. Rather, charges for healthcare are incurred by others, most commonly patients, and those patients are the ones who become liable for payment of those charges. Therefore, because a healthcare provider does not incur reasonable charges and is not liable for allowable expenses, plaintiff's argument that MCL 500.3107(1)(a) permits a provider to directly sue an insurer for reimbursement is not persuasive.[26] Moreover, plaintiff's interpretation of MCL 500.3107(1)(a) improperly requires the Court to read into MCL 500.3107(1)(a) a meaning that the

[25] *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), quoting *Webster's II New College Dictionary* (2001) (alterations in original).

[26] Plaintiff also points to the word "payable" in MCL 500.3107 to argue that no-fault benefits are to be paid to a healthcare provider for all reasonable charges for medical treatment. But MCL 500.3107 is silent regarding to whom the benefits are payable. Plaintiff does not explain how this provision vests a provider with rights against an insurer or otherwise indicates that benefits are payable to a provider.

Legislature did not manifest through the words of MCL 500.3107(1)(a) itself.[27]

Plaintiff, like previous panels of the Court of Appeals,[28] largely relies on MCL 500.3112 in support of its argument that healthcare providers possess a direct cause of action against no-fault insurers. That provision states in full:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:
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> (a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.
>
> (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse. [MCL 500.3112.]

While this section, which addresses to whom PIP benefits are payable, undoubtedly allows for the com-

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[27] See *Roberts*, 466 Mich at 63.

[28] See, e.g., *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*, 313 Mich App 113; 881 NW2d 120 (2015); *Wyoming Chiropractic*, 308 Mich App 389.

mon practice of no-fault insurers directly paying healthcare providers, its text does not require direct payment of healthcare providers or give providers any right to directly sue a no-fault insurer, as will be evidenced through a sentence-by-sentence examination of the provision.

The first sentence, which provides that PIP benefits "are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents," addresses both allowable expenses and survivor's loss and sets forth the groups of persons to whom an insurer may direct payment to discharge its liability to the insured. The Legislature's use of the disjunctive word "or" indicates "an alternative or choice between two things."[29] The word immediately preceding the disjunctive options is "payable," which is defined by the *Merriam-Webster's Collegiate Dictionary* to mean "that may, can, or must be paid."[30] Therefore, according to the first sentence of MCL 500.3112, PIP benefits, which are paid by the insurer, "may, can, or must be paid" either (1) to the injured person *or* (2) for the benefit of the injured person. In the case of the injured person's death, PIP benefits "may, can, or must be paid" either (1) to the decedent's dependents *or* (2) for the benefit of those dependents. This sentence does nothing more than allow a no-fault insurer to satisfy its obligation to the insured by paying the injured

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[29] See *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011) (" 'Or' is . . . a disjunctive [term], used to indicate a disunion, a separation, an alternative.") (quotation marks and citation omitted; alteration in original).

[30] *Merriam-Webster's Collegiate Dictionary* (11th ed). "Payable" is not defined in the no-fault act. We therefore presume that the Legislature intended for the word to have its common and ordinary meaning. MCL 8.3a. To assist in determining the ordinary meaning of relevant words, this Court may consult a dictionary. *Klooster v Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011).

person directly or by paying a party providing PIP services on the injured person's behalf. That a third party may *receive* payment directly from an insurer for PIP benefits does not mean that the third party has a statutory *entitlement* to that method of payment.

Plaintiff urges us to find, like previous Court of Appeals panels have, a provider cause of action in MCL 500.3112's phrase "for the benefit of the injured person." This language, however, does not state that benefits are payable "to the provider," or otherwise indicate that a provider itself has an entitlement to benefits. To the contrary, it expressly leaves that entitlement with the injured person and merely recognizes that one who does not have a direct cause of action against a no-fault insurer may be paid directly by the insurer, but only in order to benefit the injured person. Simply stated, nothing in the first sentence is properly construed as bestowing a statutory cause of action on the injured person's healthcare provider.

The second sentence of MCL 500.3112 reads:

> Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.

This sentence allows a no-fault insurer to discharge its liability through payment to or for the benefit of a person it believes is entitled to benefits, as long as the payment is made in good faith and the insurer has not been previously "notified in writing of the claim of some other person." Plaintiff argues that healthcare providers qualify as "some other person" for purposes of this sentence. Even if this were so, plaintiff still has not demonstrated a legal right of action against a

no-fault insurer. The phrase "claim of some other person" does not itself confer on any person a "claim"[31] or "right" to recover benefits. Rather, it presupposes that "some other person" otherwise possesses a claim for PIP benefits against the insurer.[32] Significantly, plaintiff is unable to demonstrate that the no-fault act elsewhere confers on a healthcare provider a right to claim benefits from a no-fault insurer.

The third sentence of MCL 500.3112 reads, "If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order." This sentence merely provides a procedure for resolving doubts about which persons are entitled to benefits; it does not itself confer a right or entitlement on any person, including a healthcare provider, to sue a no-fault insurer.[33] And the sentence's

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[31] Because the no-fault act does not define "claim," we may consult a dictionary definition. *Klooster*, 488 Mich at 304. The relevant dictionary definitions of "claim" include "a demand for something due or believed to be due" and "a right to something." *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, to have a "claim" under the no-fault act, a provider must have a right to payment of PIP benefits from a no-fault insurer.

[32] We need not decide precisely to whom this sentence applies in order to conclude that it does not confer on a healthcare provider the right to sue for payment of benefits. It seems, however, that this sentence is likely applicable primarily to dependents and survivors given that the end of the statute pertains to the allocation of benefits to those groups of persons.

[33] Plaintiff argues that a healthcare provider qualifies as a "person" for purposes of the third sentence of MCL 500.3112 given that the Insurance Code, in MCL 500.114, defines the word "person" to include corporate entities, like healthcare providers. But this Court long ago recognized that, given its inconsistent use throughout the no-fault act, "the term 'person' must be construed in the exact context in which it is used to ascertain its precise meaning." *Belcher v Aetna Cas & Surety*

reference to "apportionment" cannot logically pertain to allowable expenses like the reasonable charges incurred for healthcare services, because an injured person owes the provider, and is entitled to PIP benefits for, the entirety of those allowable expenses under MCL 500.3107(1)(a), not an apportioned amount.[34]

Finally, the fourth sentence provides, "The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate." And the fifth sentence

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Co, 409 Mich 231, 258; 293 NW2d 594 (1980). Plaintiff has not explained why "person," in the context of the third sentence of MCL 500.3112, refers to a corporate entity like a healthcare provider. In any event, even if a healthcare provider were a "person" for purposes of this sentence, the sentence itself, as discussed, does not purport to create or confer any rights with respect to the "persons" covered by its doubt-resolution procedure.

[34] See *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012) (noting that MCL 500.3107(1) allows "unlimited lifetime benefits" for allowable expenses). In contrast, apportionment of benefits is necessary when the allowable benefits are finite in amount, as is the case with survivor's loss benefits. See MCL 500.3108(1).

Again, we need not decide precisely to whom this sentence pertains in order to conclude that it does not confer on a healthcare provider the right to sue for payment of benefits. Nonetheless, we note that it would seem to primarily pertain to dependent and survivor benefits. There are several scenarios in which there could be doubt regarding the proper dependent or survivor to receive benefits. For example, under MCL 500.3110(1), doubt could emerge about whether a surviving spouse or a minor child is a proper person to receive benefits if it were unclear whether they were living in the same house as the victim. Doubt could also emerge under MCL 500.3110(2) regarding the proper apportionment of benefits because "the extent of [one's] dependency shall be determined in accordance with the facts as they exist at the time of death." Similarly, doubt could emerge under MCL 500.3110(3) because this subsection conditions "dependent" status on particular factual inquiries. In those circumstances, a hearing might be necessary for the circuit court to "designate the payees and make an equitable apportionment" of benefits. MCL 500.3112.

addresses the payment of dependent and survivor benefits in the absence of a court order. These sentences contain no language that can be reasonably understood as creating a right for a healthcare provider to directly sue a no-fault insurer. As in the third sentence, the reference to "apportionment" in the fourth sentence is inapplicable in the context of charges for services rendered by a healthcare provider. Similarly, the fourth sentence's call for the court to take into account "the relationship of the payees to the injured person" is inapt in the context of a healthcare provider's bill for services rendered. If the injured person qualifies for benefits, the insurer is liable under MCL 500.3107(1)(a) to pay "all reasonable charges incurred" by the injured person; no further inquiry into the "relationship" between the injured person and the provider is relevant.[35] And the fifth sentence on its face pertains only to payment to dependents and survivors. Therefore, the fourth and fifth sentences clearly do not create a statutory cause of action for healthcare providers.

While plaintiff primarily cites MCL 500.3112 as establishing a healthcare-provider cause of action under the no-fault act, there is nothing in the language of this provision that can reasonably be interpreted as vesting a healthcare provider with a right to demand reimbursement from a no-fault insurer for services the provider rendered to an insured. Although this provi-

[35] In contrast, the relationship between a payee and an injured person is relevant when survivor and dependent benefits are at issue. Certain individuals are conclusively presumed to be dependents under MCL 500.3110(1), but when one of those conclusive relationships is not at issue, "questions of dependency and the extent of dependency shall be determined in accordance with the facts as they exist at the time of death" under MCL 500.3110(2), which may require an inquiry into the parties' relationship.

sion allows insurers to pay a provider of no-fault services directly "for the benefit of" the insured, it does not establish a concomitant claim enforceable by an insured's benefactors.[36] Plaintiff has not pointed to any other provision in the no-fault act that bestows on healthcare providers a right to directly sue a no-fault insurer.[37]

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[36] The dissent asserts that this conclusion "renders surplusage the possibility of payment to a third party like a healthcare provider." This is not so. By permitting insurers to directly pay healthcare providers on the injured person's behalf, MCL 500.3112 allows the insurer to eliminate the insured as a conduit in the payment process, relieving the insured from having to redirect to the healthcare provider payment received from the insurer. It is not surplusage for the statute to expressly permit an insurer to directly pay its insured's healthcare bills in order to discharge its obligation to its insured. The fact that the statute grants that permission does not create a right in the providers to sue the insurer for payment.

[37] Other provisions cited by plaintiff in support of its argument that healthcare providers have a direct claim of their own are MCL 500.3145(1) and MCL 500.3148.

MCL 500.3145(1), the no-fault statute of limitations provision, provides that "[a]n action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury . . . ." Plaintiff argues that this provision does not only permit the injured person to bring a lawsuit, but that it plainly allows a timely lawsuit for recovery of PIP benefits "payable under this chapter" and that under MCL 500.3107, MCL 500.3157, and MCL 500.3112, allowable expenses are payable to healthcare providers. Consequently, plaintiff contends that MCL 500.3145(1) contemplates that providers will bring lawsuits to recover benefits. According to plaintiff, the third sentence of MCL 500.3145(1) confirms this interpretation by stating that "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." Under plaintiff's interpretation, the Legislature's use of the word "claimant," instead of "injured person," demonstrates that other persons, like providers, may bring lawsuits to recover PIP benefits.

MCL 500.3148, which pertains to attorney fees, states in part that "[a]n attorney is entitled to a reasonable fee for advising and represent-

Two textual clues found elsewhere in the no-fault act support the conclusion that a healthcare provider does not possess a statutory cause of action against a no-fault insurer. The priority statutes, MCL 500.3114 and MCL 500.3115, define against whom an individual may make a claim for benefits. The default rule for priority is found in MCL 500.3114(1), which states, in part, that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." "Person" in this instance cannot mean a healthcare provider because providers are not named in the PIP insurance policy and quite simply do not sustain accidental bodily injuries. MCL 500.3114(2) states that "[a] person suffering accidental bodily injury . . . shall receive the [PIP] benefits to which the person is entitled from the insurer of the motor vehicle," and MCL 500.3114(4), (5), and (6) prioritize the order in which "a person suffering accidental bodily injury arising from a motor vehicle accident . . . shall claim personal protection insurance benefits from [multiple] insurers[.]" MCL 500.3115(1) similarly sets forth the insurer priority for "a person suffering accidental bodily injury while not an occupant of a motor vehicle," and it provides that

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ing a claimant in an action for personal or property protection insurance benefits which are overdue." MCL 500.3148(1). Plaintiff similarly argues that the statute's reference to "claimant" rather than "injured person" indicates that healthcare providers have the right to bring an independent lawsuit for payment of PIP benefits.

Plaintiff's reliance on the references to "claimant" rather than "injured person" in MCL 500.3145(1) and MCL 500.3148 is helpful to plaintiff's argument only if healthcare providers are proper claimants under the no-fault act. The provisions cited by plaintiff do not establish that providers possess a claim under the act. Because MCL 500.3145(1) and MCL 500.3148 do not create rights to PIP benefits that do not otherwise exist, plaintiff's reliance on these provisions is misplaced.

those persons "shall claim [PIP] benefits" in the order provided in MCL 500.3115(1). In both of these provisions, the Legislature specifically contemplates that the entitlement or claim belongs to the person who has "sustained accidental bodily injury," and the statutory language goes into great detail regarding the priority of insurers for claims by a person suffering such injury. Notably lacking from these entitlement provisions is any arguable reference to or contemplation of a healthcare provider's entitlement to benefits under the no-fault act.[38]

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[38] This conclusion is consistent with *Belcher*, 409 Mich at 236, in which this Court considered whether "no-fault insurance benefits [are] to be paid to the surviving dependent(s) of a deceased uninsured motorist[.]" (Quotation marks and citation omitted.) In analyzing this issue, this Court opined that the no-fault act "operates to compensate only a limited class of persons for economic losses sustained as a result of motor vehicle accidents. Under personal protection insurance, benefits are made payable only to injured persons or surviving dependents of the injured person." *Id*. at 243-244. The Court further described MCL 500.3114 and MCL 500.3115 as the no-fault act's only entitlement provisions "in the sense that they are the only sections where persons are given the right to claim personal protection insurance benefits from a specific insurer." *Id*. at 252. *Belcher* is not directly applicable in this case because it did not examine whether a healthcare provider possesses a cause of action under the no-fault act. Contrary to the dissent's assertion, we do not rely on *Belcher* to exclude the possibility of a provider claim, nor do we contend that an injured person's cause of action under the no-fault act derives entirely from MCL 500.3114 and MCL 500.3115. Instead, we simply note that *Belcher*'s holding is consistent with our independent conclusion that healthcare providers possess no statutory cause of action because, just like the remainder of the no-fault act, neither MCL 500.3114 nor MCL 500.3115 contemplates that a healthcare provider may directly claim recovery for the cost of providing PIP benefits.

Moreover, in *Belcher* this Court concluded that, while the text of the entitlement provisions gives only injured persons the right to assert a claim for benefits against a no-fault insurer, the Legislature clearly intended that surviving dependents recover certain losses in the event that the injured person dies, as evidenced by the provision of benefits for

In sum, a review of the plain language of the no-fault act reveals no support for plaintiff's argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer.[39] This conclusion does not mean that a healthcare provider is without recourse; a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges.[40] However, a provider simply has no statutory cause of action of its own

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survivors in MCL 500.3108 and MCL 500.3112. *Id*. at 254-255. To effectuate the intent made explicit in the statutory language, the Court inferred from the language of MCL 500.3114 and MCL 500.3115 that when an injured person is given the right to recover benefits from a specific insurer, the surviving dependents have the same right of recovery for their losses. *Id*. at 255. Contrary to the dissent's belief, no similar statutory basis exists for recognizing this type of claim on the part of an injured person's healthcare provider. We will not infer a cause of action for healthcare providers when the language of the no-fault act indicates no such desire on the part of the Legislature.

[39] We conclude today only that a healthcare provider possesses no statutory right to sue a no-fault insurer. While defendant argues that a provider likewise possesses no contractual right to sue a no-fault insurer given that healthcare providers are incidental rather than intended beneficiaries of a contract between the insured and the insurer, this Court declines to make such a blanket assertion. That determination rests on the specific terms of the contract between the relevant parties. See *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003) ("A person is a third-party beneficiary of a contract only when *that contract* establishes that a promisor has undertaken a promise 'directly' to or for that person.") (citations omitted; emphasis added). This Court need not consider whether plaintiff possesses a contractual right to sue defendant in the instant case because plaintiff did not allege any contractual basis for relief in its complaint.

[40] See *Miller v Citizens Ins Co*, 490 Mich 904 (2011). Moreover, our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. See MCL 500.3143; *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998) (noting that only the assignment of future benefits is prohibited by MCL 500.3143).

to directly sue a no-fault insurer. Accordingly, we overrule all Court of Appeals caselaw inconsistent with this conclusion.

IV. APPLICATION

Given our conclusion that healthcare providers possess no statutory cause of action under the no-fault act, it is unnecessary to consider the substance of the Court of Appeals' opinion. Because a healthcare provider possesses no statutory right to sue a no-fault insurer, we need not examine whether a release executed between an insured and an insurer releases an insurer's liability for a healthcare provider's "claim." Further, the release executed in this case between Stockford and defendant does not appear to extinguish Stockford's liability to plaintiff. And nothing in this opinion would bar plaintiff from seeking reimbursement of the amount due it directly from Stockford, the person to whom services were provided.[41]

V. CONCLUSION

The Court of Appeals' opinion in this case is premised on the notion that an injured person's healthcare provider has an independent statutory right to bring an action against a no-fault insurer for payment of no-fault benefits. This premise is unfounded and not supported by the text of the no-fault act. A healthcare provider possesses no statutory cause of action under the no-fault act against a no-fault insurer for recovery of PIP benefits. Plaintiff therefore has no statutory entitlement to proceed with its action against defendant. Accordingly, we reverse the judgment of the

[41] See *Miller*, 490 Mich at 904.

Court of Appeals and remand this case to the Saginaw Circuit Court for entry of an order granting summary disposition to defendant.

MARKMAN, C.J., and MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with ZAHRA, J.

BERNSTEIN, J. (*dissenting*). I respectfully disagree with the majority's conclusion that healthcare providers do not possess a cause of action under Michigan's no-fault act, MCL 500.3101 *et seq*., to recover personal protection insurance (PIP) benefits from a no-fault insurer for services provided to an insured. I believe that MCL 500.3112 establishes that an independent action may be brought by a healthcare provider against a no-fault insurer and that the majority's contrary construction is not supported by the plain language of the statute. Accordingly, I would affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Jack Stockford, who held no-fault insurance through defendant, State Farm Mutual Automobile Insurance Company, was injured in a motor vehicle accident on June 20, 2011. Plaintiff, Covenant Medical Center, Inc., provided medical services to Stockford on multiple occasions in the following months. Plaintiff sent defendant bills for these services totaling $43,484.80 on July 3, 2012, August 2, 2012, and October 9, 2012. Defendant sent plaintiff a written denial of payment on November 15, 2012.

Meanwhile, apparently unbeknownst to plaintiff, Stockford had filed suit against defendant on June 4, 2012, seeking PIP benefits for expenses arising out of the June 20 accident. Stockford entered into an agree-

ment with defendant on April 2, 2013, by which defendant consented to pay Stockford $59,000 in exchange for a full and final release "regarding all past and present claims incurred through January 10, 2013, for what are commonly referred to as first party benefits or personal injury protection benefits . . . ." As part of this broad release, Stockford agreed to indemnify defendant against claims made by any providers. Plaintiff was specifically named in this portion of the release agreement.

Plaintiff did not learn of the release until it filed suit against defendant on April 25, 2013. Defendant was granted summary disposition pursuant to MCR 2.116(C)(7) under the theory that Stockford's release barred plaintiff's claim. The Court of Appeals reversed in a published per curiam opinion, concluding that defendant's settlement agreement with Stockford had not been a "good faith" payment that could discharge its liability to plaintiff under MCL 500.3112. *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50; 880 NW2d 294 (2015).

II. ANALYSIS

I agree with the majority that none of the caselaw relied on by the Court of Appeals directly addressed the question of whether healthcare providers have an independent cause of action for PIP benefits under the no-fault act. However, this does not necessarily mean that the Court of Appeals' longstanding interpretation of the no-fault act was inconsistent with the plain language of the statute. While no provision of the no-fault act confers a direct cause of action specific to healthcare providers, the plain language of MCL 500.3112 suggests that such a cause exists. Furthermore, although no provision of the no-fault act explic-

itly states that a healthcare provider may have a claim for PIP benefits, healthcare providers are no different in this regard from any other would-be claimant under the no-fault act, including injured people themselves.

No provision of the no-fault act expressly defines "claimant." However, provisions such as MCL 500.3112 contemplate who may *receive* PIP benefits under the no-fault act, and the ability to receive benefits is necessary in order to claim them. Absent any specific statement establishing who may bring a claim for PIP benefits, we must consider the plain language of MCL 500.3112, which provides:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:
>
> (a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.
>
> (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

The first sentence of MCL 500.3112 suggests that healthcare providers have a claim for PIP benefits. It provides that PIP benefits "are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents." MCL 500.3112. As the majority notes, this plainly means that insurers may pay benefits directly to healthcare providers, because such a payment would be "for the benefit of" the injured person or the injured person's dependents. *Id*. The majority clearly believes that an injured person is entitled to bring an action to recover these benefits, hanging its hat on the "shall claim" language of MCL 500.3114 and MCL 500.3115. But this language no more establishes an entitlement to make a legal claim than does the "payable to or for the benefit of" language of MCL 500.3112.

In the absence of any express entitlement provision in MCL 500.3112, the majority insists that MCL 500.3114 and MCL 500.3115 function as entitlement provisions for injured persons. However, as the majority admits, these are priority statutes that govern the order of priority among insurers rather than explicitly defining who may be a claimant under the no-fault act. The majority asserts that these two provisions are entitlement provisions because they include language to the effect that an injured person " 'shall claim [PIP] benefits,' " *ante* at 216 (alteration in original), but this interpretation ignores the context in which that language appears. The "shall claim" language appears in MCL 500.3114(4) and (5) and MCL 500.3115(1). In each of those provisions, the "shall claim" language is part of the longer phrase "shall claim [PIP] benefits from insurers in the following order of priority," immediately followed by a list of the insurers that may be required to pay benefits. MCL 500.3114(4) and (5);

MCL 500.3115(1). The mandate of these statutes is not to define who must *receive* benefits, but who must *pay* them.

Indeed, MCL 500.3114 and MCL 500.3115 cannot possibly define the bounds of who can bring an action for PIP benefits. The majority's reliance on *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 251-252; 293 NW2d 594 (1980), for the proposition that MCL 500.3114 and MCL 500.3115 are entitlement provisions that exclude the possibility of a provider claim is inapt. Although the *Belcher* Court referred to MCL 500.3114 and MCL 500.3115 as entitlement provisions in some sense, it rejected the notion that these two sections of the no-fault act constituted the be-all and end-all of potential PIP benefit claimants, remarking that neither provision gave survivors an express right to claim benefits even though survivors' benefits are clearly recognized in MCL 500.3108 and MCL 500.3112. *Belcher*, 409 Mich at 254-255.

The *Belcher* Court was right. A finding that MCL 500.3114 and MCL 500.3115 are the only statutes in the no-fault act that establish an entitlement to a legal claim would render nugatory the language in MCL 500.3112 that permits payment of benefits to dependents and to other parties for the benefit of the injured person (a group of recipients that the majority concedes would include healthcare providers). See *ante* at 208-209. Such a reading would run counter to the rule of statutory interpretation barring us from interpreting statutes in a manner that would render any portion of a statute surplusage or nugatory. *Wyandotte Electrical Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 140; 881 NW2d 95 (2016). Therefore, I cannot interpret MCL 500.3114 and MCL 500.3115 as the only provisions in the no-fault act that establish an entitlement to a legal claim for PIP benefits.

Nor can I conclude that MCL 500.3112 supports the notion that injured persons have a cause of action for PIP benefits but healthcare providers do not. MCL 500.3112 makes PIP benefits "payable"—that is, benefits "that may, can, or must be paid"[1]—to either the injured person *or* to someone else for that person's benefit, e.g., a healthcare provider. The statute does not treat these options differently. It is inconsistent to conclude that healthcare providers do not have an entitlement to PIP benefits while an injured person does. Healthcare providers cannot be barred from seeking to enforce their right to payment under this provision.[2]

The remainder of MCL 500.3112 does not undercut the conclusion that providers have an entitlement to a legal claim for PIP benefits. Indeed, the remainder of this provision does not discuss entitlement to benefits, but rather delineates procedures to be followed when there is some dispute among claimants to benefits. The second sentence of MCL 500.3112 explains that a good-faith payment of PIP benefits discharges an insurer's liability unless the insurer has received written notice of "the claim of some other person." The third sentence allows an insurer, claimant, or other interested party to seek a court order determining the proper person to receive benefits or the proper apportionment of benefits. The fourth permits a court to designate payees or apportion benefits as it considers

[1] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[2] To the extent that the majority argues that healthcare providers are not entitled to benefits because they do not "incur" charges within the meaning of MCL 500.3107(1)(a), it is incorrect. Healthcare providers clearly become liable for expenses arising out of the treatment of injured persons, expenses that include, among other things, human labor (and associated wages and salaries) and the cost of medical equipment and its operation.

appropriate, while the remainder of the provision directs an insurer's payment of benefits in the absence of a court order.

The majority suggests that these aspects of MCL 500.3112 are inconsistent with the notion that the no-fault act establishes a healthcare provider's entitlement to a legal claim, but this is simply not the case. Although the directives in MCL 500.3112 do not in themselves entitle healthcare providers to benefits, they do not derogate the entitlement to make a legal claim alluded to in the first sentence of MCL 500.3112. The majority suggests that the bulk of MCL 500.3112 cuts against the notion of a provider claim and must be limited to dependent and survivor benefits, but this is not true. For example, contrary to the majority's assertion, the reference to apportionment in the third sentence is not limited in this fashion. "Apportionment" as used in that sentence could certainly apply to expenses incurred for healthcare services if, for example, an injured person received treatment from multiple providers resulting in PIP-qualifying charges. Nor do the fourth and fifth sentences suggest that the entirety of MCL 500.3112 is limited to dependent and survivor benefits. These sentences instead provide purely discretionary rubrics a trial court may follow when issuing an order. These sentences do not prevent the distribution of benefits to a healthcare provider.

In sum, the no-fault act does not expressly grant healthcare providers the right to directly sue insurers for PIP benefits. But it does not expressly grant that right to any party, not even an insured party injured in a motor vehicle accident. If we are to require an express statutory provision in order to create a cause of action, and no such provision appears in the no-fault act, it would follow that no party could ever bring suit

to compel an insurer to pay PIP benefits. But it simply cannot be that the Legislature created a statutory scheme for the distribution of PIP benefits that no party could ever recover if an insurer denied coverage. MCL 500.3112 permits payment of PIP benefits to either an injured person or to a healthcare provider because direct payment to the provider would be for the benefit of the injured person. To hold that only an injured person is entitled to enforce this right to payment renders surplusage the possibility of payment to a third party like a healthcare provider. To avoid such an interpretation of the language of the no-fault act, healthcare providers must have a claim for PIP benefits.

III. APPLICATION

Because the no-fault act gives healthcare providers a claim for PIP benefits, I believe that the Court of Appeals reached the correct result in this case. In theory, an agreement like the one between Stockford and defendant could extinguish an insurer's liability for PIP benefits arising out of a particular accident. However, the second sentence of MCL 500.3112 provides:

> Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.

As the Court of Appeals found, the release executed by Stockford and defendant was not in good faith. Defendant had been made aware of plaintiff's claim through the bills plaintiff transmitted to it. However, defendant entered into the settlement with Stockford and sought

to permanently foreclose plaintiff's claim for PIP benefits without informing plaintiff.[3] The Court of Appeals' conclusion that the settlement with Stockford did not constitute a good-faith payment was eminently reasonable, as was the Court's concomitant conclusion that the payment did not discharge defendant's liability as contemplated by the second sentence of MCL 500.3112.

IV. CONCLUSION

I disagree with the majority's conclusion that the no-fault act does not give healthcare providers the right to bring an action against a no-fault insurer for PIP benefits. That reading renders nugatory the first sentence of MCL 500.3112, which permits payment of PIP benefits to healthcare providers. Because I believe that healthcare providers like plaintiff are entitled to enforce the receipt of payment due and that the Court of Appeals correctly concluded that defendant's liability for PIP benefits under MCL 500.3112 was not discharged, I would affirm the judgment of the Court of Appeals.

WILDER, J., did not participate in the disposition of this matter.

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[3] It is, of course, interesting that in this settlement agreement defendant demanded indemnification against provider claims that it now insists cannot exist under the no-fault act.

PEOPLE v FREDERICK

PEOPLE v VAN DOORNE

Docket Nos. 153115 and 153117. Argued on application for leave to appeal March 9, 2017. Decided June 1, 2017.

Michael Frederick and Todd Van Doorne were separately charged in the Kent Circuit Court with various drug offenses after seven officers from the Kent Area Narcotics Enforcement Team made unscheduled visits to the defendants' respective homes during the predawn hours on March 18, 2014. Officers knocked on Frederick's door around 4:00 a.m. and on Van Doorne's door around 5:30 a.m. Officers woke defendants and their families for the purpose of questioning each defendant about marijuana butter that they suspected the defendants possessed. Both defendants subsequently consented to a search of their respective homes, and marijuana butter and other marijuana products were recovered from each home. Defendants moved to suppress the evidence, and the court, Dennis B. Leiber, J., denied both motions, concluding that the officers had not conducted a search by knocking on defendants' doors during the predawn hours and that the subsequent consent searches were valid. Defendants sought interlocutory leave to appeal, which the Court of Appeals denied in separate unpublished orders, entered October 15, 2014 (Docket Nos. 323642 and 323643). Defendants sought leave to appeal in the Supreme Court. The Supreme Court, in lieu of granting leave to appeal, remanded the cases to the Court of Appeals for consideration as on leave granted and directed the Court of Appeals to address whether the "knock and talk" procedure conducted in these cases was consistent with the Fourth Amendment as articulated in *Florida v Jardines*, 569 US 1 (2013). *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015). The Court of Appeals consolidated the two cases and issued a split decision. 313 Mich App 457 (2015). The majority concluded that the officers' predawn "knock and talk" visits were within the scope of the public's implied license because homeowners would be unsurprised to find a predawn visitor delivering a newspaper or seeking emergency assistance, but the dissenting judge concluded that the police

conduct violated the Fourth Amendment because the searches, which occurred during hours at which a homeowner would not expect visitors, were outside the scope of a proper knock and talk procedure. Defendants sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 499 Mich 952 (2016).

In a unanimous opinion by Justice MCCORMACK, in lieu of granting leave to appeal, the Supreme Court *held*:

The scope of the implied license to approach a house and knock is time-sensitive; it generally does not extend to predawn approaches. While approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search, when information-gathering is conjoined with a trespass, a Fourth Amendment search has occurred. In these cases, the police conduct exceeded the scope of the implied license to knock and talk because the officers approached the defendants' respective homes during the predawn hours; therefore, the officers trespassed on Fourth-Amendment-protected property. And because the officers trespassed while seeking information, they performed searches in violation of the Fourth Amendment.

1. The proper scope of a knock and talk is determined by the implied license that is granted to the general public. Therefore, a police officer not armed with a warrant may approach a home and knock precisely because that is no more than any private citizen might do. When police officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing. Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night. Background social norms that invite a visitor to the front door typically do not extend to a visit in the middle of the night. Accordingly, the scope of the implied license to approach a house and knock is time-sensitive; it generally does not extend to predawn approaches. Additionally, while approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search, when information-gathering is conjoined with a trespass, a Fourth Amendment search has occurred. In these cases, the police officers exceeded the scope of the implied license to knock and talk because the officers approached defendants' respective homes without warrants during the predawn hours; therefore, the officers trespassed on

Fourth-Amendment-protected property. And because the officers trespassed while seeking information about defendants' alleged possession of marijuana butter, they performed searches in violation of the Fourth Amendment.

2. Consent searches, when voluntary, are an exception to the warrant requirement. The voluntariness question turns on whether a reasonable person would, under the totality of the circumstances, feel able to choose whether to consent. Evidence obtained through an illegal search or seizure is tainted by that initial illegality unless sufficiently attenuated from it. Thus, even when consent is voluntary, if it is not attenuated from the unconstitutional search, the evidence must be suppressed. Three factors are considered in determining whether consent is sufficiently attenuated: (1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. In these cases, because the trial court determined that there was no Fourth Amendment violation, it did not consider whether the subsequent consent was attenuated from the illegality. Therefore, the cases had to be remanded to the trial court for consideration of that question in the first instance.

Reversed and remanded to the Kent Circuit Court to determine whether defendants' consent to search was attenuated from the officers' illegal search.

1. CONSTITUTIONAL LAW — FOURTH AMENDMENT — KNOCK AND TALK PROCEDURE — PREDAWN APPROACHES.

The proper scope of a knock and talk is determined by the implied license that is granted to the general public; the scope of the implied license to approach a house and knock is time-sensitive and generally does not extend to predawn approaches (US Const, Am IV).

2. CONSTITUTIONAL LAW — FOURTH AMENDMENT — KNOCK AND TALK PROCEDURE — ILLEGAL SEARCHES — INFORMATION-GATHERING CONJOINED WITH TRESPASS.

The proper scope of a knock and talk is determined by the implied license that is granted to the general public; while approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search, when information-gathering is conjoined with a trespass, a Fourth Amendment search has occurred (US Const, Am IV).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Shaw Law Group, PLC (by *Jeffrey P. Arnson*), for Michael Frederick.

Bruce Alan Block, PLC (by *Bruce Alan Block* and *Bogomir Rajsic III*), for Todd Van Doorne.

Amicus Curiae:

Michael D. Wendling, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

MCCORMACK, J. In these consolidated cases, we consider the constitutionality of two early morning searches of the defendants' homes. We conclude that the police conduct in both cases was unconstitutional; these were not permissible "knock and talks," but rather warrantless searches. Because of these illegal searches, the defendants' consent to search—even if voluntary—is invalid unless it is sufficiently attenuated from the illegality. Accordingly, we reverse the Court of Appeals' contrary determination and remand these cases to the Kent Circuit Court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

During the predawn hours on March 18, 2014, seven officers from the Kent Area Narcotics Enforcement Team (KANET) made unscheduled visits to the defendants' homes. Both defendants were employees of the corrections division of the Kent County Sheriff Department. Their names had come up in a criminal investi-

gation, and KANET decided to perform these early morning visits to the defendants' homes rather than waiting until daytime to speak with the defendants (or seeking search warrants). KANET knocked on defendant Michael Frederick's door around 4:00 a.m. and on defendant Todd Van Doorne's door around 5:30 a.m. Lieutenant Al Roetman, who was present at both searches, testified that everyone appeared to be asleep at both houses.

Both defendants and their families were surprised and alarmed by the intrusions. Van Doorne considered arming himself, as did Frederick's wife. Nonetheless, both defendants answered the door after a few minutes of knocking—each thinking that there must have been some sort of emergency.

Instead, each defendant found himself confronted with a group of police officers. The officers asked each defendant about marijuana butter that they suspected the defendants possessed. After a conversation with each defendant, during which the defendants were read their *Miranda*[1] rights, both defendants consented to a search of their homes and signed a consent form to that effect. Marijuana butter and other marijuana products were recovered from each house.

The defendants were charged with various drug offenses. Both moved to suppress evidence of the marijuana products found in their homes. The trial court denied both motions. The court concluded that KANET had not conducted a search by approaching the home and knocking, and that the subsequent consent search was a valid, voluntary search. The court distinguished *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013), noting that the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

police here did not use a drug-sniffing dog or otherwise try to search the home without knocking. Rather, because the police approached the home and knocked, the trial court held that these were valid knock and talks.

The defendants sought interlocutory leave to appeal, which the Court of Appeals denied. The defendants then sought leave to appeal in this Court. In lieu of granting leave to appeal, we remanded the cases to the Court of Appeals for consideration as on leave granted. *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015). We directed the Court of Appeals to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v Jardines* . . . ." *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

On remand, the Court of Appeals issued a split opinion. The majority concluded that the knock and talk procedures at issue were permitted by the Fourth Amendment. *People v Frederick*, 313 Mich App 457, 461; 886 NW2d 1 (2015). The majority emphasized that the officers approached the home, knocked, and waited to be received, and "*Jardines* plainly condones such conduct." *Id*. at 469. Though the police visits here occurred during the early morning hours, the majority concluded that they were nonetheless within the scope of the implied license because homeowners would be unsurprised to find a predawn visitor delivering a newspaper or seeking emergency assistance. *Id*. at 481.

Judge SERVITTO dissented. She concluded that the police conduct violated the defendants' Fourth Amendment rights. *Id*. at 496 (SERVITTO, J., dissenting). First, Judge SERVITTO noted that the *Jardines* majority and

dissent had seemed to agree, in dicta, that nighttime visits would be outside the scope of the implied license. *Id*. at 487-488. Further, Judge SERVITTO reasoned that the validity of a knock and talk is premised on "the implied license a homeowner extends to the public-at-large." *Id*. at 496. Because the hours the police arrived at the defendants' homes are not times at which most homeowners expect visitors, she concluded that the visits were outside the scope of a proper knock and talk. *Id*.

II. ANALYSIS

In general, a search or seizure within a home or its curtilage without a warrant is per se an unreasonable search under the Fourth Amendment. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996); *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967). Two arguments have been presented as to why this police conduct was lawful. First, the prosecution argues that the initial approach was a knock and talk, not a search. Second, the prosecution argues that the search that followed that initial approach was a consent search.

A. KNOCK AND TALK

A "knock and talk," when performed within its proper scope, is not a search at all. *Jardines*, 569 US at 8. The proper scope of a knock and talk is determined by the "implied license" that is granted to "solicitors, hawkers, and peddlers of all kinds." *Id*. (citation and quotation marks omitted). "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more

than any private citizen might do.' " *Id*., quoting *Kentucky v King*, 563 US 452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011).

In *Jardines*, the police approached a house via the front walk with a drug dog. *Jardines*, 569 US at 3-4. The dog alerted, indicating that it smelled contraband, and eventually sat at the front door of the home, where the odor was strongest. *Id*. at 4. Using this information, the police obtained a warrant, and their search of the home revealed marijuana plants. *Id*.

Justice Scalia, writing for the Court, employed a property-rights framework[2] to conclude that the pre-warrant conduct of the police constituted a search. The

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[2] In *Katz v United States*, 389 US 347, the Court broke with tradition by considering not whether the government had trod on the defendant's property interests, but rather whether it had violated his privacy interests. Subsequently, the Court clarified that *Katz* had not replaced the property-interests test; *Katz* merely added to it. *Alderman v United States*, 394 US 165, 180; 89 S Ct 961; 22 L Ed 2d 176 (1969) ("[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . .").

The Court reaffirmed the importance of the property-rights analysis in the Fourth Amendment context in *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012). In that case, the Court held that the warrantless installation of a GPS tracking device on the exterior of a Jeep and subsequent tracking of the defendant's movements on public roads constituted a search, despite the Court's earlier holdings that tracking of a defendant's movements on public roads was not a search. *Id*. at 404; cf. *United States v Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (holding that no search occurred when law enforcement tracked on public roads the location of a beeper that had been installed in a container before the defendant's possession of the container). The *Jones* Court distinguished *Knotts* on the ground that it did not involve a trespass. *Jones*, 565 US at 409-410. The violation of Jones's property rights, combined with the subsequent information-gathering, constituted a search. *Id*. at 407-408. The Court cautioned that "[t]respass alone does not qualify, but there must be conjoined with that . . . an attempt to find something or to obtain information." *Id*. at 408 n 5.

Court distinguished the case from *King*, in which the Court had held that a knock and talk was *not* a search, because the police in *Jardines*, unlike the police in *King*, had trespassed; although the public, and thus the police, generally have an implied license to "approach the door by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave," the police in *Jardines* had not complied with the scope of that implied license. *Id*. at 8. "[I]ntroducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*." *Id*. at 9. Thus, the police had trespassed on Fourth-Amendment-protected property.[3] *Id*.

Consistently with *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012), the *Jardines* Court required not only a trespass, but also some attempted information-gathering, to find that a search had occurred. *Jardines*, 569 US at 5-6; *Jones*, 565 US at 408 n 5 ("[P]ost-*Katz* we have explained that an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation. . . . Trespass alone does not qualify [as a search], but there must be conjoined with that . . . an attempt to find something or to obtain information.") (citations and quotation marks omitted). The *Jardines* Court

[3] The *Jardines* Court distinguished between trespasses that implicate the Fourth Amendment and those that do not. For instance, police may trespass and search in open fields without violating the Fourth Amendment because "an open field . . . is not one of those protected areas enumerated in the Fourth Amendment." *Jones*, 565 US at 411, citing *Oliver v United States*, 466 US 170, 177; 104 S Ct 1735; 80 L Ed 2d 214 (1984). But because the curtilage is part of the home, *Oliver*, 466 US at 180, and homes are protected by the Fourth Amendment, trespassing on the curtilage implicates Fourth Amendment protections.

concluded that the police conduct there included information-gathering, such that the behavior constituted a warrantless search of the curtilage. *Jardines*, 569 US at 10-11.

It is also clear from *Jones* and *Jardines* that "information-gathering" is not synonymous with a Fourth Amendment "search." Both *Jones* and *Jardines* held that conduct that would not amount to a search, standing alone, was nonetheless information-gathering. The information-gathering in *Jardines* was the use of a drug-sniffing dog—conduct that the Supreme Court of the United States has held is not a search when the police have not trespassed. *Id*. at 5; *Illinois v Caballes*, 543 US 405, 410; 125 S Ct 834; 160 L Ed 2d 842 (2005) (holding that a dog sniff conducted during a lawful traffic stop did not implicate legitimate privacy interests). Similarly, in *Jones*, the information-gathering was the tracking of the defendant's location on public streets —conduct that the Supreme Court has also held is not a search when the police have not trespassed. *Jones*, 565 US at 408 n 5; *United States v Knotts*, 460 US 276, 285; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (holding that a person traveling in an automobile on public roads has no reasonable expectation of privacy in his or her location). But information-gathering that is not a search nevertheless becomes a search when it is combined with a trespass on Fourth-Amendment-protected property.[4]

In *Jardines*, the majority and dissenting opinions address in dicta one issue that is particularly relevant

[4] For example, looking into the windows of a home from a sidewalk or other public area is not a search. But it *is* information-gathering, such that, if the police trespass on the home's curtilage and peer through the windows from that vantage point, they have conducted a search. The trespass converts conduct that would not otherwise constitute a search into a search.

here. In his dissent, Justice Alito noted that, "as a general matter, . . . a visitor [may not] come to the front door in the middle of the night without an express invitation." *Jardines*, 569 US at 20 (Alito, J., dissenting). In response, the majority opinion reasoned that the dissent "quite rightly" relied on the fact that a nighttime knock would be alarming in concluding that nightime visits would be outside the scope of the implied license. *Id*. at 9 n 3 (opinion of the Court) ("We think a typical person would find it a cause for great alarm (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch with or without a dog.") (citation, quotation marks, and emphasis omitted). Thus, the *Jardines* Court apparently agreed, albeit in dicta, that a nighttime visit would be outside the scope of the implied license (and thus a trespass).

We believe, as the Supreme Court suggested in *Jardines*, that the scope of the implied license to approach a house and knock is time-sensitive. *Id*.; *id*. at 20 (Alito, J., dissenting). Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night. See *id*. at 9 (opinion of the Court) ("There is no customary invitation to do *that*."). This custom was apparent to the investigating officers in this case. KANET officers testified candidly that it would be inappropriate for Girl Scouts or other visitors to knock on the door in the middle of the night, but evidently the officers believed that they were not bound by these customs.[5] But a knock and talk is not

[5] In fact, multiple KANET members testified that they performed knock and talks in the middle of the night on a regular basis. Roetman testified that "[j]ust because it hits the stroke of midnight doesn't mean

considered a governmental intrusion precisely because its contours are defined by what *anyone* may do. *King*, 563 US at 469 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing. That is what happened here. The reasoning that leads us to conclude that these visits were outside the scope of the implied license is not nuanced or complicated. As the *Jardines* Court aptly explained, Girl Scouts and trick-or-treaters regularly manage to abide by the terms of the implied license. *See Jardines*, 569 US at 8 ("Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters."). And, as any Girl Scout knows, the "background social norms that invite a visitor to the front door," *id*. at 9, typically do not extend to a visit in the middle of the night. See *United States v Lundin*, 817 F3d 1151, 1159 (CA 9, 2016) ("[U]nexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours."). Thus, we hold that the police were trespassing when they approached the defendants' homes.[6]

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our case stops and we don't keep going to people's homes, whether it's a marijuana case or an armed robbery. . . . I don't know what you're getting at."

[6] We need not decide precisely what time the implied license to approach begins and ends. In these cases, there were no circumstances that would lead a reasonable member of the public to believe that the occupants of the respective homes welcomed visitors at 4:00 a.m. or 5:30 a.m. Accordingly, we believe it is clear that these approaches were outside the scope of the implied license.

The Court of Appeals majority reasoned that the implied license extended to midnight visitors seeking emergency assistance or delivering the newspaper and therefore it extended, too, to the police conduct here. We find these examples unhelpful. Newspaper delivery services have express permission to be on the property; therefore, their conduct is irrelevant when considering the implied license to approach a house.[7] And the fact that a visitor may approach a home in an emergency does not mean that a visitor who is *not* in an emergency may approach. Emergencies justify conduct that would otherwise be unacceptable; they are exceptions to the rule, not the rule.[8] Because we conclude that the implied scope of the license does not extend to these predawn approaches, we hold that the police were trespassing.

Having concluded that the police conduct was a trespass on Fourth-Amendment-protected property, we next turn to whether the police were seeking "to find something or to obtain information," such that the Fourth Amendment is implicated. *Jones*, 565 US at 408 n 5. A police officer walking through a neighborhood who takes a shortcut across the corner of a homeowner's lawn has trespassed. Yet that officer has not violated the Fourth Amendment because, without some information-gathering, no search has occurred.

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[7] Moreover, most newspaper delivery services have permission to leave newspapers on the property, not to approach the house and knock. Most homeowners would be surprised—and likely indignant—if their newspaper delivery person rang the bell and knocked for several minutes at 5:00 a.m. rather than simply leaving the paper.

[8] See *Ploof v Putnam*, 81 Vt 471; 71 A 188, 189 (1908) ("It is clear that an entry upon the land of another may be justified by necessity . . . ."); *Vincent v Lake Erie Transp Co*, 109 Minn 456, 460; 124 NW 221 (1910) (holding that trespass onto the property of another may be justified by necessity).

In these cases, however, the police were seeking information; therefore, their conduct implicated the Fourth Amendment. The KANET officers were not simply cutting across the defendants' lawns as a shortcut, stopping by to drop off a get-well-soon basket, or visiting the homes to regretfully inform the defendants that a loved one had been injured in an accident. The officers approached each house to obtain information about the marijuana butter they suspected each defendant possessed. This intent is sufficient to satisfy the information-gathering prong of the *Jones* test.

That the officers intended to get permission to search for the marijuana butter does not alter our analysis. We agree with the prosecution that, as *King* established and *Jardines* affirmed, "it is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that. The mere purpose of gathering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment." *Jardines*, 569 US at 9 n 4 (citations, quotation marks, and emphasis omitted), citing *King*, 563 US at 469-470. True enough; approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search. *King*, 563 US at 469-470. But, as noted above, when "conjoined" with a trespass, information-gathering—which need not qualify as a search, standing alone—is all that is required to turn the trespass into a Fourth Amendment search. *Jones*, 565 US at 408 n 5. The officers here plainly approached the defendants' homes for the purpose of gathering information.[9]

[9] Detective Todd Butler, one of the KANET members who participated in the knock and talk, testified that "[t]he only reason we were there is because of the drugs."

The fact that the officers sought to gather their information by speaking with the homeowners rather than by peering through windows or rummaging through the bushes is irrelevant. What matters is that they sought to gather information by way of a trespass on Fourth-Amendment-protected property. That they did. The approaches of the defendants' homes were not valid knock and talks, but rather searches under the Fourth Amendment. And because the police did not have warrants or any other exception to the warrant requirement, we conclude that the approaches violated the Fourth Amendment.

B. CONSENT

This is not the end of the analysis, however. During the invalid knock and talks, each defendant consented to a search of his respective home. Consent searches, when voluntary, are an exception to the warrant requirement. *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). The voluntariness question turns on whether a reasonable person would, under the totality of the circumstances, feel able to choose whether to consent. *Id*. at 227.

The defendants believe that their consent, even if voluntary, is irrelevant, given the contemporaneous Fourth Amendment violation. The prosecution views the Fourth Amendment violation as irrelevant, given the subsequent consent. Neither is correct. The defendants' consent is not irrelevant—but neither is it evaluated separately from the illegal searches.

Rather, the defendants' consent—even if voluntary—is invalid unless it is sufficiently attenuated from the warrantless search. The Supreme Court has repeatedly held that evidence obtained through an illegal search or seizure is tainted by that initial

illegality unless sufficiently attenuated from it. See *Wong Sun v United States*, 371 US 471, 486; 83 S Ct 407; 9 L Ed 2d 441 (1963) (holding that evidence acquired after an illegal search must be suppressed unless the government shows that its acquisition of the evidence resulted from "an intervening independent act of free will" sufficient "to purge the primary taint of the unlawful invasion"). That analysis has been applied to both consensual statements and—particularly relevant here—consensual searches. *Brown v Illinois*, 422 US 590, 602; 95 S Ct 2254; 45 L Ed 2d 416 (1975) (holding that when an inculpatory statement follows an unlawful arrest, a finding of voluntariness does not obviate the need to make a separate Fourth Amendment determination as to whether the statement was " 'sufficiently an act of free will to purge the primary taint' "), quoting *Wong Sun*, 371 US at 486; *Florida v Royer*, 460 US 491, 507-508; 103 S Ct 1319; 75 L Ed 2d 229 (1983) ("Because we affirm the . . . conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search.").

Thus, even when consent is voluntary, if it is not attenuated from the unconstitutional search, the evidence must be suppressed. *Wong Sun*, 371 US at 486; *Brown*, 422 US at 602; *Royer*, 460 US at 507-508. The Supreme Court has identified three factors to be considered in determining whether consent is sufficiently attenuated: (1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Brown*, 422 US at 603-604.

In these cases, because the trial court determined that there was no Fourth Amendment violation, it did

not consider whether the subsequent consent was attenuated from the illegality. Therefore, we remand to that court for consideration of that question in the first instance.

III. CONCLUSION

A proper application of Fourth Amendment jurisprudence requires us to reverse the Court of Appeals. Because these knock and talks were outside the scope of the implied license, the officers trespassed on Fourth-Amendment-protected property. And because the officers trespassed while seeking information, they performed illegal searches. Finally, because of these illegal searches, the defendants' consent—even if voluntary—is nonetheless invalid unless it was sufficiently attenuated from the illegality. We therefore reverse the Court of Appeals and remand these cases to the Kent Circuit Court to determine whether the defendants' consent to search was attenuated from the officers' illegal search.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with MCCORMACK, J.

KEMP v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 151719. Argued on application for leave to appeal October 6, 2016. Decided June 15, 2017.

Daniel Kemp filed a complaint in the Wayne Circuit Court against his no-fault insurer, Farm Bureau General Insurance Company of Michigan, seeking personal protection insurance (PIP) benefits under the parked motor vehicle exception in MCL 500.3106(1)(b) for an injury he sustained while unloading personal items from his parked motor vehicle. Farm Bureau moved for summary disposition under MCL 2.116(C)(10) on the basis that Kemp had not established any genuine issue of material fact regarding whether he satisfied MCL 500.3106. Kemp responded by asking the trial court to deny Farm Bureau's motion and, instead, to grant judgment to Kemp under MCR 2.116(I)(2). The court, Susan D. Borman, J., granted Farm Bureau's motion for summary disposition. Kemp appealed. The Court of Appeals, CAVANAGH and SAAD, JJ. (BECKERING, P.J., dissenting), affirmed the trial court's decision in an unpublished per curiam opinion issued May 5, 2015 (Docket No. 319796). Kemp sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant Kemp's application for leave to appeal or take other action. 499 Mich 861 (2016).

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Farm Bureau was not entitled to summary disposition because Kemp satisfied the transportational function requirement as a matter of law, and he created a genuine issue of material fact concerning whether he satisfied the parked vehicle exception in MCL 500.3106(1)(b) and the corresponding causation requirement. Therefore, the trial court erred by granting summary disposition in favor of defendant, and the Court of Appeals erred by affirming that decision. The conveyance of personal belongings is closely related to the transportational function of motor vehicles, and a person who is engaged in the activity of unloading his or her personal effects from a vehicle upon arrival at a

destination is using the vehicle for its transportational function. *Shellenberger v Ins Co of North America*, 182 Mich App 601 (1990), was overruled to the extent it suggested otherwise.

1. The Michigan no-fault insurance act, MCL 500.3101 *et seq*., specifically MCL 500.3105(1), requires no-fault automobile insurers to pay PIP benefits to a person for injuries arising from the ownership, operation, maintenance, or use of a motor vehicle. PIP benefits are generally not payable for injuries involving a parked motor vehicle unless the claimant can show, under MCL 500.3106(1), that one of the exceptions to the parked motor vehicle exclusion applies. One of the exceptions is addressed in MCL 500.3106(1)(b), which states, in relevant part, that an injury may qualify for no-fault benefits when the injury arises out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if the injury was a direct result of physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997), provides a three-step framework for analyzing whether a no-fault insurer must provide benefits for injuries related to parked motor vehicles: (1) the claimant must show that the circumstances of the injury fit one of the exceptions in MCL 500.3106(1); (2) the claimant must show that the injury arose from the ownership, operation, maintenance, or use of a parked motor vehicle as a motor vehicle (the transportational function requirement); and (3) the claimant must show that the injury had a causal relationship to the parked vehicle that was more than incidental, fortuitous, or but for. In this case, Kemp created a question of fact regarding whether his injury arose directly from his physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process. Kemp showed that his injury arose as he was unloading his personal items from his parked vehicle and that he was in physical contact with the items at the time of the injury. Whether plaintiff's property was of sufficient size and weight to have caused his injury was a question of fact for the jury.

2. In addition to establishing a parked vehicle exception under MCL 500.3106(1), to be eligible for PIP benefits when an injury involves a parked motor vehicle, MCL 500.3105 requires that the injury arise from the injured person's use of the motor vehicle as a motor vehicle. That is, the activity giving rise to the injury must be closely related to the vehicle's transportational function. Kemp was injured as he unloaded personal items from his vehicle after arriving at his home. The dictionary definition of the term "vehicle" is any device or contrivance for carrying or

conveying persons or objects. A person who is engaged in the activity of unloading his or her personal effects from a vehicle upon arrival at a destination is using the vehicle for its transportational function, i.e., for the conveyance of persons or objects from one place to another. In reaching the opposite conclusion, the Court of Appeals relied on *Shellenberger*, which erroneously conflated transportational function with some facet particular to the normal functioning of a motor vehicle. But the correct question is whether the activity in which the plaintiff was engaged was closely related to the vehicle's transportational function. That the injury could have occurred elsewhere is of no moment. *Shellenberger* was overruled to the extent it suggested otherwise. Kemp's act of unloading items from his vehicle upon arrival at his destination constituted the use of a motor vehicle as a motor vehicle and satisfied the transportational function requirement as a matter of law.

3. To recover under MCL 500.3106(1)(b), an injured person must also show a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. The injury must be foreseeably identifiable with the normal use of the vehicle. In this case, Kemp's injury was foreseeably identifiable as an injury that could arise from the normal use of his vehicle, and he raised a question of fact regarding whether his injury had a causal relationship to the use of a motor vehicle as a motor vehicle that was more than incidental, fortuitous, or but for.

Court of Appeals' decision affirming the trial court's grant of summary disposition in favor of Farm Bureau reversed and case remanded to the trial court for further proceedings.

Justice ZAHRA, joined by Chief Justice MARKMAN and Justice WILDER, dissenting, concluded that Kemp had failed to establish a genuine issue of material fact with regard to the parked motor vehicle exception in MCL 500.3106(1)(b) and would have granted leave to appeal to reexamine *Putkamer*. In this case, there was no evidence that Kemp's physical contact with the property caused Kemp's injury; that is, Kemp produced no evidence that the kinetic energy, weight, or other physical property of the items he was unloading caused his injury. Rather, Kemp himself testified that the injury occurred when he turned and twisted to place the items on the ground. The evidence suggested that the act of unloading the property—and not physical contact with the property—caused Kemp's injury. Simply touching property being unloaded from a vehicle does not establish that the injury occurred as a direct result of that physical contact. Further, *Putkamer* should be reexamined because there is little question

that the third prong of *Putkamer*'s analytical framework cannot apply to injuries arising from parked vehicles under MCL 500.3106(1)(b), which contains its own causation requirement; the *Putkamer* test does not bear sufficient resemblance to the actual statutory text at issue.

INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — PARKED MOTOR VEHICLE EXCEPTIONS — TRANSPORTATIONAL FUNCTION REQUIREMENT.

Using a vehicle to carry personal belongings is closely related to the use of a motor vehicle as a motor vehicle and so meets the transportational function requirement that, along with other requirements, is necessary to establish a parked motor vehicle exception to the general rule that injuries involving parked motor vehicles are not covered by no-fault insurance (MCL 500.3106).

Marshall Lasser, PC (by *Marshall Lasser*), for Daniel Kemp.

Kopka Pinkus Dolin PLC (by *Mark L. Dolin*, *Valerie Henning Mock*, and *Donald A. Winningham*) and *Bursch Law PLLC* (by *John J. Bursch*) for Farm Bureau General Insurance Company of Michigan.

Amicus Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*), and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas* and *Stephen H. Sinas*) for the Coalition Protecting Auto No-Fault.

VIVIANO, J. At issue in this case is whether plaintiff, Daniel Kemp, is entitled to personal protection insurance (PIP) benefits under the no-fault act[1] for injuries he allegedly sustained while unloading personal belongings from his parked vehicle.[2] We hold that plaintiff created an issue of fact regarding whether he

[1] MCL 500.3101 *et seq*.

[2] As explained herein, a plaintiff seeking PIP benefits for an injury related to a parked motor vehicle must satisfy (1) one of the three exceptions set forth in MCL 500.3106(1); (2) the transportational

satisfied the parked motor vehicle exception in MCL 500.3106(1)(b) and the corresponding causation requirement. We also hold as a matter of law that plaintiff satisfied the transportational function requirement. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEEDINGS

On September 15, 2012, after plaintiff finished working, he placed his briefcase, overnight bag, thermos, and lunch box on the floor behind the driver's seat of his 2010 Chevy Silverado 1500 extended cab truck. He then drove home. When he arrived, he parked in his driveway, stepped out of the vehicle, and went to retrieve his belongings. Plaintiff opened the rear door, reached into the vehicle for his belongings, and sustained an injury as he was lowering them from the vehicle.

Subsequently, plaintiff filed suit against his auto insurer, defendant Farm Bureau General Insurance Company of Michigan, seeking no-fault benefits under § 3106(1)(b). Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff was not entitled to no-fault benefits because (1) his injury did not arise out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle, (2) his injury did not meet the parked motor vehicle exception in § 3106(1)(b), and (3) his injury did not have a causal relationship to the parked motor vehicle that was more than incidental, fortu-

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function requirement; and (3) the causation requirement. See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997).

itous, or but for. In response, plaintiff asked the trial court to deny defendant's motion and to grant plaintiff judgment under MCR 2.116(I)(2).[3] The trial court granted defendant's motion.

Plaintiff appealed, and the Court of Appeals affirmed the trial court's judgment in a split decision.[4] The Court of Appeals majority concluded that plaintiff's "injury had nothing to do with 'the transportational function' of his truck."[5] According to the Court, "the removal of personal effects from a parked vehicle . . . cannot be said to result from some facet particular to the normal functioning of a motor vehicle" because similar movements routinely occur in other places.[6] Rather, the majority reasoned, plaintiff's vehicle was used as a "storage space for his personal items" and was "merely the site" of the injury.[7]

Dissenting, Judge BECKERING concluded that plaintiff had satisfied the parked motor vehicle exception set forth in § 3106(1)(b).[8] The dissent further concluded that plaintiff had satisfied the transportational function requirement because "it is axiomatic that when one travels in a vehicle, one will take personal effects along for the ride and will seek to unload those personal effects when the drive is finished."[9] Finally, the dissent reasoned that "plaintiff's injury had a direct causal relationship to the parked vehicle" be-

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[3] MCR 2.116(I)(2) states that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

[4] *Kemp v Farm Bureau Gen Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2015 (Docket No. 319796).

[5] *Id*. at 3 (citation omitted).

[6] *Id*. (quotation marks and citation omitted).

[7] *Id*.

[8] *Id*. (BECKERING, P.J., dissenting) at 1.

[9] *Id*. at 5.

cause it was the act of retrieving his personal effects from his vehicle that caused his injury.[10]

Plaintiff then sought review in this Court, and we ordered oral argument on plaintiff's application, directing the parties to address

> (1) whether the plaintiff's injury is closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation, maintenance, or use of his motor vehicle as a motor vehicle; and (2) whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous, or but for. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 217 n 3 (1998).[11]

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10).[12] MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In determining whether there is a genuine issue as to any material fact, we consider the evidence in the light most favorable to the nonmoving party.[13] " '[W]here there is no dispute about the facts, the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide and not a factual one for a jury.' "[14]

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[10] *Id*. at 6.

[11] *Kemp v Farm Bureau Gen Ins Co of Mich*, 499 Mich 861, 861-862 (2016).

[12] *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012).

[13] *Id*.

[14] *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 216 n 1; 580 NW2d 424 (1998), quoting *Putkamer*, 454 Mich at 630 (alteration in original).

Issues of statutory interpretation are also reviewed de novo.[15] When interpreting statutes, our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language.[16] "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[17] "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."[18]

III. ANALYSIS

A. LEGAL BACKGROUND

"The Michigan no-fault insurance act requires a no-fault automobile insurer to provide first-party injury protection for certain injuries related to a motor vehicle . . . ."[19] The no-fault act's initial scope of coverage for PIP benefits is set forth in MCL 500.3105(1), which provides that 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." However, when an injury involves a parked motor vehicle, coverage is generally excluded unless the claimant demonstrates that one of three statutory exceptions applies.[20] Plaintiff claims that he is entitled to PIP benefits under the parked motor vehicle exception contained in the second clause of § 3106(1)(b), which provides:

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[15] *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014).

[16] *Id.* at 696.

[17] *Id.*

[18] *Id.* (quotation marks and citation omitted).

[19] *Putkamer*, 454 Mich at 631.

[20] MCL 500.3106(1).

> (1) 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:
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> * * *
>
> (b) . . . 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*.[21]

This Court has provided a three-step framework to analyze coverage of injuries related to parked motor vehicles.[22] First, the claimant must demonstrate that his or her "conduct fits one of the three exceptions of subsection 3106(1)."[23] Second, the claimant must show that "the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*[.]"[24] Finally, the claimant must demonstrate that the "injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for."[25] We analyze each of these requirements in turn.

B. STEP ONE: PARKED MOTOR VEHICLE EXCEPTION IN § 3106(1)(b)

We must first determine whether plaintiff's conduct falls within the parked motor vehicle exception con-

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[21] Emphasis added. There is an exception to this coverage for certain injuries occurring to an employee in the course of employment if workers' compensation benefits are available to compensate for the injury. MCL 500.3106(2). The workers' compensation exception is not pertinent here.

[22] *Putkamer*, 454 Mich at 635-636; *McKenzie*, 458 Mich at 217 n 3.

[23] *Putkamer*, 454 Mich at 635.

[24] *Id*. at 635-636 (emphasis added).

[25] *Id*. at 636.

tained in the second clause of § 3106(1)(b), which provides coverage when "the injury was a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process."[26]

In this case, plaintiff established a question of fact concerning whether he was injured as he lowered his briefcase, overnight bag, thermos, and lunch box (all of which were bundled together) from his vehicle to the ground during the unloading process. Those items are "property" because they are things "owned or possessed" by plaintiff.[27] And plaintiff testified that he was in physical contact with his property and lowering it from the vehicle when he sustained the injury.

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[26] MCL 500.3106(1)(b). For the first time in its supplemental brief to this Court, defendant argues that the two clauses of § 3106(1)(b)—"direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used" and "direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process"—should not be construed as independent exceptions. But see *Winter v Auto Club of Mich*, 433 Mich 446, 460; 446 NW2d 132 (1989), citing § 3106(1)(b) ("The second [clause] requires that the injury be a direct result of physical contact with 'property being lifted onto or lowered from the vehicle in the loading or unloading process.' "). However, defendant did not contest the meaning of this subdivision in the lower courts, and we did not request briefing on the issue. We decline to address defendant's arguments in this regard because they are unpreserved. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 & n 23; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review," and "[t]his Court has repeatedly declined to consider arguments not presented at a lower level . . . .").

[27] *Merriam-Webster's Collegiate Dictionary* (11th ed). "All words and phrases shall be construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a. "To understand the meaning of words in a statute that are not otherwise defined, we may resort to dictionary definitions for guidance." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 559 n 41; 886 NW2d 113 (2016).

That leaves only the question whether a reasonable jury could find that plaintiff's injury was the "direct result" of this physical contact with the property. At an earlier stage of this case, defendant argued that the statutory phrase "direct result" means that the injury must be "due to" physical contact with the property—a position that the dissent now advances. We agree. Plaintiff must show that his injury was caused by contact with the property being loaded or unloaded.[28]

Here, plaintiff testified: "I leaned in the vehicle, picked up my items, brought them outside as I twisted to set them down. That's when I heard bang, stuff fell to the ground, I fell in the truck." The dissent contends, in essence, that this testimony establishes only a temporal, rather than a causal, relationship between plaintiff's contact with the property and his injury and is therefore insufficient to create a jury question. It is true, of course, that plaintiff did not himself testify as to causation, but we do not believe it follows that a jury could not reasonably infer causation from plaintiff's testimony and other evidence in the record.[29]

We can cite, and indeed the dissent also cites, several cases in which a plaintiff's injury was caused (or alleged to be caused) by the kinetic energy, weight, or some other physical property associated with the

[28] See, e.g., *Celina Mut Ins Co v Citizens Ins Co*, 136 Mich App 315, 320; 355 NW2d 916 (1984) ("Stephens's injuries were caused by contact with the property being loaded and unloaded, the steel."). The dissent's person-struck-by-lightning hypothetical is therefore a red herring.

[29] Plaintiff submitted into evidence an affidavit from Dr. Surinder Kaura, averring that, in his opinion, plaintiff's "calf and low back injuries arose out of the process of unloading the items as Mr. Kemp described, and were not merely incidental to the unloading process." As both the majority and dissent below noted, the trial court erred by failing to view Dr. Kaura's affidavit in the light most favorable to plaintiff.

thing being loaded or unloaded from a parked motor vehicle.[30] Whether, in this case, plaintiff's property was of sufficient size and weight to cause plaintiff's injury is, in our view, an issue for the jury to decide—unless we could conclude, as a matter of law, that it could not have caused the injury alleged.[31] We believe plaintiff's bundled-together briefcase, overnight bag, thermos, and lunch box clears this threshold.[32]

Accordingly, plaintiff established a question of fact as to whether his injury falls within the parked motor vehicle exception in the second clause of § 3106(1)(b) because it "was a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process."

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[30] See, e.g., *Arnold v Auto-Owners Ins Co*, 84 Mich App 75, 80; 269 NW2d 311 (1978) (reversing summary judgment for the insurance companies when the plaintiff ruptured a disk in his back while he was lifting a ramp onto the upper deck of his employer's truck); *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173, 182; 870 NW2d 731 (2015) (holding that "the statute does not require that the property, itself, inflict the injuries" and rejecting the insurer's "attempts to fundamentally rewrite the statute to state that a plaintiff's injury must occur as a result of being *struck* by the property being loaded or unloaded"); *Ritchie v Federal Ins Co*, 132 Mich App 372, 373-374; 347 NW2d 478 (1984) (holding that there was a question of fact about whether the plaintiff's contact with the ice directly resulted in the injury he sustained when the stairway he was descending collapsed as he was carrying a 50-pound block of ice to load it onto his truck).

[31] We agree that an injury allegedly caused by unloading the dissent's hypothetical feather would almost certainly not survive summary disposition.

[32] The dissent's citation of *Dinkins v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2012 (Docket No. 307363), is, therefore, unhelpful because it begs the factual question at issue in this case. We also find no reasoned basis for excluding, as a matter of law, injuries caused when a person uses a "twisting action" to lower property to the ground, as distinct from other methods a person may use to load or unload property.

C. STEP TWO: TRANSPORTATIONAL FUNCTION REQUIREMENT

Next, we must determine whether plaintiff has met the transportational function requirement.[33] In *McKenzie*, this Court discussed this requirement as follows:

> [T]he phrase "use of a motor vehicle 'as a motor vehicle' " would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. . . . It seems then that when we are applying the statute, the phrase "as a motor vehicle"

[33] Because we conclude that plaintiff has met this requirement, we need not address his argument that "the Court of Appeals majority erred in tacking on to MCL 500.3106(1)(b) a requirement that the injury fulfill the 'transportational function' of the vehicle." (Capitalization altered.) Compare *McKenzie*, 458 Mich at 218 (concluding that courts must analyze the transportational function requirement for parked vehicles), and *Putkamer*, 454 Mich at 632-633 (same), with *Winter*, 433 Mich at 457 ("In limiting no-fault benefits to injuries 'arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle,' the Legislature realized that it would be inherently difficult to determine when a *parked* vehicle is in use 'as a motor vehicle.' Accordingly, the Legislature specifically described in subsections (a)-(c) of § 3106(1) the limited circumstances when a parked vehicle is being used 'as a motor vehicle.' "); see also *Drake v Citizens Ins Co of America*, 270 Mich App 22, 30; 715 NW2d 387 (2006) ("[A] cogent argument can be made that if any of the three parked-vehicle exceptions applies in a given case, the injury, by statutory mandate, *does arise* out of the ownership, operation, maintenance, or use of the parked vehicle as a motor vehicle; therefore, PIP benefits would be recoverable.").

> invites us to determine if the vehicle is being used for transportational purposes.[34]

The Court concluded that "whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles."[35] To answer this question, we must examine the activity the plaintiff was engaged in at the time of the injury.[36]

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[34] *McKenzie*, 458 Mich at 218-219.

[35] *Id*. at 225-226.

[36] See *id*. at 219. In *McKenzie*, we observed that "no-fault insurance generally covers damage directly resulting from an accident involving moving motor vehicles . . . because moving motor vehicles are quite obviously engaged in a transportational function." *Id*. at 221, citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22; 528 NW2d 681 (1995). The question becomes a little more complicated when a vehicle is stationary because "[i]njuries involving parked motor vehicles do not normally involve the vehicle *as a motor vehicle*." *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639; 309 NW2d 544 (1981). The statutory exceptions to the parked vehicle exclusion in § 3106(1) outline situations in which, "although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle." *Id*. at 640-641. In *Putkamer*, we held that "entering a vehicle in order to travel in it is closely related to the transportational function." *McKenzie*, 458 Mich at 221, citing *Putkamer*, 454 Mich at 636-637. Because the vehicle in *Putkamer* was stationary, we examined whether the activity the plaintiff was engaged in—entering a vehicle in order to travel in it—was closely related to the vehicle's transportational function. And, properly understood, *McKenzie* itself followed this same mode of analysis. In applying its new test, the Court stated:

> If we apply this test here, it is clear that the requisite nexus between the injury and the transportational function of the motor vehicle is lacking. *At the time the injury occurred, the parked camper/trailer was being used as sleeping accommodations*. This use is too far removed from the transportational function to constitute use of the camper/trailer "as a motor vehicle" at the time of the injury. [*McKenzie*, 458 Mich at 226 (emphasis added).]

It is evident that, despite referring to the "nexus between the injury and the transportational function of the motor vehicle," the *McKenzie*

In this case, it is undisputed that plaintiff was injured while unloading personal items from his vehicle upon arrival at his destination. We believe the conveyance of one's belongings is also closely related to—if not an integral part of—the transportational function of motor vehicles.[37] Lending support to our interpretation of the statutory language is that "the dictionary definition of 'vehicle' is 'any device or contrivance for carrying or conveying persons or *objects*, [especially] over land or in space . . . .' "[38] We have little

Court's analysis of the second step of the *Putkamer* framework was focused on whether the *activity* giving rise to the injury—sleeping in a parked camper/trailer—was closely related to the vehicle's transportational function. We believe this is the proper inquiry in the second step of the *Putkamer* framework in cases involving parked motor vehicles.

[37] See *Walega v Walega*, 312 Mich App 259, 272; 877 NW2d 910 (2015) (finding that an injury that occurred while the plaintiff was using a truck to move or transport a very heavy safe was closely related to the transportational function of the vehicle).

[38] *McKenzie*, 458 Mich at 219 (emphasis added), citing *Webster's New World Dictionary* (3d college ed). Also supporting our conclusion is the fact that the Uniform Motor Vehicle Accident Reparations Act, from which the "use of a motor vehicle as a motor vehicle" limitation in § 3105(1) originated, see *McKenzie*, 458 Mich at 217-218, citing *Thornton v Allstate Ins Co*, 425 Mich 643, 657; 391 NW2d 320 (1986), provides limited coverage for injuries arising from conduct in the course of loading and unloading a vehicle. See Uniform Motor Vehicle Accident Reparations Act (UMVARA), § 1(a)(6); 14 ULA 43-44 (2005) (defining "maintenance or use of a motor vehicle" as "maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, . . . conduct in the course of loading and unloading the vehicle" if "the conduct occurs while occupying, entering into, or alighting from it"). From this, we can deduce that the drafters of the UMVARA believed that a vehicle is being used as a motor vehicle, i.e., for transportational purposes, during at least some portions of the loading and unloading process.

Finally, it is worth noting that if we agreed with the Court of Appeals that the transportational function requirement bars coverage for injury occurring during loading or unloading activities, see *Kemp*, unpub op at 3, we would render the second clause of MCL 500.3106(1)(b) nugatory—something courts should strive to avoid. See

difficulty concluding that a person who is engaged in the activity of unloading his or her personal effects from a vehicle upon arrival at a destination is using the vehicle for its transportational function, i.e., for the conveyance of persons or objects from one place to another.

The Court of Appeals, in reaching a contrary conclusion, relied heavily on *Shellenberger v Ins Co of North America*, stating as follows:

> [T]he removal of personal effects from a parked vehicle . . . "cannot be said to result from some facet particular to the normal functioning of a motor vehicle. The need to make similar movements in order to reach for [personal effects] routinely occurs in offices, airports, homes, conference rooms, courtrooms, restaurants, and countless other settings . . . . The fact that plaintiff's movement in reaching for [his personal effects] occurred in the interior of the truck does not transform the incident into a motor vehicle accident for no-fault purposes."[39]

We find *Shellenberger*'s reasoning to be troubling for the following reasons. First, while it appropriately focuses on the activity the plaintiff was engaged in at the time of the injury—for example, moving a briefcase in *Shellenberger* and unloading personal effects from a parked vehicle in this case—the proper inquiry under *McKenzie* is whether that activity was *closely related* to the vehicle's transportational function.[40] There is no

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Johnson v Recca, 492 Mich 169, 177; 821 NW2d 520 (2012) ("[C]ourts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' "), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

[39] *Kemp*, unpub op at 3, quoting *Shellenberger v Ins Co of North America*, 182 Mich App 601, 605; 452 NW2d 892 (1990) (second and third alterations in original).

[40] See note 36 of this opinion.

requirement that the activity at issue "result from" the vehicle's transportational function—that requirement would confuse the transportational function and causation inquiries. And, more importantly, *Shellenberger* erroneously conflates transportational function with "some facet particular to the normal functioning of a motor vehicle."[41] Contrary to *Shellenberger*'s suggestion, *Thornton* does not require that the type of movements made or the injuries suffered be unique to motor vehicles or that they may only occur in a motor vehicle.[42] Instead, as noted above, the question at this stage is simply whether the activity plaintiff was engaged in at the time of the injury was closely related to the vehicle's transportational function. That the injury could have occurred elsewhere is of no moment.

This is not the first time we have rejected *Shellenberger*'s analysis. In *McCarthy v Allstate Ins Co*, the Court of Appeals, after quoting the same passage from *Shellenberger*, observed that "the movements that [the claimant] made to lift [a box of pasties]—twisting, turning, reaching behind her, attempting to lift the box—could have occurred in her home, her place of work, and 'countless other settings where no-fault insurance does not attach.' "[43] The *McCarthy* Court held that the causation requirement was not satisfied, stating as follows:

> We therefore conclude that, regardless of whether an item is being loaded, unloaded, or merely moved around within the vehicle, an injury resulting from the movement of a person reaching for or handling that item is not sufficiently connected causally to the use of the vehicle to

[41] *Shellenberger*, 182 Mich App at 605.

[42] See *Thornton*, 425 Mich at 643.

[43] *McCarthy v Allstate Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 1999 (Docket No. 212629), p 4.

> transport the item. Stated differently, we conclude that although McCarthy's injury occurred when unloading her vehicle and therefore arose out of her use of that vehicle as a motor vehicle, the injury resulted not from any circumstance peculiar to motor vehicles but from the act of lifting the box of pasties. As the *Shellenberger* panel noted, similar movements are made in a wide variety of settings, and we conclude that the fact that McCarthy's injury occurred inside a vehicle does not provide a sufficient causal connection. Simply put, we conclude that the vehicle in this case was merely the situs of injury and not the cause of it.[44]

On appeal, we reversed the Court of Appeals' analysis and held that the "plaintiff established a causal link between her injury and the motor vehicle. The box of pasties she was unloading from her car snagged on the front seat and she hurt her back trying to free the box up to lift it out."[45] Having rejected *Shellenberger*'s analysis on two separate occasions, we now overrule it to the extent that it is inconsistent with our opinion today.

We hold that unloading property from a vehicle upon arrival at a destination constitutes use of a motor vehicle as a motor vehicle and satisfies the transportational function requirement.[46] In the present case, plaintiff testified that he sustained an injury while unloading his belongings from his vehicle upon arriving at his house. As a result, plaintiff satisfied the transportational function requirement as a matter of law.

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[44] *Id*.

[45] *McCarthy v Allstate Ins Co*, 462 Mich 860 (2000), citing *Putkamer*, 454 Mich 626.

[46] We do not address whether unloading activity occurring some period of time after the vehicle arrives at a destination satisfies the transportational function requirement because the issue is not before us in this case.

D. STEP THREE: CAUSAL RELATIONSHIP

Finally, we must consider whether "the injury had a causal relationship to the parked motor vehicle that [was] more than incidental, fortuitous, or but for."[47] In *Thornton*, we adopted the following causation test set forth in *Kangas v Aetna Casualty & Surety Co*:

> "[T]here . . . must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle."[48]

After noting "a significant difference between the contractual language construed in *Kangas*—'arising out of the use of a motor vehicle'—and the statutory language at issue [in *Thornton*]: 'arising out of the . . . use of a motor vehicle *as a motor vehicle*,' "[49] we concluded that there can be no recovery of no-fault PIP benefits unless the causal connection between the injury and the use of a motor vehicle as a motor vehicle "is more than 'but for,' incidental, or fortuitous."[50]

In *Thornton*, as noted previously, we explained that " '[e]ach of the exceptions to the parking exclusion . . . describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle.' "[51] We have already concluded above that plaintiff created

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[47] *Putkamer*, 454 Mich at 636.

[48] *Thornton*, 425 Mich at 650-651, quoting *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975); see also *Putkamer*, 454 Mich at 635-636.

[49] *Thornton*, 425 Mich at 656-657.

[50] *Id*. at 659-660.

[51] *Id*. at 659, quoting *Miller*, 411 Mich at 640-641.

an issue of fact that his conduct in unloading his vehicle upon arrival at his destination falls within the parked motor vehicle exception contained in the second clause of § 3106(1)(b). And we have concluded that, as a matter of law, plaintiff was using his vehicle as a motor vehicle, i.e, for a transportational purpose, when he was unloading his property from it. All that is left, then, is to determine whether plaintiff's injury had a causal relation to his conduct in unloading his vehicle that was more than incidental, fortuitous, or but for.[52]

We believe that plaintiff's injury—suffered while he was unloading his property from his vehicle upon his arrival home—was foreseeably identifiable with the normal use of the vehicle. The parked motor vehicle exception contained in the second clause of § 3106(1)(b) has its own causation component. See MCL 500.3106(1)(b) (stating that "the injury was a *direct result* of physical contact") (emphasis added). Having already concluded that plaintiff has established a question of fact regarding whether he met this causation requirement, we also conclude that he has raised a question of fact regarding whether his injury had a causal relation to the use of a motor vehicle as a motor vehicle that was more than incidental, fortuitous, or but for.[53]

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[52] It is important to note that the three steps of the *Putkamer* framework are not discrete inquiries. We recognized as much in *McKenzie*, when we instructed that "what constitutes use of a motor vehicle 'as a motor vehicle' also figures in a causation analysis, i.e., whether an injury's relation to the use of a motor vehicle *as a motor vehicle* is more than but for, incidental, and fortuitous." *McKenzie*, 458 Mich at 222 n 8, quoting *Thornton*, 454 Mich at 661 (quotation marks omitted). In other words, the second and third steps bear an obvious logical relationship to one another.

[53] We decline the dissent's invitation to reconsider whether *Putkamer*'s causation requirement is consistent with the plain language of

IV. CONCLUSION

We hold that plaintiff created an issue of fact regarding whether he satisfied the parked motor vehicle exception in § 3106(1)(b) and the corresponding causation requirement of the three-step framework used to analyze PIP coverage for injuries related to parked motor vehicles. And we hold as a matter of law that plaintiff satisfied the transportational function requirement. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this opinion.

MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*dissenting*). In this no-fault action arising from plaintiff's interaction with items in a parked vehicle, the majority concludes "that plaintiff created an issue of fact regarding whether he satisfied the parked motor vehicle exception in MCL 500.3106(1)(b) and the corresponding causation requirement."[1] The majority also concludes "as a matter of law that plaintiff satisfied the transportational function requirement."[2] I respectfully dissent. I would decide this case on the basis of MCL 500.3106(1)(b) alone and hold that plaintiff has failed to establish a genuine factual basis from which to conclude that "the injury was a *direct result of physical contact with . . . property* being lifted onto or lowered from the vehicle in the loading or unloading process."[3]

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§ 3106(1)(b) when no party has asked us either to overrule *Putkamer*'s causation requirement or to grant leave to appeal on this ground.

[1] *Ante* at 248-249.

[2] *Ante* at 249.

[3] MCL 500.3106(1)(b) (emphasis added).

Further, I would take this opportunity to reexamine *Putkamer v Transamerica Ins Corp of America*[4] and its progeny. In my view, the causation prong of *Putkamer*'s analytical framework does not find its origin in the plain language of MCL 500.3106, and caselaw addressing the parked vehicle provision, over the years, has drifted well beyond the language of the no-fault act, MCL 500.3101 *et seq*. This case makes clear that the third prong, i.e., the causation prong, of *Putkamer*'s general test cannot apply to injuries arising from parked vehicles under MCL 500.3106(1)(b). And because this error of statutory interpretation will often reoccur, the most prudent action at this time would be to grant plaintiff's application and, with the benefit of full briefing and argument, reexamine the operation of MCL 500.3106 and the vitality of *Putkamer*. I believe that failing to correct the misinterpretation of MCL 500.3106 will "impose far more injury upon the judicial process than any effect associated with our decision to apply the policy decisions of the Legislature instead of the policy decisions of this Court . . . ."[5]

I. MCL 500.3106(1)(b)

Under Michigan's no-fault insurance act and in regard to this case, "[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless," as set forth in MCL 500.3106(1)(b), "*the injury was a direct result of physical contact with . . . property* being lifted onto or lowered from the vehicle in the loading or

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[4] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997).

[5] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 183; 615 NW2d 702 (2000).

unloading process."[6] In this case, plaintiff sustained injury while unloading personal belongings from his parked vehicle. He testified: "I leaned in the vehicle, picked up my items, brought them outside as I twisted to set them down. That's when I heard bang, stuff fell to the ground, I fell in the truck." For purposes of this appeal, I accept the majority's characterization of plaintiff's testimony "that he was in physical contact with his property and lowering it from the vehicle when he sustained the injury."[7]

Regardless of whether the term "property" is afforded its plain meaning as the majority posits[8] or its contextual meaning of "cargo or freight" as first suggested by defendant on appeal in this Court,[9] this term

[6] MCL 500.3106(1) (emphasis added).

[7] *Ante* at 254.

[8] See *ante* at 254.

[9] Defendant presents a novel and intriguing argument that the phrase "property being lifted onto or lowered from the vehicle in the loading or unloading process" must be read in relation to the preceding phrase—"equipment permanently mounted on the vehicle, while the equipment was being operated or used." Defendant asserts that MCL 500.3106(1)(b) thus refers only to cargo or freight that is being "lifted onto or lowered from the vehicle in the loading or unloading process," not to personal items being removed from a vehicle's interior or trunk.

Notably, this argument is contrary to *Arnold v Auto-Owners Ins Co*, 84 Mich App 75, 79-80; 269 NW2d 311 (1978), in which the Court of Appeals held that MCL 500.3106(1)(b) contains two independent clauses and provides coverage when the injury was the direct result of physical contact with either (1) "equipment permanently mounted on [the] motor vehicle while [the] equipment was being operated or used," or (2) "property being lifted onto or lowered from [the] motor vehicle in the loading or unloading process." (Emphasis omitted.) Defendant has not acknowledged this decision, but I question whether *Arnold* was correctly decided.

MCL 500.3106(1)(b) contains two clauses, but they are not entirely independent of one another. Were the clauses actually independent in application, the Legislature would have separated these clauses and

is not the focal point of this case. The disputed statutory language is whether "the injury was a *direct result* of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process."[10] On this point, the majority concludes that plaintiff's contact with his briefcase, overnight bag, thermos, and unfoldable lunch bags while unloading them from his vehicle creates a genuine issue of material fact as to whether this property caused the injury alleged.[11] In support of its conclusion, the majority relies on caselaw that, as summarized by the majority, requires that "plaintiff's injury [be] caused (or alleged to be caused) by the kinetic energy, weight, or some other physical property associated with the thing being loaded or unloaded from a parked motor vehicle."[12] In this case, while plaintiff was in physical contact with the property, there is no evidence to indicate that physical contact with the property—the "kinetic energy, weight, or some other physical property associated with the thing being loaded or unloaded"—caused the injury,

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created a fourth parked vehicle exception under MCL 500.3106(1) instead of including the two clauses in the single exception under MCL 500.3106(1)(b). Stated differently, even though the two clauses are contained in one exception and are separated by a disjunctive term, the clauses may nonetheless be read together to provide contextual meaning to the term "property" as it is used in MCL 500.3106(1)(b). And when read together, a cogent argument can be made that, in context, "property being lifted onto or lowered from the vehicle in the loading or unloading process" refers to property being lifted onto or lowered from a vehicle while using or operating equipment permanently mounted on the vehicle. Despite my openness to defendant's argument, I agree with the majority that defendant failed to preserve this issue. See *ante* at 254 n 26.

[10] MCL 500.3106(1)(b) (emphasis added).

[11] *Ante* at 255-256.

[12] *Ante* at 255-256.

rather than the twisting action of placing the property on the ground.[13]

In my view, plaintiff's testimony that he was in physical contact with the property he was removing from his truck when he sustained the injury does not establish that "the injury was a *direct result* of physical contact with . . . property . . . ."[14] Plaintiff's testimony indicated that the injury occurred while he was turning and twisting to set down his personal items. This suggests that the act of unloading the property caused the injury, rather than plaintiff's contact with the property. While plaintiff testified that he was unloading his "briefcase, overnight bag, thermos[, and] . . . unfoldable lunch bags," all of which were bound together, he made no assertion that any or all of these items caused his injury.[15] Therefore, the record pre-

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[13] See *Dinkins v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2012 (Docket No. 307363), p 3 ("There are no characteristics about a bag containing DVDs that would cause an ordinary person to injure oneself in the process of unloading it from a parked car. If plaintiff's bag was peculiarly heavy or unwieldy in any way, it was not clearly set forth in the record before the trial court when it ruled on defendant's motion for summary disposition.").

[14] MCL 500.3106(1)(b) (emphasis added).

[15] I disagree with the majority's suggestion that the affidavit from Dr. Surinder Kaura was not properly considered by the trial court. Rather, as the Court of Appeals majority explained, "viewing the physician's affidavit in the light most favorable to plaintiff does not change the fact that plaintiff's injury did not arise 'out . . . of the ownership, operation[,] maintenance, or use of the parked motor vehicle as a motor vehicle.' " *Kemp v Farm Bureau Gen Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2015 (Docket No. 319796), p 3 n 2. After explaining that he accepted plaintiff's version of events, Kaura stated, "[i]t is my opinion that his calf and low back injuries arose out of the process of unloading the items as Mr. Kemp described, and were not merely incidental to the unloading process." The trial court was correct that Kaura's affidavit adds nothing to plaintiff's testimony and is therefore irrelevant. Further, "the opinion of an expert may not extend

sented to this Court does not support the conclusion that there exists a genuine issue of material fact regarding whether plaintiff's injury was a "direct result" of his physical contact with the property he was unloading from his truck.[16]

The majority fails to attach independent meaning to the phrase "direct result." That is, the majority suggests that a plaintiff establishes that his or her injury was a "direct result" merely by presenting evidence that the plaintiff was injured *while* in physical contact with property that he or she was loading or unloading from a vehicle. But the statute plainly requires that the injury be a *direct result* of physical contact with property that is being loaded or unloaded. A person struck by lightning while in physical contact with property that he or she is loading or unloading cannot be said to be injured as a *direct result* of physical contact with that property. In both legal and common parlance, the word "direct" in this context means to be "[f]ree from extraneous influence; immediate,"[17] and

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to the creation of new legal definitions and standards and to legal conclusions." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). Kaura's affidavit essentially parrots plaintiff's allegations and concludes that the exception in MCL 500.3106(1)(b) has been satisfied. In my view, this is improper evidence asserting a legal standard and conclusion.

[16] MCL 500.3106(1)(b). Contrary to any implication in the majority opinion, I would not categorically exclude from no-fault coverage lifting or carrying injuries occurring during the loading or unloading process. I would only exclude those injuries that do not "directly result" from physical contact with the property. In the absence of a showing that the injury "directly resulted" from physical contact with the property, any injury that happens to occur while a person is lifting anything, even a feather, from a vehicle would be covered. As discussed next in this opinion, this interpretation not only ignores the "direct result" requirement but also renders the statute arbitrary in its application.

[17] *Black's Law Dictionary* (10th ed). See also *Webster's New World College Dictionary* (5th ed) ("with nothing or no one in between;

"result" commonly means "consequence, effect, or conclusion."[18] Reading these terms together, one gleans that a plaintiff's injury must have arisen from an uninfluenced and immediate consequence of physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process. But, again, plaintiff has presented no evidence at all that physical contact with his property caused his injury.

Perhaps if the statute provided instead that coverage is afforded for an injury that in any way results from the loading or unloading process, I would be inclined to agree with the majority. But it does not, and the majority has not identified any evidence that plaintiff's injury was the direct result of physical contact with his property. Even plaintiff's expert could only conclude that plaintiff's "calf and low back injuries arose out of the process of unloading the items as [plaintiff] described . . . ."[19] Simply put, an injury arising out of the process of unloading items from a vehicle

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immediate; close, firsthand, or personal *[direct* contact, *direct* knowledge*]*"); *Random House Webster's College Dictionary* (2001) ("without intermediary agents, conditions, etc.; immediate: *direct contact*"); *Merriam-Webster's Collegiate Dictionary* (11th ed) ("marked by absence of an intervening agency, instrumentality or influence").

[18] *Black's Law Dictionary* (10th ed). See also *Webster's New World College Dictionary* (5th ed) ("to happen or issue as a consequence or effect"); *Random House Webster's College Dictionary* (2001) ("to arise or proceed as a consequence of actions, premises, etc.; be the outcome"); *Merriam-Webster's Collegiate Dictionary* (11th ed) ("something that results as a consequence, issue, or conclusion").

[19] Likewise, the Court of Appeals' dissenting judge ignored the statutory requirement that the injury directly result from physical contact with property, relying only on plaintiff's "very act—removing items from the vehicle and attempting to set them down—that was the cause of the alleged injury." *Kemp v Farm Bureau Gen Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2015 (Docket No. 319796) (BECKERING, P.J., dissenting), p 6.

does not establish that "the injury was a direct result of physical contact with . . . property . . . ."[20]

There exists published caselaw from the Court of Appeals consistent with my interpretation of MCL 500.3106(1)(b). For instance, in *Celina Mut Ins Co v Citizens Ins Co*,[21] the Court of Appeals sustained a claim under MCL 500.3106(1)(b) when, in the process of loading a semitrailer, "the crane operator accidentally knocked a bundle [of steel tubing] off a previously stacked pile, and that bundle rolled into and injured [the claimant]."[22] Another example is *Adanalic v Harco Nat'l Ins Co*,[23] in which the claimant was seriously injured while unloading a pallet from a truck onto a semitrailer. Specifically, while the claimant "was pull-

[20] MCL 500.3106(1)(b). Further, MCL 500.3106(1)(b) plainly requires that the injury be a *direct result* of physical contact with *property* that is being loaded or unloaded. If, as the majority seems to conclude, MCL 500.3106(1)(b) encompasses injuries that occur as a result of any physical contact with property being loaded or unloaded from a vehicle, the requirement that there be physical contact with property becomes very artificial. Under the majority's interpretation, if a claimant is in the process of loading or unloading a vehicle and is injured as the claimant leans into the vehicle but before making contact with the property, the claimant is not entitled to PIP benefits. On the other hand, a claimant is entitled to PIP benefits if the claimant is ever so slightly touching property being loaded or unloaded from the vehicle when the injury results. Simply stated, the majority's interpretation creates a seemingly arbitrary line that encompasses injuries during the loading or unloading process only if these injuries happen to occur when a claimant is in physical contact with the property being loaded or unloaded. By giving plain meaning to the "directly results" language of MCL 500.3106(1)(b) as it is related to the physical-contact requirement, a claimant is entitled to PIP benefits under the parked vehicle provision when contact with the property in some fashion causes the injury.

[21] *Celina Mut Ins Co v Citizens Ins Co*, 136 Mich App 315; 355 NW2d 916 (1984).

[22] *Id*. at 317-318.

[23] *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015).

ing the pallet with a belt," "[t]he ramp connecting the trailer and the [truck] collapsed, which caused the pallet to fall to the ground, which, in turn, caused [the claimant] to fall to the ground."[24] The panel noted that "the statute does not require that the property, itself, inflict the injuries. It only requires that the injuries directly result from physical contact with the property."[25] Therefore, reasoned the panel, "the statute is satisfied . . . where [the claimant's] physical contact with the pallet caused him to fall to the ground, directly resulting in his injuries."[26] In sum, these cases were sustained because the property directly contributed to the injury.[27]

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[24] *Id*. at 182 (quotation marks omitted).

[25] *Id*. (quotation marks omitted).

[26] *Id*. (quotation marks omitted).

[27] In *Ritchie v Federal Ins Co*, 132 Mich App 372; 347 NW2d 478 (1984), the Court of Appeals sustained a claim under MCL 500.3106(1)(b) even though it was questionable whether the injury was a "direct result" of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process. The claimant "was injured when the stairs collapsed under him as he held a block of ice over his head while in the process of loading his truck." *Id*. at 375. The panel explained that "[t]he stairway broke because of the combined weight of plaintiff and the block of ice," and noted that "[d]efendant's brief admits that '[l]ogic would dictate that the stairway gave way under the weight of the plaintiff and the block of ice.' " *Id*. (third alteration in original). The panel concluded that "applying the commonly approved usage of the language, 'physical contact' with the 'property being lifted' during the loading process could arguably have 'directly resulted' in causing plaintiff's injury. The weight of the ice may have been the straw that broke the camel's back." *Id*.

Even though the evidence of a "direct injury" in *Ritchie* was somewhat anecdotal, the panel sustained the claim noting that at the least " 'the property being lifted' . . . could *arguably* have 'directly resulted' in causing plaintiff's injury." *Id*. (emphasis added). In this case, plaintiff has only established that his injury directly resulted from his physical movements while he happened to be unloading property from his vehicle.

II. *PUTKAMER v TRANSAMERICA INS CORP OF AMERICA*

As previously mentioned, I would take this opportunity to reexamine *Putkamer*[28] and its progeny. In my view, there is little question that the third prong of *Putkamer*'s general test cannot apply to injuries arising from parked vehicles under MCL 500.3106(1)(b).

In *Putkamer*, the "plaintiff was getting into her vehicle on the driver's side, [and] she fell on the ice and was injured."[29] Citing our decision in *Winter v Auto Club of Mich*,[30] we explained that "[w]here the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone."[31] We further explained that "[t]here is no need for an additional determination whether the injury is covered under subsection 3105(1)."[32] Though it seems clear from that language that *Putkamer* embraced the proposition that MCL 500.3105(1) is not controlling in parked vehicle cases,[33] the Court then explained that the "underlying policy of the parked motor vehicle exclusion . . . is to ensure that an injury that is covered by the no-fault act involves use of the parked motor vehicle *as a motor vehicle*."[34]

This purported underlying policy was first explained in *Miller v Auto-Owners Ins Co*,[35] which involved

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[28] *Putkamer*, 454 Mich 626.

[29] *Id*. at 628.

[30] *Winter v Auto Club of Mich*, 433 Mich 446; 446 NW2d 132 (1989).

[31] *Putkamer*, 454 Mich at 632, citing *Winter*, 433 Mich at 457.

[32] *Putkamer*, 454 Mich at 632-633, citing *Winter*, 433 Mich at 458 n 10.

[33] MCL 500.3105(1) provides, "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."

[34] *Putkamer*, 454 Mich at 633.

[35] *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981).

a claim for accidental bodily injury arising out of the maintenance of a motor vehicle, although the vehicle was parked at the time of the accident. Rather than addressing the relevant statutory text, the Court in *Miller* engaged in "an assessment of the respective policies appearing from the requirement of coverage in § 3105(1) and the exclusion from that required coverage for parked vehicles in § 3106 as they bear upon the scope of coverage intended by the Legislature."[36] The Court opined that the policy underlying the parked vehicle exclusion was that

> [e]ach of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle.[37]

The *Miller* Court held that because "[t]he policies underlying § 3105(1) and § 3106 thus are complementary rather than conflicting," "[c]ompensation is thus required by the no-fault act without regard to whether [the plaintiff's] vehicle might be considered 'parked' at the time of injury."[38] By adopting *Miller*'s dubious assertions of "underlying policies" of the no-fault act,[39] the *Putkamer* Court opened itself to further departure

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[36] *Id*. at 638.

[37] *Id*. at 640-641.

[38] *Id*. at 641.

[39] The following portion of *Miller* has been effectively disavowed:

> Section 3106(b) [now MCL 500.3106(1)(b)] recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the

from the textual basis of the law. While there is some textual basis under MCL 500.3106(1) to require that the injury be " 'directly related' to the vehicle's character as a motor vehicle,"[40] i.e., "parked vehicle as a motor vehicle,"[41] there is no basis to conclude "that subsection 3106(1), like subsection 3105(1), requires that, in order to recover, the injury must have a causal relationship to the motor vehicle that is more than incidental, fortuitous, or but for."[42]

Putkamer broadly held that

> where a claimant suffers an injury in an event related to a parked motor vehicle, he must establish that the injury arose out of the ownership, operation, maintenance, or use of the parked vehicle by establishing that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1). In doing so under § 3106, he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for.[43]

In my opinion, the *Putkamer* test does not bear sufficient resemblance to the actual statutory text at issue. MCL 500.3106(1) provides that:

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vehicle as a motor vehicle. [*Miller*, 411 Mich at 640, disavowal recognized by *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013).]

Further, this Court has ordered argument to determine whether *Miller* is viable precedent and, if so, whether it should be overturned. *Spectrum Health Hosp v Westfield Ins Co*, 498 Mich 969 (2016).

[40] *Putkamer*, 454 Mich at 634.

[41] MCL 500.3106(1).

[42] *Putkamer*, 454 Mich at 635.

[43] *Id*. at 635-636.

> 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 an unreasonable risk of the bodily injury which occurred.
>
> (b) . . . [T]he 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) . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

I agree with *Putkamer* to the extent that it concludes that a plaintiff who meets an exception contained in MCL 500.3106(1)(a) to (c) that arises out of the ownership, operation, maintenance, or use of a *parked vehicle as a motor vehicle* has established an accidental bodily injury. But, because the Legislature included a causal component in MCL 500.3106(1)(b), i.e., "direct result," I see no statutory support for the proposition that a claimant must additionally establish that the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. At a minimum, I would limit *Putkamer* and its progeny and clarify that the third prong of *Putkamer*'s general test does not apply to injuries arising from parked vehicles under MCL 500.3106(1)(b). With that said, I believe the most prudent action at this time would be to grant plaintiff's application and, with the benefit of full briefing and argument, reexamine the operation of MCL 500.3106 and the vitality of *Putkamer*.

MARKMAN, C.J., and WILDER, J., concurred with ZAHRA, J.

PEOPLE v COMER

Docket No. 152713. Argued on application for leave to appeal January 10, 2017. Decided June 23, 2017.

Justin T. Comer pleaded guilty to charges of criminal sexual conduct in the first-degree (CSC-I) and second-degree home invasion in the St. Clair Circuit Court. The judge, James P. Adair, sentenced defendant to concurrent prison terms for the two offenses. Defendant's judgment of sentence contained a line to be checked by the court indicating that the defendant would be subject to lifetime electronic monitoring under MCL 750.520n, but the line was not checked, and the court did not otherwise indicate that defendant was subject to lifetime electronic monitoring. Defendant sought leave to appeal in the Court of Appeals, challenging the scoring of several offense variables. In lieu of granting leave to appeal, the Court of Appeals vacated defendant's CSC-I sentence and remanded for resentencing on the basis of a scoring error. The trial court resentenced defendant on October 8, 2012, and the second judgment of sentence also included the same unchecked line referring to lifetime electronic monitoring and omitted any other reference to that punishment. The Michigan Department of Corrections subsequently notified the trial court by letter that, pursuant to *People v Brantley*, 296 Mich App 546 (2012), defendant's sentence should have included lifetime electronic monitoring. The judge, Michael L. West, ruled that defendant's guilty plea was "defective" because defendant had not been advised about lifetime electronic monitoring and rejected defendant's argument that the omission of lifetime electronic monitoring could only be corrected pursuant to a timely motion to correct an invalid sentence. Defendant declined to withdraw his plea, and on April 29, 2013, the trial court signed a new judgment of sentence retaining the term of incarceration previously imposed and adding: "Lifetime GPS upon release from prison." Defendant again sought leave to appeal in the Court of Appeals, which the Court of Appeals denied. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 497 Mich 957 (2015). The Court of Appeals held that, pursuant to *Brantley*, defendant was subject to lifetime electronic monitoring when he

was first sentenced, but because defendant's sentence did not include lifetime electronic monitoring, defendant's sentence was invalid. 312 Mich App 538 (2015). The Court of Appeals further held that, pursuant to *People v Harris*, 224 Mich App 597 (1997), the trial court was empowered to correct defendant's invalid sentence without time limitation. Judge GLEICHER concurred in the result but asserted that *Harris* was wrongly decided because MCR 6.429 only permits a court to correct an invalid sentence after a party has filed a motion seeking that relief. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 499 Mich 888 (2016).

In an opinion by Justice VIVIANO, joined by Chief Justice MARKMAN and Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under MCL 750.520b(2)(d), the punishment of lifetime electronic monitoring must be imposed for all CSC-I sentences when the offender is not imprisoned for life without the possibility of parole under MCL 750.520b(2)(c). Defendant's sentence for CSC-I was invalid because it did not include lifetime electronic monitoring. Under MCR 6.435 and MCR 6.429, a trial court may not correct an invalid sentence on its own initiative after entry of the judgment; the court may only do so upon the proper motion of a party, and *Harris* is overruled to the extent that it is inconsistent with this conclusion. Because neither party moved to correct defendant's sentence, the trial court erred by adding lifetime electronic monitoring to defendant's sentence on its own initiative 19 months after the original sentence was imposed.

1. MCL 750.520b(2) sets forth the punishment for CSC-I. MCL 750.520b(2)(a), (b), and (c) detail the penalties to be imposed depending on the circumstances of the case. Under MCL 750.520b(2)(d), in addition to any other penalty imposed under Subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under MCL 750.520n. MCL 750.520n(1) provides that a person convicted under MCL 750.520b or MCL 750.520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under MCL 791.285. Therefore, under MCL 750.520b(2)(d), the trial court shall sentence a defendant to lifetime electronic monitoring as provided by MCL 750.520n in addition to any other penalty imposed under MCL 750.520b(2)(a) *or* (b). The disjunctive term "or" signals that there are two circumstances in which lifetime electronic monitoring must be

imposed under MCL 750.520b(2). Lifetime electronic monitoring must be imposed (1) when a defendant receives a sentence of life in prison or any term of years under MCL 750.520b(2)(a); *or* (2) when a defendant also receives a mandatory minimum sentence under MCL 750.520b(2)(b) because the crime was committed by an individual 17 years of age or older against an individual less than 13 years of age. Thus, the Legislature has mandated lifetime electronic monitoring for all CSC-I sentences except when the defendant is sentenced to life without the possibility of parole under MCL 750.520b(2)(c). To conclude that lifetime electronic monitoring is limited only to sentences imposed under MCL 750.520b(2)(b) would impermissibly render the Legislature's reference in MCL 750.520b(2)(d) to "any other penalty imposed under subdivision (a)" nugatory. Moreover, reading MCL 750.520b(2)(d) in the context of the entire legislative scheme demonstrates the Legislature's intent to mandate lifetime electronic monitoring for all CSC-I sentences when the defendant has not been sentenced to life without parole. In this case, defendant pleaded guilty to CSC-I under MCL 750.520b(1)(c) for sexual penetration occurring under circumstances involving the commission of another felony, and the punishment for that offense is (1) imprisonment for life or for any term of years and (2) mandatory lifetime electronic monitoring. The Court of Appeals correctly determined that defendant's sentence was invalid because defendant's judgment of sentence did not include the statutorily mandated punishment of lifetime electronic monitoring.

2. MCR 6.435 provides the general rule regarding a court's ability to correct mistakes in judgments and orders. MCR 6.435(A) provides that clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it. In this case, the failure to sentence defendant to lifetime electronic monitoring was a substantive mistake, not a clerical mistake. MCR 6.435(B) provides that after giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. MCR 6.435(B) permits a trial court to act on its own initiative to correct substantive mistakes in a sentence, but only if it has not yet entered judgment. MCR 6.429(A), the court rule outlining the court's authority to modify a sentence, provides that a motion to correct an invalid sentence may be filed by either party and that the court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as

provided by law. MCR 6.429(B) outlines the time for filing such a motion. In cases where, as here, a defendant may only appeal by leave, MCR 6.429(B)(3) provides that either party has six months from the entry of judgment of sentence to file a motion to correct an invalid sentence. Importantly, MCR 6.429 is conspicuously silent on the court's authority to correct an invalid sentence sua sponte, and when considered against the backdrop of the general rule, MCR 6.435(B), the silence is telling. Additionally, interpreting MCR 6.429 as authorizing trial courts to correct invalid sentences sua sponte would render the time limitation in MCR 6.429(B)(3) a mere formality. Therefore, when considering MCR 6.435 and MCR 6.429 together, the trial court's authority to correct an invalid sentence on its own initiative ends upon entry of the judgment of sentence. An invalid sentence may be corrected only upon the timely filing of a motion to correct an invalid sentence in accordance with MCR 6.429, and *Harris* is overruled to the extent that it was inconsistent with this conclusion. In this case, defendant's sentence was invalid because it did not include the statutorily mandated punishment of lifetime electronic monitoring, and the trial court improperly ordered a hearing on its own initiative, after which it added lifetime electronic monitoring to defendant's sentence. Under MCR 6.435 and MCR 6.429, the trial court lacked the authority to correct defendant's invalid sentence absent a motion from one of the parties. Accordingly, the Court of Appeals erred when it affirmed the trial court's correction of defendant's invalid sentence.

Affirmed in part, reversed in part, and the April 29, 2013 judgment of sentence vacated; case remanded to the trial court to reinstate the October 8, 2012 judgment of sentence.

Justice ZAHRA, joined by Justice WILDER, concurring in part and dissenting in part, agreed with the majority's holding that defendant's sentence was invalid because MCL 750.520b(2)(d) required the trial court to sentence defendant to lifetime electronic monitoring and also agreed with the majority's conclusion that the trial court lacked authority to correct defendant's invalid sentence. Justice ZAHRA disagreed with the majority's remedy because it did not address the significant constitutional concerns regarding whether defendant's plea was involuntary: because defendant was not made aware that mandatory lifetime electronic monitoring was a direct consequence of the plea, defendant's plea was not constitutionally valid, and any action taken to redress errors in defendant's sentence predicated on that invalid plea would be premature. Additionally, specific performance of an invalid sentence would be inappropriate because the court rules

provide no basis for such a remedy. Instead of reinstating an invalid sentence that was predicated on an invalid plea, Justice ZAHRA would have concluded that the appropriate remedy was to give defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.

1. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — SENTENCES — MANDATORY IMPOSITION OF LIFETIME ELECTRONIC MONITORING.

MCL 750.520b(2) outlines the punishment for criminal sexual conduct in the first degree (CSC-I); MCL 750.520b(2)(d) provides that, in addition to any other penalty imposed under MCL 750.520b(2)(a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under MCL 750.520n; under MCL 750.520b(2)(d), the punishment of lifetime electronic monitoring must be imposed for all CSC-I sentences when the offender is not imprisoned for life without the possibility of parole under MCL 750.520b(2)(c).

2. SENTENCES — INVALID SENTENCES — COURT'S AUTHORITY TO CORRECT AN INVALID SENTENCE.

MCR 6.435 provides the general court rule regarding a court's ability to correct mistakes in judgments and orders; MCR 6.429 provides the court rule regarding a court's ability to correct an invalid sentence; under MCR 6.435 and MCR 6.429, a trial court may not correct an invalid sentence on its own initiative after entry of the judgment; the court may only do so upon the proper motion of a party.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline C. Ouvry*) for defendant.

Amici Curiae:

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

Michael Wendling, President of the Prosecuting Attorneys Association of Michigan, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the Prosecuting Attorneys Association of Michigan.

VIVIANO, J. We address whether the trial court's failure to impose lifetime electronic monitoring as a part of defendant's sentence for criminal sexual conduct in the first-degree (CSC-I) rendered defendant's sentence invalid and, if so, whether the trial court could correct the invalid sentence on its own initiative 19 months after the original judgment of sentence had entered. We hold that defendant's sentence was invalid because MCL 750.520b(2)(d) required the trial court to sentence defendant to lifetime electronic monitoring. We further hold that under MCR 6.435 and MCR 6.429, the trial court erred by correcting defendant's invalid sentence on its own initiative absent a motion from either party. In lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals in part, reverse in part, vacate the April 29, 2013 judgment of sentence, and remand this case to the trial court to reinstate the October 8, 2012 judgment of sentence.

I. FACTS AND PROCEDURAL HISTORY

In 2011, defendant, Justin Comer, was charged with CSC-I and first-degree home invasion stemming from an incident involving a 48-year-old woman. He pleaded guilty to CSC-I and second-degree home invasion. On October 3, 2011, former St. Clair Circuit Court Judge James Adair sentenced defendant to concurrent prison terms of 51 months to 18 years for the CSC-I conviction and 51 months to 15 years for the second-degree home invasion conviction. The judgment of sentence in-

cluded a line to be checked by the trial court, indicating: "The defendant is subject to lifetime monitoring under MCL 750.520n." This line was not checked, and the trial court did not otherwise indicate that defendant was subject to lifetime electronic monitoring.

Defendant sought leave to appeal in the Court of Appeals, challenging the scoring of several offense variables. In lieu of granting leave to appeal, the Court of Appeals vacated defendant's CSC-I sentence and remanded for resentencing based on a scoring error.[1] Thereafter, on October 8, 2012, Judge Adair resentenced defendant, reducing his minimum sentence for both convictions to 42 months. The second judgment of sentence also included the same unchecked line referring to lifetime electronic monitoring and omitted any other reference to that punishment.

On January 29, 2013, the Michigan Department of Corrections notified the trial court by letter that, pursuant to *People v Brantley*,[2] defendant's sentence should have included lifetime electronic monitoring. Defendant objected, arguing that *Brantley* did not apply and that the prosecution's failure to bring a motion to correct defendant's sentence precluded resentencing. At a hearing on April 29, 2013, Judge Adair's successor, Judge Michael West, ruled that defendant's guilty plea was "defective" because defendant was not advised about lifetime electronic monitoring. Judge West declared that he would not proceed further with the plea being defective. He rejected

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[1] *People v Comer*, unpublished order of the Court of Appeals, entered June 29, 2012 (Docket No. 309402).

[2] *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012). In *Brantley*, the Court of Appeals held that any defendant convicted of CSC-I under MCL 750.520b must be ordered to submit to lifetime electronic monitoring. *Id*. at 559.

defendant's argument that the omission of lifetime electronic monitoring could only be corrected pursuant to a timely motion to correct an invalid sentence.[3] The trial court offered defendant an opportunity to withdraw his plea or to allow the plea to stand while acceding to the lifetime electronic monitoring requirement. Defendant declined to withdraw his plea. Thereafter, the trial court signed a new judgment of sentence retaining the term of incarceration previously imposed and adding: "Lifetime GPS upon release from prison."[4]

Defendant again sought leave to appeal. After the Court of Appeals denied defendant's delayed application for leave to appeal,[5] we remanded the case to that Court for consideration as on leave granted.[6] On remand, the Court of Appeals affirmed defendant's sentence in a published opinion.[7] Bound by *Brantley*, the Court of Appeals held that defendant was subject to lifetime electronic monitoring when he was first sentenced in 2011.[8] Because defendant's sentence did not include lifetime electronic monitoring, the Court of Appeals concluded that his sentence was invalid.[9] Next, the Court of Appeals addressed whether the trial court had the authority to correct defendant's sentence. Relying on its prior decision in *People v Harris*,[10]

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[3] The prosecution conceded at oral argument that neither party filed a motion to correct an invalid sentence under MCR 6.429.

[4] Capitalization altered.

[5] *People v Comer*, unpublished order of the Court of Appeals, entered January 27, 2014 (Docket No. 318854).

[6] *People v Comer*, 497 Mich 957 (2015).

[7] *People v Comer*, 312 Mich App 538, 540; 879 NW2d 306 (2015).

[8] *Id*. at 544.

[9] *Id*.

[10] *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997). In *Harris*, the Court of Appeals held that a motion for resentencing is not a

the Court of Appeals held that "the trial court was empowered to correct defendant's invalid sentence without time limitation."[11]

Judge GLEICHER concurred in the result but asserted that *Harris* was wrongly decided because, in her view, MCR 6.429 only permits a court to correct an invalid sentence after a party has filed a motion seeking that relief.[12] She noted that no such motion had been filed by either party.[13] But for *Harris*, she would have held that the trial court lacked the authority to correct the mistake in defendant's sentence.[14]

Defendant sought leave to appeal in this Court. We scheduled oral argument on the application, directing the parties to address:

> (1) whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d), i.e., whether MCL 750.520n requires that the defendant, who pled guilty to MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring, compare *People v Brantley*, 296 Mich App 546[, 823 NW2d 290] (2012), with *People v King*, 297 Mich App 465[, 824 NW2d 258] (2012); and (2) if so, whether the trial court was authorized to amend the defendant's judgment of sentence on the court's own initiative twenty months after the original sentencing, in the absence of a motion filed by any party. See MCR 6.429; MCR 6.435.[15]

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prerequisite for a trial court to correct an invalid sentence under MCR 6.429(A) and that the rule does not set time limits with respect to a trial court's authority to correct an invalid sentence. *Id*. at 601.

[11] *Comer*, 312 Mich App at 545.

[12] *Id*. at 546-547 (GLEICHER, P.J., concurring).

[13] *Id*. at 547.

[14] *Id*. at 549.

[15] *People v Comer*, 499 Mich 888 (2016).

II. STANDARD OF REVIEW

The proper interpretation and application of statutes and court rules is a question of law, which this Court reviews de novo.[16] When interpreting statutes, we begin with the statute's plain language.[17] In doing so, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.[18] We must give effect to every word, phrase, and clause and avoid an interpretation that would render any part surplusage or nugatory.[19] When the statute's language is unambiguous, the statute must be enforced as written.[20] These same legal principles govern the interpretation of court rules.[21]

III. ANALYSIS

A. DEFENDANT IS SUBJECT TO LIFETIME ELECTRONIC MONITORING

We first address whether defendant is subject to lifetime electronic monitoring by virtue of his CSC-I conviction for a sexual penetration that occurred under circumstances involving the commission of another felony. Punishment for this offense is governed by MCL 750.520b(2), which provides:

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
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> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

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[16] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

[17] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

[18] *Id*.

[19] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012).

[20] *Madugula*, 496 Mich at 696.

[21] *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 278; 884 NW2d 257 (2016).

> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
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> (c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.
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> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

MCL 750.520n addresses lifetime electronic monitoring. Subsection (1) provides:

> A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

We begin, as we must, with the statutory language. Section 520b(2) governs the punishment imposed for all persons convicted of CSC-I. The first three subdivisions address the terms of imprisonment imposed for CSC-I. Generally, CSC-I is punishable by imprisonment for life or any term of years,[22] with two exceptions. Under the first exception, CSC-I offenses committed by an individual 17 years of age or older against an individual less than 13 years of age are also subject

[22] MCL 750.520b(2)(a).

to a 25-year mandatory minimum sentence.[23] The second exception, which is not at issue here, specifies that certain repeat offenders must be imprisoned for life without the possibility of parole.[24]

In addition to imprisonment, the Legislature has imposed lifetime electronic monitoring as an additional punishment for a CSC-I conviction.[25] Under § 520b(2)(d), the trial court shall sentence a defendant to lifetime electronic monitoring as provided by § 520n "[i]n addition to any other penalty imposed under subdivision (a) or (b) . . . ."[26] The disjunctive term "or" signals that there are two circumstances in which lifetime electronic monitoring must be imposed under MCL 750.520b(2).[27] Lifetime electronic monitoring must be imposed (1) when a defendant receives a sentence of life in prison or any term of years under § 520b(2)(a); *or* (2) when a defendant also receives a mandatory minimum sentence under § 520b(2)(b) because the crime was "committed by an individual 17 years of age or older against an individual less than 13 years of age." Thus, the Legislature has mandated lifetime electronic monitoring for all CSC-I sentences except when the defendant is sentenced to life without the possibility of parole under § 520b(2)(c).[28] To con-

[23] MCL 750.520b(2)(b).

[24] MCL 750.520b(2)(c).

[25] *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012).

[26] The Legislature's use of the term "shall" indicates that this is a mandatory directive. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014).

[27] See *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). "Or" is a disjunctive term used to indicate a disunion, a separation, an alternative. *Id*. at 499 n 11.

[28] In *Brantley*, the panel erroneously stated that "*any* defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime

clude otherwise, as defendant urges, and limit lifetime electronic monitoring only to sentences imposed under § 520b(2)(b) would impermissibly render the Legislature's reference in § 520b(2)(d) to "any other penalty imposed under subdivision (a)" nugatory.[29]

Reading § 520b(2)(d) in the context of the entire legislative scheme similarly demonstrates the Legislature's intent to mandate lifetime electronic monitoring for all CSC-I sentences in which the defendant has not been sentenced to life without parole. Section 520b(2)(d) is located in Chapter LXXVI of the Michigan Penal Code, MCL 750.1 *et seq*. This chapter is titled "Rape" and sets forth the elements and punishments for offenses involving criminal sexual conduct. Immediately following § 520b is § 520c, which addresses criminal sexual conduct in the second degree (CSC-II). Similar to sentences for CSC-I, the Legislature has also mandated that courts impose lifetime electronic monitoring as part of CSC-II sentences, albeit in more limited circumstances. The relevant provision, MCL 750.520c(2)(b), provides:

> In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime elec-

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electronic monitoring." *Brantley*, 296 Mich App at 559 (emphasis added). Because § 520b(2)(d) omits any reference to Subdivision (c), the lifetime electronic monitoring requirement does not apply to individuals sentenced to imprisonment for life without the possibility of parole under that subdivision. See *People v Johnson*, 298 Mich App 128, 135-136; 826 NW2d 170 (2012).

[29] See *Johnson*, 492 Mich at 177. We reject defendant's argument that this interpretation renders the phrase "under section 520n" in § 520b(2)(d) meaningless. To the contrary, § 520n provides that defendants sentenced to lifetime electronic monitoring under §§ 520b or 520c are subject to the Department of Corrections' lifetime electronic monitoring program established by MCL 791.285. See *People v Kern*, 288 Mich App 513, 520; 794 NW2d 362 (2010). Section 520n also prohibits certain acts or omissions by individuals sentenced to lifetime electronic monitoring and provides the punishment for such violations.

> tronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

Under this provision, lifetime electronic monitoring is only mandated for CSC-II convictions when the offender was 17 years of age or older and the victim was less than 13 years of age. In contrast, § 520b contains no such limitation. Because the Legislature has specifically limited lifetime electronic monitoring for CSC-II offenders to sentences arising from specific age-based offenses, we will not read an identical limitation into § 520b where the Legislature did not see fit to include it.[30]

Finally, we note that in analyzing this issue, lower courts and the parties in this case have focused extensively on when lifetime electronic monitoring may be imposed under § 520n(1).[31] Their arguments have primarily been concerned with the effect of the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" in § 520n(1). We reject defendant's invitation to read this phrase as restricting lifetime electronic monitoring to CSC-I and CSC-II sentences for offenses committed by an individual 17 years of age or older against an individual less than 13 years of age. Generally, a modifying clause is confined solely to the last antecedent unless a contrary intention appears.[32] There is no such intention here. Applying

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

[31] See, e.g., *Brantley*, 296 Mich App at 557; *People v King*, 297 Mich App 465, 485-487; 824 NW2d 258 (2012).

[32] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

this general rule to determine that the age limitation only applies to convictions for CSC-II is entirely consistent with the statutory analysis above. Instead, it is defendant's reading that fails to give effect to every phrase and clause in the statutory scheme. In addition to rendering part of § 520b(2)(d) nugatory, interpreting § 520n(1) to add an age limitation to both § 520b and § 520c would improperly render the specific age limitation in § 520c(2)(b) surplusage.[33] Therefore, we hold that under § 520b(2)(d), lifetime electronic monitoring must be imposed for all defendants convicted of CSC-I except where the defendant has been sentenced to life without the possibility of parole under § 520b(2)(c).

Turning to this case, defendant pleaded guilty to CSC-I under § 520b(1)(c) for sexual penetration occurring under circumstances involving the commission of another felony. The punishment for this offense is: (1) imprisonment for life or for any term of years and (2) mandatory lifetime electronic monitoring.[34] Consequently, the trial court was required to impose lifetime electronic monitoring. Because defendant's judgment of sentence did not include this statutorily mandated punishment, we agree with the Court of Appeals that his sentence was invalid.[35]

B. THE TRIAL COURT COULD NOT AMEND DEFENDANT'S SENTENCE ON ITS OWN INITIATIVE

Having determined that defendant's sentence was invalid, we next address whether the trial court was

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[33] See *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015) (stating that we must "avoid an interpretation that would render any part of the statute surplusage or nugatory") (citation and quotation marks omitted).

[34] MCL 750.520b(2)(a) and (d).

[35] See *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) (stating that a sentence is invalid when it is based on "a misconception of law").

authorized to amend defendant's judgment of sentence on its own initiative 19 months after judgment on the sentence had entered.

As with statutes, we begin our analysis with the plain language of the relevant court rules.[36] Answering whether the trial court has the authority to correct sua sponte an invalid sentence after judgment on that sentence has entered requires us to consider two court rules: one general, one specific. MCR 6.435, entitled "Correcting Mistakes," provides the general rule regarding a court's ability to correct mistakes in judgments and orders. MCR 6.435(A) details the court's authority to correct clerical mistakes and provides:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

Under this subrule, a court may correct a clerical mistake on its own initiative at any time, including after a judgment has entered.

But the parties do not contend that the failure to sentence defendant to lifetime electronic monitoring was a clerical mistake. Nor could they—the original sentencing judge said nothing about lifetime electronic monitoring at the initial sentencing. Instead, as the parties recognize, the failure to impose lifetime electronic monitoring was a substantive mistake, which is the province of MCR 6.435(B). Subrule (B) reads:

> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

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[36] *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

As with clerical errors, MCR 6.435(B) contemplates the court acting on its own initiative to correct substantive mistakes; otherwise, there would be no need to specify that the court must first give the parties an opportunity to be heard. Yet the court's ability to correct substantive mistakes under MCR 6.435(B) ends upon entry of the judgment.[37]

Against the backdrop of MCR 6.435, we turn to the specific court rule discussing the court's ability to correct an invalid sentence. MCR 6.429, entitled "Correction and Appeal of Sentence," provides, in relevant part:

> (A) Authority to Modify Sentence. A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.
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> (B) Time for Filing Motion.
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> (1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
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> (2) 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).
>
> (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
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> (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

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[37] This provides the court with a seven-day window to review a sentence before signing the judgment of sentence. See MCR 6.427 ("Within 7 days after sentencing, the court must date and sign a written judgment of sentence . . . .").

The first sentence of MCR 6.429(A) provides that "[a] motion to correct an invalid sentence may be filed by either party." This provision gives both parties the ability to seek correction of an invalid sentence if they choose to do so.[38] The next sentence of the rule states that a "court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." This reflects the well-recognized principle that trial courts possess the power to review and correct an invalid sentence.[39] It also distinguishes this power from the trial court's authority to modify a valid sentence, which is much more circumscribed.[40]

MCR 6.429(B) provides a detailed process governing how and when a party may file a motion to correct an invalid sentence.[41] Specifically, before the filing of a timely claim of appeal, either party may file a motion to correct an invalid sentence under MCR 6.429(B)(1). After a claim of appeal has been filed, a party may only file a motion to correct an invalid sentence as specified by MCR 6.429(B)(2) and (3). These motions are time-limited. If a claim of appeal has been filed, a defendant has 56 days to file a motion to correct an invalid

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[38] This sentence was added by a 2005 amendment clarifying that the rule applies to motions to correct an invalid sentence and that such motions may be filed by either party. MCR 6.429(A), as amended July 13, 2005, 473 Mich lxx (2005).

[39] *Miles*, 454 Mich at 96; *In re Jenkins*, 438 Mich 364, 369; 475 NW2d 279 (1991).

[40] Trial courts ordinarily lack the authority to set aside a valid sentence. See *People v Barfield*, 411 Mich 700, 702-703; 311 NW2d 724 (1981). But the Legislature may provide exceptions to this rule. See, e.g., MCL 801.257 ("[A] prisoner may receive, if approved by the court, a reduction of 1/4 of his or her term if his or her conduct, diligence, and general attitude merit such reduction.").

[41] See *Lee*, 489 Mich at 299 ("MCR 6.429(B) sets the time limits for a motion to correct an invalid sentence . . . .").

sentence.[42] Or the appellant may file a motion to remand within the time provided for filing the appellant's brief.[43] In cases where, as here, a defendant may only appeal by leave, either party has six months from the entry of the judgment of sentence to file a motion to correct an invalid sentence.[44] Finally, when the appeal process is complete, the defendant may seek to correct an invalid sentence by seeking relief pursuant to Subchapter 6.500.[45]

Important to our interpretation of the rule is what MCR 6.429 does not address. While the second sentence in MCR 6.429(A) states that the court may correct invalid, but not valid, sentences, the remainder of MCR 6.429 focuses on parties filing a motion to correct an invalid sentence and is conspicuously silent on the court's authority to correct an invalid sentence sua sponte. When considered against the backdrop of the general rule, MCR 6.435(B), which permits a trial court to act on its own initiative to correct substantive mistakes in a sentence, but only until judgment is entered, the silence is telling. Had the drafters intended MCR 6.429 to allow sua sponte correction of substantive mistakes in a sentence after judgment is entered, we would have expected them to be more explicit.[46] As a result, we believe MCR 6.429(A) is best read as requiring a party to file a timely motion before

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[42] MCR 6.429(B)(2); MCR 7.208(B)(1).

[43] MCR 6.429(B)(2); MCR 7.211(C)(1).

[44] MCR 6.429(B)(3). Because defendant pleaded guilty, he could only appeal his sentence by leave. MCR 7.203(B)(1).

[45] MCR 6.429(B)(4).

[46] For instance, the court rules specifically grant a trial court the authority to act "on its own initiative" in other contexts, including several times in the same subchapter as MCR 6.429. See, e.g., MCR 6.412(D)(2) (challenges for cause); MCR 6.420(D) (poll of jury); MCR 6.435(A) (correcting clerical mistakes); MCR 6.005(G) (unanticipated conflicts of interest); MCR 6.120(B) (permissive joinder); MCR 6.610(B)

a court may correct an invalid sentence upon which judgment has already entered.

Therefore, we conclude that MCR 6.429 authorizes either party to seek correction of an invalid sentence upon which judgment has entered, but the rule does not authorize a trial court to do so sua sponte. MCR 6.429(B) describes in detail the process for correcting an invalid sentence, which requires the motion of a party. Like MCR 6.429(A), Subrule (B) contains no indication that a trial court may act on its own initiative. To the contrary, the procedure and accompanying time limits set forth in MCR 6.429(B) would have little meaning if MCR 6.429 permitted trial courts to correct invalid sentences sua sponte at any time. Interpreting the rule in this manner would render the time limitation in MCR 6.429(B)(3) a mere formality—for example, a prosecutor who fails to timely file could still bring to the court's attention that a defendant's sentence is invalid and urge the court to act on its own initiative to correct the sentence. And, if the trial court had unilateral authority to correct an invalid sentence under MCR 6.429, the timeliness of the prosecutor's request would be immaterial.[47]

In sum, when considering MCR 6.435 and MCR 6.429 together, we conclude that the trial court's authority to correct an invalid sentence on its own initiative ends upon entry of the judgment of sentence. Thereafter,

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(pretrial conference). We do not, however, suggest that the phrase "on its own initiative" is always required to authorize sua sponte action. We conclude only that MCR 6.429, when read together with MCR 6.435, contains no indicia that a trial court may independently act to correct an invalid sentence once judgment on that sentence has entered.

[47] We have already recognized that these time limits are not trivialities. In *People v Lee*, we held that a prosecutor's motion filed 20 months after the judgment of sentence entered was untimely and should have been denied by the trial court. *Lee*, 489 Mich at 299. This determination would have been unnecessary if the trial court had the authority to correct the sentence sua sponte.

an invalid sentence may be corrected only upon the timely filing of a motion to correct an invalid sentence in accordance with MCR 6.429.[48] In reaching the opposite conclusion, the Court of Appeals in this case relied on its previous decision in *Harris*,[49] which stated that "a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A) . . . ."[50] We overrule *Harris* to the extent that it is inconsistent with our opinion.

We emphasize that we reach our decision, as we must, based on the text of the relevant court rules.[51] In the past, we have recognized that trial courts have the power to correct an invalid sentence sua sponte.[52]

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[48] See *People v Peck*, 481 Mich 863, 867 n 1 (2008) (MARKMAN, J., dissenting) ("[MCR 6.429] requires that a 'motion' be 'filed' by a 'party' before a trial court may correct a sentence."); *Comer*, 312 Mich App at 547 (GLEICHER, P.J., concurring) ("These procedures clearly contemplate that a court may correct an invalid sentence only after a party has filed a motion seeking that relief."). See also *Michigan Rules of Court: Volume I — State*, MCR 6.435 (1989 Staff Comment), p 357 (stating that the limitation in MCR 6.435(B) in correcting substantive mistakes "does not, however, prohibit a party aggrieved by a substantive mistake from obtaining relief by using available postconviction procedures. . . . [T]he defendant may obtain relief by filing a postconviction motion. See 6.429"). We acknowledge that staff comments to the court rules are not binding authority, but they can be persuasive in understanding the proper scope or interpretation of a rule or its terms. See *People v Hernandez*, 443 Mich 1, 9 n 9; 503 NW2d 629 (1993).

[49] In *Harris*, the prosecution moved for resentencing more than one year after the defendant's judgment of sentence when it discovered that a consecutive sentence should have been imposed. *Harris*, 224 Mich App at 599. The trial court granted the motion and resentenced the defendant. *Id*.

[50] *Id*. at 601.

[51] See *People v Holder*, 483 Mich 168, 176; 767 NW2d 423 (2009) ("It is imperative . . . that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules.").

[52] See, e.g., *In re Lemire*, 360 Mich 693, 695; 105 NW2d 37 (1960); *In re Vitali*, 153 Mich 514, 515; 116 NW 1066 (1908); *People v Farrell*, 146

But this Court is constitutionally vested with the exclusive authority to establish and modify rules of practice and procedure in this state.[53] And when this Court exercises that authority, the courts are bound by its exercise. By adopting MCR 6.435 and MCR 6.429, we set forth the governing procedure for correcting an invalid sentence in Michigan that trial courts must follow.[54] Under these rules, a party must move to correct an invalid sentence; a court cannot do so on its own accord after entry of the judgment.[55]

As applied here, defendant's sentence was invalid because it did not include the statutorily mandated punishment of lifetime electronic monitoring. Under MCR 6.429(B), the court could have corrected this

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Mich 264, 270; 109 NW 440 (1906) (opinion by CARPENTER, C.J.); *People v Dane*, 81 Mich 36, 40; 45 NW 655 (1890).

[53] Const 1963, art 6, § 5. See also *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999).

[54] See *Holder*, 483 Mich at 176. While the result here is dictated by the plain language of MCR 6.429, in the future this Court may exercise its rulemaking authority to expressly provide courts with the power to correct sentences on their own initiative. We note that courts have this broader power in other jurisdictions. FR Crim P 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error."); *Commonwealth v Jones*, 520 Pa 385, 389-390; 554 A2d 50 (1989) (holding that a sentencing court may correct an illegal sentence sua sponte); *Guerin v Fullerton*, 389 P2d 84, 85; 154 Colo 142 (1964) (noting that Colo R Crim P 35(a) permits a court to correct a sentence on its own motion).

[55] Our decision in *Miles* is not to the contrary. In *Miles*, we appear to have assumed that an invalid sentence was subject to sua sponte modification by the trial court under MCR 6.429(A) and noted that certain sentence modifications are ministerial in nature and do not require a resentencing hearing. *Miles*, 454 Mich at 98-99. We ultimately held that the trial court erred when it modified defendant's sentence sua sponte without holding a hearing and remanded for a resentencing hearing because that was the remedy sought by the defendant. *Id*. at 94, 100. In doing so, we did not address the specific question presented here, i.e., whether a trial court may modify an invalid sentence on its own initiative at any time.

substantive error on its own initiative before entering judgment. After that, the prosecution had six months from the entry of the judgment of sentence to file a motion to correct the invalid sentence. The prosecution did not do so. Instead, the trial court ordered a hearing on its own initiative, which was held 19 months after the original sentence was imposed, after which it added lifetime electronic monitoring to defendant's sentence. Under MCR 6.435 and MCR 6.429, this was improper because the trial court lacked the authority to correct defendant's invalid sentence absent a motion from one of the parties.[56] Accordingly, we hold that the Court of Appeals erred when it affirmed the trial court's correction of defendant's invalid sentence.

IV. CONCLUSION

We hold that under MCL 750.520b(2)(d), the punishment of lifetime electronic monitoring must be imposed for all CSC-I sentences in which the offender is not imprisoned for life without the possibility of parole under § 520b(2)(c). Because defendant's sentence for CSC-I did not include lifetime electronic monitoring, it was invalid. We further hold that under MCR 6.435 and MCR 6.429, a trial court may not correct an invalid sentence on its own initiative after entry of the judgment; the court may only do so upon the proper motion of a party. Because neither party moved to correct defendant's sentence, the trial court erred by adding lifetime electronic monitoring to defendant's sentence

[56] Additionally, we agree with Judge GLEICHER that the trial court erred by treating this as a plea withdrawal case in order to circumvent MCR 6.435 and that MCR 6.310(C) "relates to the trial court's determination of a *motion* brought by a defendant to withdraw a guilty plea." *Comer*, 312 Mich App at 551 (GLEICHER, P.J., concurring). Because defendant has not brought such a motion here, the plea withdrawal procedure set forth in MCR 6.310(C) is inapplicable.

on its own initiative 19 months after the original sentence was imposed. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, vacate the April 29, 2013 judgment of sentence, and remand this case to the trial court to reinstate the October 8, 2012 judgment of sentence.

MARKMAN, C.J., and MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*concurring in part and dissenting in part*). I entirely agree with the majority's well-reasoned holding that defendant's sentence was invalid because MCL 750.520b(2)(d) required the trial court to sentence defendant to lifetime electronic monitoring (LEM). Further, I find the majority's interpretation of MCR 6.429 and MCR 6.435 reasonable, and therefore I concur with the majority's conclusion that the trial court lacked authority to correct defendant's invalid sentence.

I part ways with the majority because I disagree with the majority's remedy, which is to reinstate the very sentence it properly concluded was invalid. While a trial court is restrained from granting relief sua sponte or on the basis of an untimely filed motion to correct a valid sentence, this Court "may, *at any time*, in addition to its general powers" "enter any judgment or order that ought to have been entered . . . ."[1]

The majority's remedy, in my view, does not address the significant constitutional concerns regarding

[1] MCR 7.316(A) and (A)(7) (emphasis added). The majority mistakenly believes that this Court's power under MCR 7.316(A) and (A)(7) is predicated on an underlying court rule that requires a defendant file a motion under MCR 6.310(C). MCR 7.316(A) and (A)(7) plainly state that this Court "may, *at any time*, in addition to its general powers" "enter *any judgment or order* that ought to have been entered . . . ." (Emphasis added.)

whether defendant's plea was involuntary under this Court's decision in *People v Cole*.[2] As in *Cole*, the trial court failed to advise defendant that he is subject to LEM, which, as part of the sentence itself, is a direct consequence of the plea.[3] Because defendant was not made aware of the LEM requirement, his plea is not constitutionally valid.[4] Given that defendant's plea is not constitutionally valid, I believe any action taken to redress errors in defendant's sentence predicated on that invalid plea is premature.

This Court has made very clear that "MCR 6.310(C) provides the proper remedy for violations of MCR 6.302(B)(2)."[5] Indeed, I believe that MCR 6.310(C) "provides the *sole* remedy for violations of MCR 6.302(B)(2) when a defendant seeks to withdraw his plea after sentencing."[6] Consistently with this view, I conclude that specific performance of an invalid sentence is inappropriate because there is no basis for such a remedy in our court rules.[7] This Court's jurisprudence is generally in accord, albeit for different reasons, having stated that "[r]esentencing a defendant to a term within the range the court articulated at an erroneous plea hearing might lead to unfair results. It might create a binding 'pleaded to' sentence to which neither the prosecution nor the defendant agreed."[8]

I see no basis to depart from these principles regardless of whether defendant, the prosecution, or the trial

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[2] *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012).

[3] *Id*. at 335.

[4] *Id*. at 333, citing *Meyer v Branker*, 506 F3d 358; 367-368 (CA 4, 2007).

[5] *People v Brown*, 492 Mich 684, 699; 822 NW2d 208 (2012).

[6] *Id*. at 703 (YOUNG, C.J., concurring in part and dissenting in part).

[7] *Id*.

[8] *Id*. at 699-700 (opinion of the Court).

court raised the violations of MCR 6.302(B)(2). In each instance, the fact remains that "[i]f the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea."[9] More importantly, this Court has stressed that "the concerns about a defendant understanding the consequences of a guilty plea are present when the defendant is notified of possible sentence enhancement only after pleading guilty. Just as in the case at hand, a defendant's right to make an understanding plea is of *the utmost importance* in that circumstance."[10] Therefore, instead of reinstating an invalid sentence that is predicated on an invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea."[11]

WILDER, J., concurred with ZAHRA, J.

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[9] MCR 6.310(C).

[10] *Brown*, 492 Mich at 701 (emphasis added).

[11] MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

HAKSLUOTO v MT CLEMENS REGIONAL MEDICAL CENTER

Docket No. 153723. Argued April 12, 2017 (Calendar No. 1). Decided June 27, 2017.

Jeffrey and Carol Haksluoto filed a medical malpractice claim in the Macomb Circuit Court against Mt. Clemens Regional Medical Center, General Radiology Associates, PC, and Eli Shapiro, DO, for injuries Jeffrey sustained after he was misdiagnosed in Mt. Clemens's emergency room on December 26, 2011. Plaintiffs mailed a notice of intent (NOI) to file a claim on December 26, 2013, the final day of the two-year statutory period of limitations. Plaintiffs filed their complaint on June 27, 2014, which was 183 days after service of the NOI. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the suit was barred by the two-year statute of limitations. The court, Peter J. Maceroni, J., denied defendants' motion. Defendants appealed, and the Court of Appeals, CAVANAGH, P.J., and RIORDAN and GADOLA, JJ., reversed, holding that MCR 1.108—the rule concerning the calculation of time—was best understood to signify that the 182-day notice period began on December 27, 2013—the day *after* plaintiffs served the NOI—and expired on June 26, 2014, which meant that the notice period did not commence until one day after the limitations period had expired, and therefore filing the NOI on the last day of the limitations period failed to toll the statute of limitations. 314 Mich App 424 (2016). The Supreme Court granted plaintiffs' application for leave to appeal to consider whether plaintiffs' NOI tolled the statute of limitations and whether plaintiffs' complaint filed the day after the notice period ended was therefore timely. 500 Mich 892 (2016).

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

The limitations period for medical malpractice actions set forth in MCL 600.5805(6) is tolled when the NOI is filed on the last day of the limitations period. A timely NOI preserves the whole day the NOI is filed as a day to be used once the limitations period begins running after the notice period ends.

1. Under MCL 600.5805(6), the limitations period for a medical malpractice action is two years. MCL 600.2912b(1) requires

that a prospective medical malpractice plaintiff provide a potential defendant at least 182 days of notice prior to filing suit. MCL 600.5856(c) provides that mailing an NOI tolls the statute of limitations at the time notice is given in compliance with the applicable notice period under MCL 600.2912b if during the notice period a claim would be barred by the statute of limitations. Therefore, the NOI only tolls the statute of limitations if there is time remaining in the limitations period to toll. However, as a general proposition, Michigan rejects fractions of a day, and because the NOI in this case was filed on the final day of the limitations period—which meant that only a fraction of a day was left in the limitations period—the determination of whether any time remained to toll the statute of limitations depended on the determination of whether to round the fraction of a day up to a whole day remaining or round down to no days remaining in the limitations period.

2. The law of fractional days has two relevant strands: how time periods are counted and how fractional days are rounded off. With regard to how time periods are counted, MCL 8.6 and MCR 1.108(1) provide that, in computing a period of time, the first day is excluded and the last day is included. The method of excluding the first day and including the last in calculating a period of time is tantamount to a common-law principle given its consistent application in all contexts since Michigan's origins; the rationale for this method is to ensure that parties receive the entire amount of time to which they are entitled. Because only whole days are counted so as to ensure that the amount of time being provided to the "user" of the time consists of the entire amount of time the law allows, the user of the time receives as many whole days as are allowed under the statute—in this case, 182 days—plus the fractional day that initiates the time period. Accordingly, in this case, once the NOI was filed on December 26, 2013, "day 182" was June 26, 2014; the notice period ran for 182 whole days plus whatever fraction of the day was left on December 26, 2013, when the NOI was placed in the mail.

3. However, the law of counting time provided no answer as to whether the limitations period should be treated as having any time left to toll when there was only a fraction of a day remaining in the limitations period. The law relating to the rounding off of fractional days was used to resolve this question. The touchstone of the common law is that fractional days must be rounded off in a way that accords with common understanding and is consistent with prevailing social customs, practices, and expectations. Because the Court of Appeals' conclusion would leave a plaintiff who

filed an NOI before the expiration of the limitations period "deadlocked," such a conclusion could not be countenanced. Consequently, a timely NOI preserves the day the NOI is filed as a day to be used once the limitations period begins running after the notice period ends. This applies to any NOI that triggers tolling under MCL 600.5856(c), whether filed on the final day of the limitations period or on some earlier day. Once the notice period ends and the time for the plaintiff to bring a claim once again begins to run, it will run for the number of whole days remaining in the limitations period when the NOI was filed, plus one day to reflect the fractional day remaining when the NOI itself was filed. Therefore, when an NOI is filed on the final day of the limitations period, the next business day after the notice period expires is an eligible day to file suit.

4. In this case, plaintiffs filed the NOI on the final day of the limitations period, December 26, 2013, which preserved that entire day for use when the 182-day notice period finally expired. Consequently, the NOI tolled the limitations period, leaving one day for plaintiffs to file their complaint after the notice period ended. Plaintiffs had to wait the entire 182 days of the notice period so as to provide defendants the entire 182 days of notice to which they were entitled. In this case, plaintiffs had to wait 182 days as calculated by MCR 1.108(1), meaning that plaintiffs had to wait until June 26, 2013, was over before using whatever time remained in the period of limitations—in this case, one day, June 27, 2013—to file their complaint. Because plaintiffs filed their complaint on June 27, 2013, plaintiffs' complaint was timely filed.

Reversed and remanded.

MEDICAL MALPRACTICE — STATUTE OF LIMITATIONS — TOLLING — NOTICE OF INTENT — CALCULATING THE REMAINING TIME TO FILE THE COMPLAINT.

MCL 600.2912b(1) requires that a prospective medical malpractice plaintiff provide a potential defendant at least 182 days of notice prior to filing suit; MCL 600.5856(c) provides that mailing a notice of intent (NOI) tolls the statute of limitations at the time notice is given in compliance with the applicable notice period under MCL 600.2912b if during the notice period a claim would be barred by the statute of limitations; a timely NOI which otherwise triggers tolling preserves the day the NOI is filed as a day to be used once the limitations period begins running after the notice period ends, regardless of whether the NOI was filed on the final day of the limitations period or on some earlier day; once the notice period ends and the time for the plaintiff to bring a

> claim once again begins to run, it will run for the number of whole days remaining in the limitations period when the NOI was filed, plus one day to reflect the fractional day remaining when the NOI itself was filed; when an NOI is filed on the final day of the limitations period, the next business day after the notice period expires is an eligible day to file suit.

Hertz Schram PC (by *Steve J. Weiss* and *Daniel W. Rucker*) for plaintiffs.

Giarmarco, Mullins & Horton, PC (by *LeRoy H. Wulfmeier, III*, and *Jared M. Trust*), for defendants.

Amici Curiae:

Charfoos & Christensen, PC (by *David R. Parker*), for the Michigan Association for Justice.

Hewson & Van Hellemont, PC (by *Nicholas S. Ayoub*), for Michigan Defense Trial Counsel.

MARKMAN, C.J. The Revised Judicature Act (RJA), MCL 600.101 *et seq*., requires that a prospective medical malpractice plaintiff provide a potential defendant at least 182 days of notice prior to filing suit. If a plaintiff files a notice of intent (NOI) to file a claim before the limitations period for the malpractice action expires, but the limitations period for the malpractice action would otherwise expire during the 182-day notice period, the statute of limitations for the malpractice action is tolled for the duration of the notice period. In this case, we consider whether the limitations period is tolled when the NOI is filed on the last day of the limitations period, leaving no whole days of the limitations period to toll. We conclude that the limitations period *is* tolled under such circumstances. As a result, we further conclude that plaintiff's complaint, which was filed the day after the notice period

ended, was timely, and we reverse the contrary decision of the Court of Appeals.

I. FACTS AND HISTORY

On December 26, 2011, plaintiff Jeffrey Haksluoto[1] went to the emergency room at defendant Mt. Clemens Regional Medical Center, complaining of abdominal pain and various forms of gastrointestinal distress. He was given a CT scan that was interpreted by defendant Dr. Eli Shapiro as being unremarkable, and plaintiff was sent home. Plaintiff went back to the emergency room on January 6, 2012, at which time, he asserts, he was correctly diagnosed, prompting emergency surgery. Plaintiff now alleges that Dr. Shapiro misinterpreted the CT scan on December 26 and that if it had been properly interpreted, his condition would have been detected sooner and addressed rather than worsening.

It is undisputed that the end of the limitations period for plaintiff's medical malpractice claim was December 26, 2013. Plaintiff served his NOI on that very date, the final day of the limitations period. After waiting 182 days from December 26, 2013, plaintiff then filed his complaint on the "183rd day," June 27, 2014. Shortly after he filed his complaint, defendants filed a motion for summary disposition, arguing that the suit was time-barred, but the trial court denied the motion.

The Court of Appeals reversed. *Haksluoto v Mt Clemens Regional Med Ctr*, 314 Mich App 424; 886 NW2d 920 (2016). The panel held that MCR 1.108—

[1] His wife, Carol Haksluoto, is also a named plaintiff, claiming loss of consortium. For ease of reference, this opinion will refer to plaintiff in the singular form.

the rule concerning the calculation of time—is best understood to signify that "the 182-day notice period began on December 27, 2013—the day *after* plaintiffs served the NOI on December 26, 2013—and expired on June 26, 2014." *Id*. at 432. Because this meant that "the notice period did not commence until one day *after* the limitations period had expired," the Court felt "constrained to conclude that filing the NOI on the last day of the limitations period was not sufficient to toll the statute of limitations . . . ." *Id*. at 432-433. The Court acknowledged "that [its] analysis means that a plaintiff who serves an NOI on the last day of the limitations period is legally incapable of filing a timely complaint and is, in effect, deadlocked from timely filing a suit in compliance with both the statutory notice period and the statute of limitations." *Id*. at 433. We granted leave to appeal to consider whether plaintiff's NOI tolled the statute of limitations and whether the instant complaint filed the day after the notice period ended was therefore timely. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 892 (2016).

II. STANDARD OF REVIEW

This Court reviews motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants' motion for summary disposition in the trial court was brought under MCR 2.116(C)(7). All well-pleaded allegations are viewed in the light most favorable to the nonmoving party unless documentary evidence is provided that contradicts them. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). Substantively, this case requires us to interpret the meaning of statutes and court rules, which are reviewed de novo. See *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Simi-

larly, "[t]he applicability of a legal doctrine [constitutes] a question of law. This Court reviews questions of law de novo." *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). See also *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010) ("The interpretation and applicability of a common-law doctrine is also a question that is reviewed de novo.").

III. ANALYSIS

A. LEGAL BACKGROUND

The parties' arguments and the Court of Appeals' decision both draw upon certain provisions of the RJA and upon our court rule on calculating time periods. The limitations period for a medical malpractice action is two years. MCL 600.5805(6). The RJA also imposes a notice requirement on prospective medical malpractice plaintiffs:

> [A] person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [MCL 600.2912b(1).]

Michigan employs a "mailbox rule" for providing this notice of intent. See MCL 600.2912b(2) ("Proof of the mailing constitutes prima facie evidence of compliance" with the NOI requirement.). The RJA also provides that mailing an NOI tolls the statute of limitations

> [a]t the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations . . . . [MCL 600.5856(c).]

Plaintiff here mailed the required NOI on the final day of the limitations period: December 26, 2013. Plaintiff argues that, because MCL 600.5856(c) provides that the limitations period is tolled "[a]t the time notice is given," the limitations period was tolled at that point. Because there was some time remaining on the clock (that portion of December 26 that had not yet elapsed), plaintiff argues that we must "round up" and afford him a whole day on which to file his complaint after the notice period has ended. Defendants and the Court of Appeals, by contrast, point to MCR 1.108(1), which provides that in computing periods of time, "[t]he day of the act, [or] event, . . . after which the designated period of time begins to run is not included." Defendants argue that because the day of the act or event "is not included," the notice period did not begin until December 27, 2013, the day after the limitations period ended. Since the limitations period is tolled under MCL 600.5856(c) only when the limitations period is going to expire *during* the notice period, that notice period did not begin until *after* the limitations period ended, and therefore "there was nothing left to toll," *Ligons v Crittenton Hosp*, 490 Mich 61, 90; 803 NW2d 271 (2011), rendering plaintiff's complaint untimely.[2]

As a general matter, "the relevant sections of the Revised Judicature Act comprehensively establish

[2] Both parties essentially assume the conclusion of their respective arguments. It is undoubtedly true that the NOI was filed at some point before the end of December 26, 2013, and that December 27, 2013, was "day one" for purposes of the 182-day notice/tolling period. However, contrary to defendants' argument and the position of the Court of Appeals, identifying "day one" offers little illumination as to the legal consequences of the unexpired portion of December 26 that remained when plaintiff filed his NOI. By the same token, while it is true that the RJA provides that tolling begins "[a]t the time notice is given," plaintiff also begs the question when he argues that this language necessarily rendered timely his complaint filed on "day 183."

limitations periods, times of accrual, and tolling for civil cases." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 390; 738 NW2d 664 (2007). "[T]he Legislature intended the scheme to be comprehensive and exclusive." *Id*. at 391. Consequently, any deviation due to tolling from the two-year limitations period for malpractice actions is only as provided by statute, such as in MCL 600.5856(c). That tolling provision states that tolling begins "[a]t the time notice is given," so long as the limitations period would otherwise expire during the notice period. Thus, we stated in *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011), that "[w]hen a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations . . . ." Because it is undisputed that the notice here was filed on the final day of the limitations period (but before that final day ended), MCL 600.5856(c) has ostensibly been satisfied so as to trigger tolling.

However, as a general proposition, "[o]ur law rejects fractions of a day . . . ." *Warren v Slade*, 23 Mich 1, 3 (1871). To "reject"—or disregard—the remaining fraction of a day means we must either round up to a whole day remaining, or round down to no days remaining. *Driver* makes clear that tolling is contingent on there being time left to toll. Given that the instant NOI was filed on the final day of the limitations period, if we were to round down, the NOI would not trigger tolling because there would be no time left to toll. Therefore, to know whether there was any time left to toll and hence whether tolling was triggered, we must determine whether we round up or round down. While the Legislature certainly has the power to abrogate the common-law rule disregarding fractions of a day, see *Cohen v Supreme Sitting of the Order of the Iron Hall*, 105 Mich 283, 288; 63 NW 304 (1895) ("In the *absence*

of any statute recognizing fractions of days, it has been held that all judgments entered on the same day will be regarded as if entered at the same time.") (emphasis added), MCL 500.5856(c) does not do so. Therefore, the fundamental question we confront here is whether less than a whole day remaining in the limitations period qualifies as "time remaining on the applicable statute of limitations" as required by *Driver* to trigger tolling. In other words, while MCL 600.5856(c) provides that the limitations period is tolled "[a]t the time notice is given," if the NOI is served on the final day of the limitations period and only a fraction of a day is left, can that fractional day be tolled? This is surprisingly a question of first impression in this state. None of our caselaw squarely answers the question.[3] Rather, we must turn to the law of fractional days.

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[3] Both parties invite us to look to passing remarks in our prior opinions that are consistent with either plaintiff's or defendants' arguments. For example, plaintiff points to *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 76; 869 NW2d 213 (2015), in which we characterized an NOI sent on the final day of the limitations period as "timely"; while the plaintiff's complaint there was ultimately disallowed as having been filed before the notice period had ended, plaintiff notes that we raised no concerns that the plaintiff would have been "deadlocked" had she not waited for the end of the notice period. However, this is nonbinding dicta. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) ("Obiter dicta are not binding precedent."). The issue in *Tyra* was whether the complaint was filed *prematurely*, not whether the NOI filed on the final day of the limitations period succeeded in tolling the running of the statute of limitations.

Defendants point us, for example, to our order denying leave in *Dewan v Khoury*, 477 Mich 888 (2006). There, the plaintiff filed the NOI on the final day of the limitations period, waited 182 days, which ended on a Friday, and then filed suit on the following Monday. The Court of Appeals held that the complaint was untimely because the notice period did not begin until the day after the NOI was served, signifying that the notice period did not begin during the limitations period and thus there was no limitations period left to toll. We denied leave to appeal.

B. LAW OF FRACTIONAL DAYS

While it is well established that fractional days are to be disregarded, to assert this affords little insight as to how to go about *implementing* such disregard. We must determine whether this disregard is or is not consistent with recognizing that the instant NOI was filed before the end of the day on December 26, 2013, and if we do take such note, what effect the unexpired portion of the day had on plaintiff's subsequent filing options. The parties spend considerable effort disputing the significance of MCR 1.108(1) on this case, but that rule deals with only a single aspect of how fractional days are regarded—how time periods are *counted* in relation to fractional days. The law of fractional days, however, has two relevant strands of analysis—how time periods are counted and how fractional days are rounded off.

1. COUNTING TIME

The law regarding how time is counted is currently codified in two overlapping provisions. Among our statutes, MCL 8.6 provides that, "[i]n computing a period of days, the first day is excluded and the last day is included." Relatedly, MCR 1.108(1) provides that, "[i]n computing a period of time prescribed or allowed by these rules, by court order, or by statute . . . [t]he day of the act, [or] event, . . . after which the desig-

However, denials of leave to appeal do not establish a precedent. See MCR 7.301(E) ("The reasons for denying leave to appeal . . . are not to be regarded as precedent."); *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) ("A denial of leave to appeal has no precedential value."); *Frishett v State Farm Mut Auto Ins Co*, 378 Mich 733, 734 (1966) (When denying leave to appeal, "the Supreme Court expresses no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals.").

nated period of time begins to run is not included," but "[t]he last day of the period is included . . . ."[4] This method of excluding the first day and including the last day has been codified within our court rules in some version since Michigan's origins. Our current court rule is essentially a restatement of its predecessor, GCR 1963, 108.6, which, in turn, was a broadened version of *its* predecessor, Court Rule No. 9, § 1 (1945).[5] Court Rule No. 9, § 1 (1945) applied this method of excluding the first day and including the last to time periods that ran from the service of various court documents; however, the same method was used for time periods under statutes as a matter of common law. See, e.g., *Gorham v Wing*, 10 Mich 486, 496 (1862) ("When time is to be computed *from* the time of an act done, we think the more reasonable rule is that the day on which the act is done is to be excluded from the computation[.]"). Thus, although the method of excluding the first day and including the last was not *codified* as to statutory time periods until the 1963 court rules, it nonetheless has consistently been applied in all contexts because it "best accords with the common understanding and is least likely to lead to mistakes in

[4] The apparent overlap of the statute with the court rule was previously recognized in *Beaudry v Beaudry*, 20 Mich App 287, 288; 174 NW2d 28 (1969).

[5] "The day on which any rule shall be entered, claim of appeal filed, or order, notice, pleading or papers served shall be excluded in the computation of the time for complying with the exigency of such rule, order or notice, pleading or paper, and the day on which a compliance therewith is required shall be included . . . ." A version of the rule has been in continuous effect since Michigan's origins as a state. See Court Rule No. 9 (1933); Court Rule No. 9 (1931); Supreme Court Rule No. 25 (1916); Circuit Court Rule No. 5 (1916); Supreme Court Rule No. 25 (1897); Circuit Court Rule No. 36(a) (1897); Supreme Court Rule No. 7 (1858); Circuit Court Rule No. 15 (1858); Supreme Court Rule No. 7 (1853); Circuit Court Law Rule No. 14 (1853); Supreme Court Rule No. 7 (1843); Circuit Court Law Rule No. 9 (1843); Court Rule No. 21 (1834).

the application of statutory provisions." *Griffin v Forrest*, 49 Mich 309, 312; 13 NW 603 (1882). The fact that the same method prevails whether implemented by court rule or as simply a matter of historical practice suggests that the rule excluding the first day and including the last is tantamount to a common-law principle.[6]

The rationale for this method of excluding the first day and including the last in calculating a period of time is to ensure that parties receive the entire amount of time to which they are entitled. Consider, for example, *Dousman v O'Malley*, 1 Doug 450 (Mich, 1844), which applied a statutory ancestor of MCL 8.6. Under 1838 RS pt 1, tit 1, ch 1, § 3, ¶ 11, "[a]ny specified number of days [was to be] construed to mean entire days, excluding any fraction of a day[.]"[7] *Dousman* applied the method to 1840 PA 45, § 3, which required that a certain "citation . . . be served three days at least, before the return day thereof . . . ." In *Dousman*,

[6] Cases applying the method without recourse to any positive law authority include *Wesbrook Lane Realty Corp v Pokorny*, 250 Mich 548, 550; 231 NW 66 (1930) ("The general rule . . . is to exclude the day from which the notice begins to run and include that of performance."), *Gantz v Toles*, 40 Mich 725, 728 (1879) ("The general rule in regard to notices which has always prevailed in this State includes the day of performance and excludes the day from which notice begins to run."), and *Gorham*, 10 Mich at 496 (applying rule excluding first day and including last day to redemption period). On the other hand, in *Anderson v Baughman*, 6 Mich 298 (1859), we looked to Supreme Court Rule No. 7 (1858) rather than more generally invoking the "practice" of the Court. See also Computation of Time, 9 Opinions of the US Attorney General 131, 132-133 (March 10, 1858) ("It is the universal rule, in the computation of time for legal purposes, not to notice fractions of a day . . . .").

[7] This requirement was not retained in the Revised Statutes of 1846, and an analogous requirement was not reintroduced to our statutory law until the Legislature adopted MCL 8.6 in 1966. As this history makes clear, however, the same requirement has been in our court rules, and enforced as a matter of practice in our caselaw, the entire time.

the citation had been served on March 29, 1843, with a return date of April 1, and we said that this was insufficient because the statutory "rule of construction would exclude the day of service, that being but the fraction of a day; and, but two entire days having intervened, between the day of service and the return day of the citation, the service was clearly insufficient." 1 Doug at 451. In other words, when a party is afforded a certain number of days, that period is construed as a certain number of whole days, excluding the day which triggered the running of the period, to ensure that the party receives all of the time to which he or she is entitled. We apply a similar principle in the medical malpractice realm, requiring that a plaintiff wait the entire 182-day notice period before filing a complaint. See *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d 213 (2015).

Defendants argue that because our method of counting days excludes the first day, the notice period does not begin until the day after the notice was served, which was "day one" of the notice period under our counting rule. However, investing this much significance into identifying "day one" is inconsistent with *Dunlap v Sheffield*, 442 Mich 195, 200 n 5; 500 NW2d 739 (1993), in which we noted that "if the period was measured in days, *it would begin on the date of the accident*" because MCR 1.108(1) "only indicates that the 'day counter' will not register a '[one]' until the day after the accident." (Emphasis added.) *Dunlap* thus establishes that "day one" is not the same as the day that the period begins running. The day counter is a method by which we ensure that the party afforded a particular amount of time is provided that *entire* amount of time. As we held in *Dousman*, only whole days are counted so as to ensure that the amount of time being provided to the "user" of the time consists of

the entire amount of time the law allows for, which the user of the time essentially receives in *addition* to the fractional day that initiates the time period. In the context of this case, once the NOI was filed on December 26, 2013, "day 182" was June 26, 2014. Because Michigan uses a mailbox rule for NOIs, MCL 600.2912b(2), the notice period ran for 182 whole days *plus* whatever fraction of the day was left on December 26, 2013, at which time the NOI was placed in the mail.

In sum, the law of counting time indicates that the first fractional day—i.e., the day that triggers the running of the time period—is excluded, while the last day is included, based on common-law notions of fairness. After all,

> [i]f a man is given a certain number of days after an event in which to perform an act or claim a right, he is likely to understand that he is allowed so many *full* days, and would be surprised if told that the fragment of the day on which the event took place was to be taken into the account against him. [*Griffin*, 49 Mich at 312 (emphasis added).]

Thus, in reckoning the end of the 182-day notice period, we exclude the day on which the NOI was served to ensure that *defendants* receive 182 whole days of notice. The law of counting time tells us how long plaintiff had to wait before filing his complaint to ensure that defendants received every moment of the notice to which they were entitled. What the law of counting time does *not* explain is the legal consequence of the NOI filed on the final day of the limitations period and the effect of the unexpired fraction of the day on plaintiff's options once the notice period ended. In other words, the law of counting time provides no answer as to whether the NOI, which was filed with less than an entire day remaining in the limitations

period, tolled that period, in that it provides no answer as to whether the limitations period should be treated as having any time left to toll if there is only a *fraction* of a day remaining. To resolve this, we must look to our law relating to the rounding off of fractional days.

2. ROUNDING FRACTIONAL DAYS

As already noted, our law disregards fractions of a day. *Warren*, 23 Mich at 3. This concept is not specific to Michigan but is instead a general feature of the common law. See, e.g., *McGill v Bank of US*, 25 US (12 Wheat) 511, 514; 6 L Ed 711 (1827) ("[T]he law makes no fractions of a day."). Indeed, this proposition predates even American independence. Blackstone provided "a short explanation of the division and calculation of time by the English law," in which he observed that "[i]n the space of a day all the twenty four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes." 2 Blackstone, Commentaries on the Laws of England, pp **140-141. As we have expressed the principle, "[A]ny act done in the compass of [a day] is no more referable to any one, than to any other portion of it, but the act and the day are co-extensive[.]" *Warren*, 23 Mich at 3. This establishes that there is no need to inquire into precisely *when* on December 26, 2013, plaintiff filed his NOI. Instead, the fact that it was filed at some point or another on that day is all that matters, with the legal consequence of that action being the same regardless of the precise point in the day when it occurred. But what consequence, if any, should attach to the act of filing the NOI on the final day of the limitations period? Should we "round *down*" and treat the NOI filed on the final day as ineffective at tolling for want of any time left to toll, or should we "round *up*" and treat the NOI

as having tolled, and preserved, the date on which the NOI was filed for use once the notice period ended?

A system that disregards fractions of a day and trades only in whole days—a system in which fractional days are rounded off in some fashion—will necessarily result in parties getting somewhat more, or somewhat less, time than they would have received if the calculation of time had taken notice of hours and minutes. This effect has caused some confusion as to how "edge" cases such as the instant one should be treated.

> Now, in several of these cases, the actual result of the rule . . . may be, under given circumstances, to give the party one day more than the statute time in which to bring suit, inasmuch as he would be legally entitled to act on the very day of the event from which the time is computed, if that event took place at an hour of the day which, would permit of action; but, on the other hand, the opposite rule . . . would, under other circumstances, give him one day less than the statute time, and if that time was one day only, would give him no time at all. There is good reason, therefore, in the rule . . . of treating the day of the act or event as a point of time only, and excluding it altogether from the computation. [*Id*. at 5.]

We ultimately decided in *Warren* to err on the side of affording parties somewhat *more* time rather than somewhat *less*—to "round up" rather than "round down"—because this was consistent with "the preponderance of American authority," which "harmonize[d] with the mode of computing time under rules of practice," making it "less likely [that] those who are to act . . . [are] deceived and misled in their action." *Id*. at 6.

The touchstone of the common law, therefore, is that fractional days must be rounded off in a way that accords with common understanding and is consistent

with prevailing social customs, practices, and expectations. We recently reaffirmed this principle in *People v Woolfolk*, 497 Mich 23; 857 NW2d 524 (2014). The common-law rule that fractions of a day were disregarded was traditionally applied to mean that a day was considered over as soon as it began; accordingly, a person was considered to have arrived at a particular age on the day before his or her birthday. We rejected this rule as inconsistent with "the prevailing customs and practices of the people" to conclude that a person did not advance to their next year of age until his or her actual birthday. *Id*. at 26-27. This establishes an altogether sensible rule that, in disregarding fractions of a day, we do not consider a day to be over until it is *entirely* over.

If, as we said in *Warren*, "any act done in the compass of [the day] is no more referable to any one, than to any other portion of it," we can just as easily say that, in disregarding fractions of a day, an act taken on a particular day can be construed as though either the day had not yet begun or was entirely over. If our rule is that a day is not over until it is *entirely over*, then we have effectively decided to construe our disregarding of fractional days, at least in this context, as though the day had *not yet begun*—to, in effect, "round up" rather than down. If we were to analogize days to beads on an abacus, in disregarding fractions of a day, we keep the beads on one end of the wire or the other rather than measuring intermediate locations, and we do not move the bead from one end of the wire to the other until the day is *completely* over. But this does not mean that we are incapable of identifying when a bead has been shifted over and when it has not; it is not inconsistent with our disregard of fractional days to take note that December 26, 2013, was only partially exhausted when the NOI was mailed. But

with the day not yet over, the bead was not yet advanced. Thus, we first take notice of the fact that the day was not yet over when the NOI was filed, and second, that the NOI filed on that day preserved that *entire* day for use when the 182-day notice period finally expired.

In reaching a contrary conclusion, the Court of Appeals acknowledged that its resolution of the case meant that a plaintiff who filed an NOI on the final day of the limitations period was "deadlocked." *Haksluoto*, 314 Mich App at 433. It is hard to see how a conclusion that a plaintiff could end up "deadlocked" before the limitations period expires accords with "common understanding," which we expressed as the governing standard in *Griffin*. Indeed, this Court has specifically acknowledged this concern when it stated that "[t]he Legislature surely did not intend its tolling provision as a trap for the unwary . . . ." *Omelenchuk v City of Warren*, 461 Mich 567, 576 n 19; 609 NW2d 177 (2000), overruled in part on other grounds by *Waltz v Wyse*, 469 Mich 642 (2004). Leaving a plaintiff "deadlocked" when that plaintiff files an NOI before the limitations period expires seems as if it is the epitome of a "trap for the unwary," and it cannot be countenanced here.

We hold, therefore, that applying our common-law jurisprudence of fractional days produces a conclusion that a timely NOI preserves the day the NOI is filed as a day to be used once the limitations period begins running after the notice period ends. Notably, this applies to any NOI that triggers tolling under MCL 600.5856(c), whether filed on the final day of the limitations period or on some earlier day. The rule is that once the notice period ends and the time for the plaintiff to bring a claim once again begins to run, it will run for the number of *whole days* remaining in the

limitations period when the NOI was filed, *plus* one day to reflect the fractional day remaining when the NOI itself was filed. There is no principled reason to treat the last day differently from any other—the abacus bead does not slide over until the day is over, and that applies with equal force to the ultimate and penultimate days of the limitations period.

The rule we adopt here has been used in Michigan before. In *Crockett v Fieger Fieger Kenney & Johnson, PC*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2003 (Docket No. 240863), the claim accrued on April 10, 1996. The Court stated:

> Assuming *arguendo* the notice of intent had been sent on April 10, 1998 [the last day of the limitations period], the limitations period would have been tolled until Friday, October 9, 1998 . . . , and *suit would have* [*had to have*] *been filed by the following Monday* . . . . [*Id*. at 2 (emphasis added).]

This is precisely the result we endorse here—when an NOI is filed on the final day of the limitations period, the next business day after the notice period expires is an eligible day to file suit.[8]

As noted, this rule applies whether the NOI is filed on the final day of the limitations period or some day before the final day. Either way, if it is filed at a point

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[8] Maine has reached the same conclusion with its similar notice scheme, concluding that "the day of serving notice of claim . . . does not count in either the calculation of the period of limitations or in the calculation of the 90-day notice period," leaving the day on which notice is served as a preserved day of the limitations period once the notice period ends. *Gilbert v Maine Med Ctr*, 483 A2d 1237, 1239 (Me, 1984). See also *Woods v Young*, 53 Cal 3d 315, 326 n 3; 279 Cal Rptr 613; 807 P2d 455 (1991) ("A plaintiff who serves the notice of intent to sue on the last day of the limitations period has one day after the ninety-day waiting period to file the complaint.").

at which tolling will occur, the remaining period preserved for plaintiff to use once the notice period ends comprises the number of whole days remaining in the period of limitations when the NOI was filed, *plus* one day to reflect the fractional day remaining when the NOI is filed. Consider, in this light, the example of *Lancaster v Wease*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2010 (Docket No. 291931). There, the plaintiff filed her NOI the day before the limitations period expired and, after the notice period ended, filed her complaint not on the day immediately following the 182-day notice period ("day 183" after the NOI), but instead the day after that ("day 184" after the NOI). The Court held that her complaint was untimely. Under the rule we adopt here, that is the wrong conclusion—the plaintiff's complaint should have been deemed timely because the one whole day remaining in the limitations period was preserved *plus* the day on which the NOI was filed.

C. APPLICATION

As applied to the instant case, the rule is simple to implement. Plaintiff filed his NOI on the final day of the limitations period—December 26, 2013. Because it was filed before the end of the day on December 26, 2013, some fraction of that day remained. We take notice of that fraction of the day only to the extent that we recognize that it was not yet over, and not yet having ended, our metaphorical abacus bead was not yet shifted from one end of the wire to the other. Consequently, the NOI tolled the limitations period, leaving one day for plaintiff to file his complaint after the notice period ended.

D. PRESERVED DAY

Defendants also argue that even if plaintiff's NOI served on the final day of the limitations period successfully tolled the running of the statute of limitations, plaintiff's *complaint* was still untimely. They argue that plaintiff was required to file his complaint on "day 182"—the final day of the 182-day notice period—rather than on "day 183," the following day, on which he did file.[9] The RJA requires a plaintiff to wait 182 days after filing an NOI *before* filing suit. See MCL 600.2912b(1) ("[A] person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice . . . not less than 182 days *before* the action is commenced.") (emphasis added). We have made clear that a plaintiff must wait the *entire* 182 days before filing a complaint. In *Burton v Reed City Hosp Corp*, 471 Mich 745, 754; 691 NW2d 424 (2005), we said that "the failure to comply with the statutory [notice] requirement renders the complaint insufficient to commence the action." In *Tyra*, 498 Mich at 76-77, the plaintiff's action accrued on April 4, 2008, and the limitations period therefore expired on April 4, 2010. The NOI, dated April 1, 2010, was placed in the mail on April 4, 2010. The complaint was then filed on September 30, 2010, which was 179 days after the NOI. We held that the complaint was premature and therefore legally

[9] Defendants point to dicta in *Kincaid v Cardwell*, 300 Mich App 513, 524; 834 NW2d 122 (2013), in support of their argument. "This Court, of course, is not bound by Court of Appeals decisions." *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Moreover, the statement in *Kincaid* that an act of malpractice must have occurred within two years and 182 days of the filing of the complaint (rather than, as we hold here, two years and 183 days) constituted dicta when the act of malpractice occurred two years and 207 days before the filing of the complaint. The distinction pertinent in the instant case was not relevant.

insufficient. In doing so, we observed that "[e]ven assuming that the NOI had been sent on April 1, 2010, . . . the complaint was filed at least one day prematurely." *Id*. at 77 n 5. Under MCR 1.108(1), September 30, 2010—the day the complaint in *Tyra* was filed—was "day 182" after April 1, 2010. Our conclusion that a complaint on "day 182" was untimely only further emphasizes that the *entire* 182-day notice period must be over *before* a plaintiff can file a complaint. Indeed, this is precisely the rule of *Dousman*, in which the plaintiff had to wait three *whole* days *plus* the day of service before haling the defendant into court.

In much the same fashion here, had plaintiff filed his complaint on June 26, 2013—"day 182"—the complaint would have been untimely and legally insufficient. Instead, he had to wait 182 days *as calculated by MCR 1.108(1)*, meaning that he had to wait until June 26, 2013, was over before using whatever time remained of the period of limitations—in this case, one day, June 27, 2013, on which he filed the complaint. Therefore, his complaint was timely filed and was legally sufficient to commence his suit.

IV. CONCLUSION

This Court has not hesitated in the past to enforce the various notice and filing requirements related to medical malpractice actions as they are written. Where, as here, plaintiff's NOI was timely filed and he filed his complaint on the day that he preserved from the limitations period, he cannot be denied his day in court. Consequently, the decision of the Court of Appeals is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with MARKMAN, C.J.

WINKLER v MARIST FATHERS OF DETROIT, INC

Docket No. 152889. Argued on application for leave to appeal April 13, 2017. Decided June 27, 2017.

Bettina Winkler brought an action in the Oakland Circuit Court, alleging that Marist Fathers of Detroit, Inc., denied her admission to its high school because of her learning disability, in violation of MCL 371.1402 of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 371.1101 *et seq*. Plaintiff attended the middle school division of Notre Dame Preparatory High School and Marist Academy, but defendant denied her admission to the high school division of its school. Defendant moved for summary disposition under MCR 2.116(C)(4) and (10), arguing that under the ecclesiastical abstention doctrine, the circuit court lacked subject-matter jurisdiction to review the admission decision of a religious school, that the PWDCRA does not apply to religious schools, and that even if the act did apply to defendant, there was no genuine dispute that defendant's decision was based on plaintiff's academic record, not her learning disability; plaintiff sought a preliminary injunction. The court, Rudy J. Nichols, J., denied defendant's (C)(4) motion, concluding that it had subject-matter jurisdiction over plaintiff's PWDCRA claim. The court also denied defendant's (C)(10) motion, reasoning that it was premature because discovery had just started and that plaintiff had failed to establish that the PWDCRA does not apply to religious schools. The court also denied plaintiff's request for a preliminary injunction. Defendant appealed. In an unpublished per curiam opinion issued November 12, 2015 (Docket No. 323511), the Court of Appeals, SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ., reversed the trial court's order and remanded the case to the trial court for entry of summary disposition in favor of defendant under MCR 2.116(C)(4). Relying on *Dlaikan v Roodbeen*, 206 Mich App 591 (1994), the Court of Appeals concluded that under the First Amendment, the trial court lacked subject-matter jurisdiction to review defendant's admission decision, reasoning that courts may not analyze the decision-making process of a religious institution. The Court of Appeals accordingly declined to address defendant's argument that the PWDCRA does not apply to religious schools and defendant's remaining (C)(10) arguments that were not resolved by the trial

court. Plaintiff sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant plaintiff's application for leave to appeal or take other action, and it directed the parties to address: (1) whether the doctrine of ecclesiastical abstention involves a question of a court's subject-matter jurisdiction over a complaint, (2) whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court in questions of religious doctrine or ecclesiastical polity, and (3) whether the Supreme Court should overrule *Dlaikan*, and if so on what basis. 500 Mich 888 (2016).

In a unanimous opinion by Justice MCCORMACK, in lieu of granting leave to appeal, the Supreme Court *held*:

The ecclesiastical abstention doctrine informs how a civil court must adjudicate claims within its subject-matter jurisdiction that involve ecclesiastical questions; it does not operate to divest courts of subject-matter jurisdiction over such claims. *Dlaikan* is overruled to the extent it held otherwise.

1. Subject-matter jurisdiction is the right of a court to exercise judicial power over a certain class of cases; the court's jurisdiction is not dependent on the particular facts of a case or whether a plaintiff has a cause of action. MCL 600.605 provides that Michigan circuit courts are courts of general jurisdiction, and those courts have original jurisdiction to hear and determine all civil claims and remedies, with the exception of when exclusive jurisdiction is given in the constitution or by statute to some other court or when circuit courts are denied jurisdiction by Michigan's 1963 Constitution or Michigan statutes. Accordingly, circuit courts have subject-matter jurisdiction over claims of discrimination under the PWDCRA.

2. The ecclesiastical abstention doctrine, which arises from the Religion Clauses of the First Amendment of the United States Constitution, prohibits a civil court from substituting its opinion for that of the authorized tribunal of a religious entity in ecclesiastical matters, or from otherwise judicially interfering in the purely ecclesiastical affairs of a religious entity. While the doctrine thus ensures that a civil court, when adjudicating a particular case, does not infringe the religious freedoms and protections guaranteed under the First Amendment, it does not deprive civil courts of the right to exercise judicial power over any given class of cases. In other words, the ecclesiastical abstention doctrine does not divest courts of jurisdiction over every claim or case involving an ecclesiastical question. Instead, the doctrine requires a case-specific inquiry that informs how a court must adjudicate claims

within its subject-matter jurisdiction that involve such questions; it is not applied to determine whether the court has subject-matter jurisdiction over those claims in the first place. In this case, the ecclesiastical abstention doctrine did not divest the trial court of subject-matter jurisdiction to hear plaintiff's PWDCRA claim; the court has judicial power to consider and dispose of the claim in a manner consistent with First Amendment guarantees. Accordingly, the Court of Appeals erred by reversing the trial court's order and remanding for entry of summary disposition in favor of defendant under MCR 2.116(C)(4). To the extent *Dlaikan* and other cases held that the ecclesiastical abstention doctrine affects a court's subject-matter jurisdiction over a particular case, those decisions are overruled.

Court of Appeals judgment reversed and the case remanded to the Court of Appeals for consideration of defendant's argument that the PWDCRA does not apply to its school.

RELIGIOUS CORPORATIONS AND ASSOCIATIONS — COURTS — SUBJECT-MATTER JURISDICTION — ECCLESIASTICAL ABSTENTION DOCTRINE.

The ecclesiastical abstention doctrine ensures that a civil court, in adjudicating a particular case, does not infringe the religious freedoms and protections guaranteed under the First Amendment, but it does not deprive civil courts of the right to exercise judicial power over any given class of cases; the doctrine does not divest courts of jurisdiction over every claim or case involving an ecclesiastical question but instead requires a case-specific inquiry that informs how a court must adjudicate claims within its subject-matter jurisdiction that involve such questions; it is not applied to determine whether the court has subject-matter jurisdiction over those claims in the first place.

Nacht & Roumel, PC (by *Nicholas Roumel* and *Charlotte Croson*), for plaintiff.

Bodman PLC (by *James J. Walsh*, *Karen L. Piper*, and *Thomas J. Rheaume, Jr.*) for defendant.

MCCORMACK, J. When presented with an ecclesiastical question, civil courts have long recognized the need, grounded in the First Amendment, to abstain from answering it themselves. This case invites us to consider the nature of this ecclesiastical abstention doc-

trine: namely, whether it is properly understood as a limitation on the subject matter jurisdiction of civil courts. The defendant operates a parochial school to which the plaintiff was denied admission. When the plaintiff sued on the basis of disability discrimination, the defendant moved for summary disposition, arguing among other things that, under the ecclesiastical abstention doctrine, the circuit court lacked subject matter jurisdiction over her claim. Central to the defendant's argument was *Dlaikan v Roodbeen*, 206 Mich App 591; 522 NW2d 719 (1994), which applied the doctrine to conclude that a circuit court had no such jurisdiction over a challenge to the admissions decisions of a parochial school. The circuit court denied the defendant's motion. The Court of Appeals, however, was convinced by the defendant's jurisdictional argument and reversed the circuit court, awarding the defendant summary disposition under MCR 2.116(C)(4).

We disagree with this determination. While *Dlaikan* and some other decisions have characterized the ecclesiastical abstention doctrine as depriving civil courts of subject matter jurisdiction, it is clear from the doctrine's origins and operation that this is not so. The ecclesiastical abstention doctrine may affect how a civil court exercises its subject matter jurisdiction over a given claim; it does not divest a court of such jurisdiction altogether. To the extent *Dlaikan* and other decisions are inconsistent with this understanding of the doctrine, they are overruled. We therefore reverse the Court of Appeals' award of summary disposition to the defendant under MCR 2.116(C)(4), and we remand to that Court for further proceedings.

I

The defendant, Marist Fathers of Detroit, Inc., operates Notre Dame Preparatory High School and

Marist Academy (NDPMA), a private, Catholic school in Oakland County. The plaintiff, Bettina Winkler, is a young woman who attended the middle-school division of NDPMA, but was denied admission to its high school. Believing this decision was based on her learning disability, dyslexia, the plaintiff filed suit, alleging that the defendant violated MCL 37.1402 of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*.[1] Motions ensued, with the plaintiff requesting a preliminary injunction and the defendant seeking summary disposition under MCR 2.116(C)(4) and (C)(10). As is relevant here, the defendant argued that, under the ecclesiastical abstention doctrine—and, more specifically, its application in *Dlaikan*—the circuit court could not exercise subject matter jurisdiction over a challenge, such as the plaintiff's, to the admissions decision of a religious school. The defendant further argued that the plaintiff had failed to state a claim because the PWDCRA does not apply to religious schools and, even if it did, the record betrayed no genuine dispute that the defendant's admissions decision was based on the plaintiff's lack of academic qualification, not her disability.

The circuit court denied the defendant's motion under MCR 2.116(C)(4), concluding it had subject matter jurisdiction over the plaintiff's PWDCRA claim and observing, in support, that the

> [d]efendant cites no canon law or religious doctrine governing its admissions conditions; indeed, its reasons appear to be otherwise secular ones involving Plaintiff's grades, high school placement test results and teacher

[1] The plaintiff's complaint also stated claims for tortious fraud or misrepresentation, and for violation of MCL 445.903(1) of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. The parties subsequently stipulated to the dismissal of these claims.

> evaluations. No rituals, liturgy of worship or tenets of faith appear to have been involved in its decision. Moreover, [the d]efendant cites nothing rooted in Catholic or other religious precepts, beliefs or doctrine that governed or dictated its refusal.

The court declined to rule on the defendant's motion under MCR 2.116(C)(10), deeming it "premature" as discovery had just commenced but noting that the defendant had "failed to establish that the PWDCRA does not apply to" its school. The court also denied the plaintiff's bid for a preliminary injunction.

The defendant sought the review of the Court of Appeals, which reversed the circuit court and remanded for entry of summary disposition in the defendant's favor under MCR 2.116(C)(4). *Winkler v Marist Fathers of Detroit, Inc*, unpublished per curiam opinion of the Court of Appeals, issued November 12, 2015 (Docket No. 323511). Leaning heavily on *Dlaikan*, the panel agreed with the defendant that "civil courts lack[] subject-matter jurisdiction over [the plaintiff's PWDCRA] claim pursuant to the protections of the First Amendment." Civil courts, the panel reasoned, "have no place analyzing the decision-making process of a religious institution regarding admission," regardless of what reason there may have been for the decision; indeed, said the panel, any such inquiry by a court into the factual basis for the decision would itself "invade[] constitutional protections provided to [the] defendant as a religious institution." Accordingly, the panel concluded that the circuit court erred in believing it could exercise jurisdiction over the plaintiff's claim. In light of this ruling, the panel saw no need to reach whether the PWDCRA applied to religious schools, and declined to reach the other arguments for summary disposition raised by the defendant but not resolved by the trial court in the first instance.

The plaintiff then sought leave to appeal in this Court. We ordered oral argument on whether to grant the application or take other action, directing the parties to address:

> (1) whether the doctrine of ecclesiastical abstention involves a question of a court's subject matter jurisdiction over a claim, compare *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602, 616 (2009), with *Dlaikan v Roodbeen*, 206 Mich App 591, 594 (1994); (2) whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court "in questions of religious doctrine or ecclesiastical polity," *Dlaikan*, 206 Mich App at 594; and (3) whether this Court should overrule *Dlaikan*, and if so, on what basis. [*Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 888 (2016).]

II

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We likewise review de novo questions of subject matter jurisdiction and constitutional law. *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013); *People v Ackley*, 497 Mich 381, 388; 870 NW2d 858 (2015).

Summary disposition under MCR 2.116(C)(4) is warranted when "[t]he court lacks jurisdiction of the subject matter." As this Court has consistently explained,

> [j]urisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases ; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending ; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable

> before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. [*Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (quotation marks and citation omitted).]

See, e.g., *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001) (emphasizing that subject matter jurisdiction "*is not dependent on the particular facts of the case*"); *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998) (explaining that subject matter jurisdiction "is the right of the court to exercise jurisdiction over a class of cases, such as criminal cases"); *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992) (rejecting a challenge to the subject matter jurisdiction of the circuit court as "confus[ing] the question whether the court has jurisdiction over a class of cases, namely, child custody disputes, with the question whether a particular plaintiff has a cause of action"); *Campbell v St John Hosp*, 434 Mich 608, 613-614; 455 NW2d 695 (1990) (quoting caselaw citing *Joy*).

The circuit courts of this state are courts of general jurisdiction, with "original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const 1963, art 6, § 1; *Campbell*, 434 Mich at 613. "In construing such statutes or constitutional provisions, retention of jurisdiction is presumed and any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated." *Campbell*, 434 Mich at 614.

III

There is no dispute that circuit courts possess subject matter jurisdiction over claims of discrimina-

tion under the PWDCRA. See MCL 600.605; MCL 37.1606(2). At issue here is whether this general rule holds true for the plaintiff's PWDCRA claim (as the circuit court concluded), or if instead the court lacks such jurisdiction over the claim by virtue of the ecclesiastical abstention doctrine (as the Court of Appeals panel concluded). As noted, the panel's determination was premised largely on the prior Court of Appeals decision in *Dlaikan*, which also sought to apply the ecclesiastical abstention doctrine to a lawsuit challenging a parochial school's admissions decisions. The plaintiffs in that case brought their claims in contract and tort, and the circuit court concluded it had subject matter jurisdiction. The Court of Appeals, however, reversed in a split decision, awarding summary disposition under MCR 2.116(C)(4) to the defendant school. *Dlaikan*, 206 Mich App at 594. Relying on the ecclesiastical abstention doctrine, the *Dlaikan* majority concluded that "the pleadings demonstrate that plaintiffs' claims are so entangled in questions of religious doctrine or ecclesiastical polity that the civil courts lack jurisdiction to hear them." *Id*. The majority reasoned that, under the doctrine, "[w]hen the claim involves the provision of the very services (or as here refusal to provide these services) for which the organization enjoys First Amendment protection, then any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law." *Id*. at 593. Accordingly, the majority continued, "[a] civil court should avoid foray into a 'property dispute' regarding admission to a church's religious or educational activities, the essence of its constitutionally protected function," as "[t]o do so is to set foot on the proverbial slippery slope toward entanglement in

matters of doctrine or ecclesiastical polity." *Id*.[2]

The instant panel saw no basis for distinguishing *Dlaikan*, deeming its application of the ecclesiastical abstention doctrine dispositive of whether the circuit court could exercise subject matter jurisdiction over the plaintiff's PWDCRA claim. And *Dlaikan*, for its part, is not alone in characterizing the doctrine as a limitation on the subject matter jurisdiction of civil courts and a proper basis for an award of summary disposition under MCR 2.116(C)(4). See, e.g., *Hillenbrand v Christ Lutheran Church of Birch Run*, 312 Mich App 273, 275; 877 NW2d 178 (2015); *Pilgrim's Rest Baptist Church v Pearson*, 310 Mich App 318, 323; 872 NW2d 16 (2015).[3] The instant panel's adoption of

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[2] The dissenting judge in *Dlaikan*, meanwhile, believed the majority had construed the ecclesiastical abstention doctrine much too broadly and would have affirmed the trial court's jurisdictional ruling, as "[d]etermination of the validity of the contract rights asserted by plaintiffs does not require the trial court to stray into questions of religious doctrine or ecclesiastical polity." *Id*. at 603 (TAYLOR, J., dissenting).

[3] Both the Court of Appeals and this Court have also, at times, described the ecclesiastical abstention doctrine as pertaining to a civil court's "jurisdiction." See, e.g., *Berkaw v Mayflower Congregational Church*, 378 Mich 239, 266; 144 NW2d 444 (1966); *Davis v Scher*, 356 Mich 291, 297; 97 NW2d 137 (1959); *Berry v Bruce*, 317 Mich 490, 503; 27 NW2d 67 (1947); *Borgman v Bultema*, 213 Mich 684, 703; 182 NW 91 (1921); *Attorney General ex rel Ter Vree v Geerlings*, 55 Mich 562, 566-567; 22 NW 89 (1885); *Maciejewski v Breitenbeck*, 162 Mich App 410, 413-414; 413 NW2d 65 (1987); *Wiethoff v St Veronica Sch*, 48 Mich App 163, 166-167; 210 NW2d 208 (1973). This Court has previously cautioned against reading too much into such generic language, and we find that caution well heeded here. See, e.g., *Bowie*, 441 Mich at 39-40 (in rejecting a challenge to the circuit court's subject matter jurisdiction, reiterating this Court's warning against "[t]he loose practice [that] has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error"), quoting *Buczkowski v Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958) (quotation marks omitted). We do not see, under the

this same jurisdictional characterization is thus certainly understandable. But the characterization is also inapt. As its origins and operation make clear, the ecclesiastical abstention doctrine informs how civil courts must adjudicate claims involving ecclesiastical questions; it does not deprive those courts of subject matter jurisdiction over such claims.

IV

The ecclesiastical abstention doctrine arises from the Religion Clauses of the First Amendment of the United States Constitution[4] and reflects this Court's longstanding recognition that it would be "inconsistent with complete and untrammeled religious liberty" for

jurisdictional gloss sometimes applied to the ecclesiastical abstention doctrine in prior decisions, a binding determination by this Court that the doctrine may operate to deprive a court of "jurisdiction of the subject matter" such that summary disposition under MCR 2.116(C)(4) would be warranted.

[4] The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Am I. "These provisions apply to the states through the Fourteenth Amendment." *Smith v Calvary Christian Church*, 462 Mich 679, 684 n 4; 614 NW2d 590 (2000). They do not, however, "dictate that a State must follow a particular method" when applying the ecclesiastical abstention doctrine to disputes brought in its civil courts, so long as the method does not require from those courts "consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979) (quotation marks and citation omitted).

The Michigan Constitution also contains its own guarantee of religious freedom, see Const 1963, art 1, § 4, which "is at least as protective of religious liberty as the United States Constitution." *People v DeJonge (After Remand)*, 442 Mich 266, 273 n 9; 501 NW2d 127 (1993). The parties have not argued, and precedent does not suggest, that this guarantee adds to or alters the ecclesiastical abstention doctrine required by the First Amendment of the United States Constitution, or itself affects whether the doctrine is properly understood to divest this state's civil courts of subject matter jurisdiction.

civil courts to "enter into a consideration of church doctrine or church discipline," to "inquire into the regularity of the proceedings of church tribunals having cognizance of such matters," or "to determine whether a resolution was passed in accordance with the canon law of the church, except insofar as it may be necessary to do so, in determining whether or not it was the church that acted therein." *Van Vliet v Vander Naald*, 290 Mich 365, 370-371; 287 NW 564 (1939). See also, e.g., *Borgman v Bultema*, 213 Mich 684, 703; 182 NW 91 (1921). Accordingly, "[w]e have consistently held that the court may not substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters," *First Protestant Reformed Church v DeWolf*, 344 Mich 624, 631; 75 NW2d 19 (1956), and that "judicial interference in the purely ecclesiastical affairs of religious organizations is improper," *Berry v Bruce*, 317 Mich 490, 499; 27 NW2d 67 (1947). See, e.g., *Smith v Calvary Christian Church*, 462 Mich 679, 684; 614 NW2d 590 (2000) ("Under the ecclesiastical abstention doctrine, apparently derived from both First Amendment religion clauses, 'civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.' "), quoting *Paul v Watchtower Bible & Tract Society*, 819 F2d 875, 878 n 1 (CA 9, 1987). Accord *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.") (citations omitted).

The doctrine thus operates to ensure that, in adjudicating a particular case, a civil court does not infringe the religious freedoms and protections guaranteed under the First Amendment. It does not, however, purport to deprive civil courts of "the right . . . to exercise judicial power over" any given "class of cases." *Joy*, 287 Mich at 253 (quotation marks and citation omitted). The doctrine, for instance, has frequently been invoked and applied in the adjudication of disputes over church property; it has not, however, been understood to categorically preclude a civil court from assuming jurisdiction over such disputes. See, e.g., *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Mem Presbyterian Church*, 393 US 440, 449; 89 S Ct 601; 21 L Ed 2d 658 (1969) ("It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property."); *DeWolf*, 344 Mich at 633 ("While courts do not interfere in matters of church doctrine, church discipline, or the regularity of the proceedings of church tribunals, and refuse to interfere with the right of religious groups to worship freely as they choose, the question of the property rights of the members is a matter within the jurisdiction of the courts and may be determined by the court."); *Borgman*, 213 Mich at 703 ("Where . . . a church controversy . . . involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights under the law of the land, having in view, nevertheless, the implied obligations imputed to those parties to the controversy who have voluntarily submitted themselves to the authority of the church by connecting themselves with

it.") (quotation marks and citation omitted).[5] Likewise, while the doctrine calls for deference to the decisions of "the authorized tribunals of [a religious entity] in ecclesiastical matters," *DeWolf*, 344 Mich at 631, that deference simply requires civil courts to "accept such decisions as final, and as binding on them, in their application to the case before them," *Watson v Jones*, 80 US 679, 727; 20 L Ed 666 (1871). It does not divest courts of jurisdiction over every claim or case involving such a decision. See *Lamont*, 285 Mich App at 616 (explaining that, under the ecclesiastical abstention doctrine, a civil court retains subject matter jurisdiction over a given matter and, with it, the ability to "enter a judgment" that "resolve[s] the matter consistent with any determinations already made by" the religious entity).

Thus, while some prior decisions such as *Dlaikan* have affixed the label of subject matter jurisdiction to the ecclesiastical abstention doctrine, we agree with the Court of Appeals in *Lamont*, 285 Mich App at 616, that "[t]his characterization is a misnomer," and we

[5] Similarly, the United States Supreme Court has confirmed the existence of a "ministerial exception" to federal employment-discrimination laws, which is "grounded in the First Amendment" and which "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, 565 US 171, 188; 132 S Ct 694; 181 L Ed 2d 650 (2012). See *id*. at 194-195 (explaining that the exception "ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone") (quotation marks and citation omitted). The Court, however, made clear that this exception does not operate as "a jurisdictional bar" to such employment-discrimination suits "because the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case." *Id*. at 195 n 4 (quotation marks, citation, and brackets omitted).

disavow it. The existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification. See *Travelers Ins Co*, 465 Mich at 204; *Goecke*, 457 Mich at 458; *Bowie*, 441 Mich at 39-40; *Campbell*, 434 Mich at 613-614; *Joy*, 287 Mich at 253. By contrast, application of the ecclesiastical abstention doctrine is not determined by reference to the category or class of case the plaintiff has stated. Whether a claim sounds in property, tort, or tax, for instance, is not dispositive. Nor is the fact that the claim is brought against a religious entity, or simply appears to be the sort that "*likely* involves its ecclesiastical policies." *Dlaikan*, 206 Mich App at 593 (emphasis added). What matters instead is whether the actual adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly. The doctrine, in short, requires a case-specific inquiry that informs how a court must adjudicate certain claims within its subject matter jurisdiction; it does not determine whether the court has such jurisdiction in the first place. The instant panel thus erred, albeit understandably, in deeming summary disposition warranted under MCR 2.116(C)(4), and we reverse that determination.[6]

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[6] Other jurisdictions, it bears noting, have likewise rejected the notion that the ecclesiastical abstention doctrine operates to deprive civil courts of subject matter jurisdiction. See, e.g., *St Joseph Catholic Orphan Society v Edwards*, 449 SW3d 727, 736-737 (Ky, 2014); *Brazauskas v Fort Wayne-South Bend Diocese, Inc*, 796 NE2d 286, 290 (Ind, 2003); *Bryce v Episcopal Church in the Diocese of Colorado*, 289 F3d 648, 654 (CA 10, 2002). A number of these jurisdictions have further clarified that the doctrine operates as an affirmative defense, a characterization consistent with that adopted by the United States Supreme Court as to the "ministerial exception." See *Hosanna-Tabor*, 565 US at 195 n 4. We

V

The defendant, at this point, does not particularly dispute this general understanding of the ecclesiastical abstention doctrine,[7] urging instead that the plaintiff's PWDCRA claim still can't survive under it. According to the defendant, even if a civil court can exercise jurisdiction over the plaintiff's challenge to its admissions decision, the court cannot disrupt that decision or award the plaintiff relief as to it without impermissibly passing judgment on ecclesiastical matters. In support, the defendant suggests an analogy between the students of its high school and the clergy and membership of a church. The defendant stresses that "the action of the church authorities in the deposition of pastors and the expulsion of members is final," *Borgman*, 213 Mich at 703, and that civil courts "cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church," *Watson*, 80 US at 730. See also *Hosanna-Tabor*, 565 US at 184 (recognizing that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their

need not decide here whether we agree with this particular characterization of the doctrine—just that we agree the doctrine does not sound in subject matter jurisdiction.

[7] Although the defendant argued lack of subject matter jurisdiction in the courts below and in its initial response to the instant application, it ultimately conceded in briefing to this Court that "the doctrine of ecclesiastical abstention does not involve a question of a court's subject matter jurisdiction over a claim." Despite the defendant's concession, we have a duty to examine "the limits of [our] authority," *Fox v Bd of Regents of Univ of Mich*, 375 Mich 238, 242; 134 NW2d 146 (1965) (quotation marks and citation omitted), regardless of whether the parties concede it, see *In re Return of Forfeited Goods*, 452 Mich 659, 671; 550 NW2d 782 (1996).

own"). A parochial school's admission or expulsion of a student is no different, the defendant maintains, given the "integral part" such a school can play in furthering "the religious mission of the Catholic Church" and in "transmitting the Catholic faith to the next generation." *Lemon v Kurtzman*, 403 US 602, 609, 616; 91 S Ct 2105; 29 L Ed 2d 745 (1971) (quotation marks omitted). A similar line of thinking, it seems, informed the majority's ruling in *Dlaikan*. See *Dlaikan*, 206 Mich App at 593 (citing *Borgman*'s statement regarding the "expulsion of clergy or members" in support of its conclusion that "[a] civil court should avoid foray into a 'property dispute' regarding admission to a church's religious or educational activities, the essence of its constitutionally protected function").

Whether this analogy is generally sound, and whether it holds up in the instant case (or in *Dlaikan*, for that matter), we see no reason to reach at this time. It is for the circuit court, in the first instance, to determine whether and to what extent the adjudication of the legal and factual issues presented by the plaintiff's claim would require the resolution of ecclesiastical questions (and thus deference to any answers the church has provided to those questions).[8] It is enough for our purposes here to clarify that, contrary to the suggestion of *Dlaikan* and other decisions, the

[8] The defendant did not press the analogy discussed above in its motion for summary disposition, and the circuit court did not address it in ruling on that motion. As noted, however, the court did observe that, while discovery had just commenced, the defendant's "reasons [for its admissions decision] appear[ed] to be . . . secular." For the reasons discussed, this observation was not necessary to the circuit court's ruling under MCR 2.116(C)(4); the court was correct to conclude it had subject matter jurisdiction over the plaintiff's PWDCRA challenge to the defendant's admissions decision regardless of whether that decision was secular in nature. Should this matter ultimately return to the circuit court, the defendant remains free, as the record develops, to challenge

circuit court does, in fact, have subject matter jurisdiction over the plaintiff's claim, and the judicial power to consider it and dispose of it in a manner consistent with the guarantees of the First Amendment. Simply put, to the extent that application of the ecclesiastical abstention doctrine might still prove fatal to the plaintiff's claim for relief under the PWDCRA, it will not be for lack of "jurisdiction of the subject matter" under MCR 2.116(C)(4).

VI

Accordingly, we reverse the judgment of the Court of Appeals that the defendant is entitled to summary disposition under MCR 2.116(C)(4). As to the defendant's entitlement to summary disposition under MCR 2.116(C)(10), the Court of Appeals previously declined to reach those arguments on which the circuit court had not yet ruled; we see no reason to disrupt that decision. The circuit court did, however, reject the defendant's argument that the PWDCRA does not apply to its school, a ruling which the defendant challenged on appeal but which the panel saw no need to review given its jurisdictional determination. Having reversed the jurisdictional determination, we remand this matter to the Court of Appeals for consideration of that challenge.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with MCCORMACK, J.

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the accuracy of the court's initial characterization of its decision and to seek application of the ecclesiastical abstention doctrine to the plaintiff's claim.

BARUCH SLS, INC v TITTABAWASSEE TOWNSHIP

Docket No. 152047. Argued on application for leave to appeal December 8, 2016. Decided June 28, 2017.

Baruch SLS, Inc., a Michigan nonprofit corporation, sought exemptions from real and personal property taxes as a charitable institution under MCL 211.7o and MCL 211.9 for tax years 2010–2012. Petitioner based its request on the fact that it offered an income-based subsidy to qualifying residents of Stone Crest Assisted Living, one of its adult foster care facilities, provided those residents had made at least 24 monthly payments to petitioner. The Tax Tribunal ruled that Stone Crest was not eligible for the exemptions because petitioner did not qualify as a charitable institution under three of the six factors set forth in *Wexford Med Group v City of Cadillac*, 474 Mich 192 (2006). The Court of Appeals, OWENS, P.J., and MURRAY, J. (JANSEN, J., concurring), in an unpublished per curiam opinion, reversed the Tax Tribunal's findings with respect to two of the *Wexford* factors but affirmed the denial of the exemptions on the ground that petitioner had failed to satisfy the third *Wexford* factor because, by limiting the availability of its income-based subsidy, petitioner offered its services on a discriminatory basis. Petitioner sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 499 Mich 887 (2016).

In a unanimous opinion by Justice MCCORMACK, in lieu of granting leave to appeal, the Supreme Court *held*:

When evaluating whether an institution has met the requirements of the third *Wexford* factor by offering its charity on a nondiscriminatory basis, the key question is whether the restrictions or conditions that the institution imposes bear a reasonable relationship to a permissible charitable goal under the fourth *Wexford* factor. If a reasonable relationship exists, the third *Wexford* factor is satisfied. Because the Tax Tribunal and the Court of Appeals decided the question in this case on the basis of an incorrect understanding of the third *Wexford* factor, the portions of their opinions discussing this factor were vacated and the case was remanded for further proceedings.

1. To qualify for real and personal property tax exemptions under MCL 211.7o(1), the property must be owned and occupied by a nonprofit charitable institution and occupied by that institution solely for the purposes for which it was incorporated. Similarly, MCL 211.9(1)(a) exempts from taxation the personal property of charitable, educational, and scientific institutions, subject to some limitations. The term "charitable institution" is not defined in the statute, but the *Wexford* Court held that a charitable institution (1) must be a nonprofit institution, (2) is organized chiefly, if not solely, for charity, (3) does not offer its charity on a discriminatory basis by choosing who among the group it purports to serve deserves the services but rather serves any person who needs the particular type of charity being offered, (4) brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government, (5) does not charge for its services more than what is needed for its successful maintenance, and (6) need not meet any monetary threshold of charity if the overall nature of the institution is charitable.

2. The act of charging fees for its services does not disqualify an organization from being classified as a charitable institution for purposes of MCL 211.7o and MCL 211.9 on the ground that it offers its services on a discriminatory basis, nor does the act of selecting its beneficiaries. *Wexford*'s fifth factor specifically allows a charitable institution to charge an amount necessary to remain financially stable. The analysis of a charitable institution's fees should be conducted under factor five of the *Wexford* test rather than factor three.

3. *Wexford*'s third factor is intended to exclude organizations that discriminate by imposing purposeless restrictions on the beneficiaries of the charity, and it accomplishes this goal by banning restrictions or conditions on charity that bear no reasonable relationship to an organization's legitimate charitable goals. Whether a charitable institution has a permissible charitable goal is evaluated in factor four, which includes bringing people's minds or hearts under the influence of education or religion; relieving people's bodies from disease, suffering, or constraint; assisting people to establish themselves for life; erecting or maintaining public buildings or works; or otherwise lessening the burdens of government. If the institution's restriction is reasonably related to a goal that meets this standard, then it is acceptable under *Wexford*'s third factor. The "reasonable relationship" test should be construed quite broadly to prevent unnecessarily limiting the

restrictions a charity may choose to place on its services. The relationship between the institution's restriction and its charitable goal need not be the most direct or obvious, and any reasonable restriction that is implemented to further a charitable goal that passes *Wexford*'s fourth factor is acceptable.

Court of Appeals judgment vacated in part; Tax Tribunal opinion vacated in part; case remanded to the Tax Tribunal for further proceedings.

1. TAXATION — PROPERTY TAXES — EXEMPTIONS — CHARITABLE INSTITUTIONS — FEES FOR SERVICES.

The act of charging fees for its services does not disqualify an organization from being classified as a charitable institution for purposes of MCL 211.7o and MCL 211.9 on the ground that it offers its services on a discriminatory basis; a charitable institution may charge only the amount that is necessary for its successful maintenance.

2. TAXATION — PROPERTY TAXES — EXEMPTIONS — CHARITABLE INSTITUTIONS — CONDITIONS OR RESTRICTIONS ON BENEFICIARIES.

A charitable institution for purposes of MCL 211.7o and MCL 211.9 may not offer its charity on a discriminatory basis by choosing who among the group it purports to serve deserves the services but rather must serve any person who needs the particular type of charity being offered; a charitable institution may nevertheless impose restrictions or conditions on its beneficiaries if those restrictions or conditions bear a reasonable relationship to the institution's legitimate charitable goals; legitimate charitable goals include bringing people's minds or hearts under the influence of education or religion; relieving people's bodies from disease, suffering, or constraint; assisting people to establish themselves for life; erecting or maintaining public buildings or works; or otherwise lessening the burdens of government.

Rhoades McKee PC (by *Gregory G. Timmer* and *Terry L. Zabel*) for petitioner.

Dust & Campbell, PC (by *Gary R. Campbell*), for respondent.

Amici Curiae:

Schiff Hardin LLP (by *Joanne B. Faycurry*, *Marcy L. Rosen*, and *Matthew P. Kennison*), *Willingham & Coté,*

PC (by *Frederick M. Baker*), and *Alane & Chartier, PLC* (by *Michael F. Cavanagh*), for the Chelsea Health & Wellness Foundation.

Clark Hill PLC (by *Cynthia M. Filipovich*) for the Council of Michigan Foundations and the Michigan Nonprofit Association.

Foster, Swift, Collins & Smith, PC (by *Laura J. Genovich*), for the Michigan Townships Association, the Michigan Municipal League, the Michigan Association of Counties, the Michigan Association of School Boards, and the Public Corporation Law Section of the State Bar of Michigan.

Scott E. Munzel, PC (by *Scott E. Munzel*), for the city of Dexter and the Dexter Downtown Development Authority.

Salwa G. Guindi for Trinity Health Michigan, Inc.

MCCORMACK, J. In this case, we consider whether petitioner, Baruch SLS, Inc. (Baruch), qualifies as a charitable institution for purposes of the exemptions from real and personal property taxes set forth in MCL 211.7o and MCL 211.9. In *Wexford Med Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), we articulated a six-factor test for determining whether an institution qualifies as a charitable institution. We now clarify *Wexford*'s third factor, which requires that an institution not offer its charity on a "discriminatory basis." *Id*. at 215.

As set forth below, the third factor in the *Wexford* test excludes only restrictions or conditions on charity that bear no reasonable relationship to a permissible charitable goal. Because the lower courts did not consider Baruch's policies under the proper under-

standing of this factor, we vacate the Court of Appeals' and Tax Tribunal's opinions in part and remand this case to the Tax Tribunal for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Baruch is a Michigan nonprofit corporation registered as tax-exempt under Section 501(c)(3) of the Internal Revenue Code.[1] Baruch's adult foster care facility, Stone Crest Assisted Living (Stone Crest), is open to individuals 18 years of age and older and is licensed as a specialized care unit with programs for the aged, developmentally disabled, physically handicapped, and mentally ill. An individual may request admission to the facility for the purpose of receiving room, board, supervised personal care, and assistance with medications.

Baruch subscribes to a "faith based" philosophy in its operations, but it is not affiliated with any denomination or church, and it does not consider race, religion, color, or national origin in admissions. Baruch does not admit individuals who require isolation, restraint, or constant professional nursing care, unless the applicant is being admitted to hospice.

No financial disclosures are required for admission, and Baruch contends that admission decisions are not based on an applicant's ability to pay. Baruch's target occupants, who consist of the elderly and persons with disabilities, however, all qualify for Social Security and therefore all have some ability to pay. And Baruch has never admitted any resident who did not have some ability to pay. But no resident has ever been discharged from the facility for non-payment.

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[1] 26 USC 501(c)(3).

Baruch also maintains an "Income Based Program" at Stone Crest, which reduces a resident's monthly rate on the basis of his or her income. Baruch's written policy for this program includes the following eligibility criteria:

- A resident must have lived at Stone Crest and have made a minimum of 24 full monthly payments.
- A resident must apply for and be determined eligible for Medicaid.
- A resident must provide information about all available income.

The policy also states that only 25% of the available rooms at Stone Crest can be used for the Income Based Program at a given time.

Baruch alleges that, in practice, it has often departed from the written policy. For example, Baruch claims that it has, on an ad hoc basis, admitted residents to the Income Based Program without 24 prior payments, admitted new residents directly into the program, and filled nearly 40% of the available beds with residents in the Income Based Program.

Baruch sought tax-exempt status for real and personal property taxes under MCL 211.7o and MCL 211.9 for the years 2010–2012, but was denied. The Tax Tribunal held that Baruch was not entitled to a charitable exemption because Baruch did not satisfy factors three, five, and six of the following test, set forth in *Wexford*, for determining whether a taxpayer is a "charitable institution" under MCL 211.7o and MCL 211.9:

> (1) A "charitable institution" must be a nonprofit institution.
>
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year. [*Wexford*, 474 Mich at 215.]

Of particular interest here, the tribunal held that Baruch offered its charity on a discriminatory basis, in violation of factor three. The tribunal also held that Baruch had not met its burden to prove that the rates it charged were not more than what was needed for its successful maintenance, in violation of factor five, and that Baruch's overall nature of operation was commercial, in violation of factor six.

The Court of Appeals affirmed the tribunal's judgment, on the basis that Baruch's policies were discriminatory within the group it served in violation of factor three.[2] But the Court of Appeals reversed the tribunal regarding factors five and six. Because neither party has challenged the Court of Appeals decision regarding

[2] Judge JANSEN concurred in the result only.

factors five and six, the sole issue on appeal is whether Baruch's policies are discriminatory within the meaning of factor three.

II. LEGAL BACKGROUND

To qualify for real and personal property tax exemptions under MCL 211.7o(1), the property must be "owned and occupied by a nonprofit charitable institution . . . [and] occupied by that . . . institution solely for the purposes for which [it] was incorporated." Similarly, MCL 211.9(1)(a) exempts from taxation the "personal property of charitable, educational, and scientific institutions," subject to some limitations. The term "charitable institution" is not defined in the statute, but this Court has interpreted the meaning of that phrase on several occasions.

In *Wexford*, we announced the above-described test for evaluating whether an institution is "charitable." The Court in *Wexford* began its analysis with the statutory language governing the charitable exemption:

> "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." [*Wexford*, 474 Mich at 199, quoting MCL 211.7o.]

The "central inquiry" in *Wexford* was "whether petitioner [was] a 'charitable institution,' and, in a more general sense, what precise meaning that term has." *Id*. To answer that question, we analyzed the history of the term "charitable institution" in our caselaw. *Id*. at 205-212.

From a century of doctrine we saw "[s]everal common threads." *Id*. at 212. The first was that "the

institution's activities as a whole must be examined; it is improper to focus on one particular facet or activity." *Id*. Second, we noted that the organization can serve a particular group, but that within that group it must not discriminate. As we explained,

> the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers. [*Id*. at 213.]

We concluded that the definition of "charity" set forth in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982), encapsulates what an exemption claimant must show to constitute a charitable institution:

> "[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [*Wexford*, 474 Mich at 214 (quotation marks and citation omitted; alterations in original).]

Applying the six-factor test, we held that the petitioner in *Wexford* was a charitable institution. Among other reasons, we emphasized that

> [p]etitioner has a charity care program that offers free and reduced-cost medical care to the indigent with no restrictions. It operates under an open-access policy under which it accepts any patient who walks through its doors, with preferential treatment given to no one. Although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay. [*Id*. at 216-217.]

Thus, because the petitioner "provid[ed] a gift—free or below-cost health care—to an indefinite number of people by relieving them of disease or suffering," it was entitled to the exemption. *Id*. at 220-221.

III. ANALYSIS

The *Wexford* test is designed to differentiate charitable organizations from other kinds of institutions, but it is not designed to require an institution to offer its services entirely free or to select its recipients using only arbitrary criteria, such as first-come, first-serve, in order to qualify as a charitable institution. Yet the language in *Wexford* is, to some extent, susceptible to this interpretation, and indeed, this is how lower courts have understood *Wexford*'s third factor.

Since *Wexford*, the Tax Tribunal has, on several occasions, interpreted the test's third factor—that the institution not discriminate—as excluding organizations from the tax exemption simply because they charged fees for their services. Specifically, the tribunal has held that a facility seeking an exemption as a low-cost daycare did not satisfy the third factor solely because it did not accept those who could not afford to pay at all. *Genesee Christian Day Care Servs, Inc v City of Wyoming*, unpublished opinion of the Michigan Tax Tribunal, issued Dec 22, 2011 (Docket No. 361657), pp 20-21. Similarly, the tribunal has held that a gymnas-

tics facility that offered financial assistance in the form of scholarships was not a charitable organization, partially because it did not offer scholarships to all who might benefit. *Boyne Area Gymnastics, Inc v Boyne City*, unpublished opinion of the Michigan Tax Tribunal, issued Mar 23, 2011 (Docket No. 320068), p 7. The Court of Appeals has similarly analyzed this issue. *North Ottawa Rod & Gun Club, Inc v Grand Haven Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2007 (Docket No. 268308), p 3 (holding that the petitioner's recreational facilities could not be considered gifts to the general public without restriction because the property was only available to the general public for a fee).

Further, relying on *Wexford*'s statement that a charitable institution may not "choos[e] who, among the group it purports to serve, deserves the services," *Wexford*, 474 Mich at 215, the tribunal and the Court of Appeals have also interpreted the third factor to forbid a charitable institution from selecting its beneficiaries at all. For instance, the Court of Appeals has affirmed the Tax Tribunal's conclusion that an institution that "selects scholarship recipients through a highly subjective application process" based on the candidates' essays, references, community service, and other accomplishments offered its charity on a "discriminatory basis." *Telluride Ass'n Inc v City of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2013 (Docket No. 304735), p 4. Yet if an institution cannot serve everyone who could benefit from the service (as most cannot), surely it will have to select its beneficiaries in some manner. But the Tax Tribunal in the case below disapproved of any selection, stating that "[t]he mere process of selecting residents who will receive reduced rent requires some level of discrimination in that a choice must be made from

the group Petitioner purports to serve." *Baruch SLS, Inc v Tittabawassee Twp*, unpublished opinion of the Michigan Tax Tribunal, issued Dec 20, 2013 (Docket No. 395010), p 15. The Court of Appeals similarly concluded that Baruch had failed to comply with *Wexford* factor three because its "policy means petitioner does not 'serve[] any person who needs the particular type of charity being offered.' " *Baruch*, unpub op at 5, quoting *Wexford*, 471 Mich at 215. Under this kind of analysis, it is unclear how a charitable institution can comply with the third factor unless, perhaps, it allocates its services using an arbitrary metric, such as a lottery or first-come, first-serve.

We see several problems with interpreting *Wexford* factor three to exclude an organization from the definition of a charitable institution if it charges any amount or uses any non-random selection criteria. First, as noted above, it creates an internal inconsistency in *Wexford*'s factors. Factor five specifically allows a charitable institution to charge an amount necessary to remain financially stable. See *Wexford*, 474 Mich 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."). Factor three should be read harmoniously with factor five, and the current interpretation employed by the lower courts does not do so. Second, it is inconsistent with our precedent. In *Mich Sanitarium & Benevolent Ass'n v Battle Creek*, 138 Mich 676, 681; 101 NW 855 (1904), a case on which *Wexford* relied, the hospital at issue did not offer its services entirely for free. Indeed, the Court refused to hold "that a hospital organized under the law in question cannot collect from patients treated by it sufficient funds for its proper maintenance," because such a holding would require taxes to be paid on any charitable institution

that was not maintained through "private means." *Id*. at 683. The Court noted that "[t]he act contains nothing to warrant such a holding." *Id*.

Third, the interpretation employed by the lower courts requires charitable institutions to operate at a loss. Charitable institutions incur costs in the provision of their services. Requiring them to provide their services entirely for free, without regard for their ability to do so, is unrealistic and unsustainable. Factor five and the other *Wexford* factors strike the right balance. We hold that the analysis of a charitable institution's fees should not be conducted under factor three of the *Wexford* test. Instead, such fees should be assessed under factor five.

But restrictions or conditions designed to limit or choose who is entitled to receive the charity, such as Baruch's written policy that a resident must have lived at Stone Crest and have made a minimum of 24 monthly payments before entering the Income Based Program, are the subject of factor three. Factor three is intended to exclude organizations that discriminate by imposing purposeless restrictions on the beneficiaries of the charity. We clarify that *Wexford* factor three accomplishes this goal by banning restrictions or conditions on charity that bear no reasonable relationship to an organization's legitimate charitable goals. See *Wexford*, 474 Mich at 213 ("The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.").[3] Whether a chari-

[3] Other jurisdictions have used a similar method to analyze restrictions or conditions on charity. See *North Star Research Institute v Hennepin Co*, 306 Minn 1, 6; 236 NW2d 754 (1975); see also *Utah Co v Intermountain Health Care, Inc*, 709 P2d 265, 270 n 6 (Utah, 1985) (adopting a six-factor standard "adapted from" the *North Star* factors).

The *North Star* factors are similar to the *Wexford* factors in many respects. In particular, *North Star* factor five, which is similar to

table institution has a permissible charitable goal is evaluated in factor four, which includes "bring[ing] people's minds or hearts under the influence of education or religion; reliev[ing] people's bodies from disease, suffering, or constraint; assist[ing] people to establish themselves for life; erect[ing] or maintain-[ing] public buildings or works; or otherwise lessen-[ing] the burdens of government." *Id*. at 215. If the institution's restriction is reasonably related to a goal that meets this standard, then it is acceptable under *Wexford* factor three.

The "reasonable relationship" test should be construed quite broadly to prevent unnecessarily limiting the restrictions a charity may choose to place on its services. Other states, employing similar tests, have interpreted them flexibly to allow a charity, for example, to limit itself to the most qualified groups, see *Mayo Foundation v Comm'r of Revenue*, 306 Minn 25, 37-38; 236 NW2d 767 (1975), to restrict its services to those persons its services are tailored to serve, see *Yorgason v Co Bd of Equalization of Salt Lake Co*, 714 P2d 653, 654-655, 657 (Utah, 1986), and to tailor its services toward groups that are particularly disadvantaged and have specific needs, see *White Earth Land Recovery Project v Becker Co*, 544 NW2d 778, 781 (Minn, 1996).

Examples may help demonstrate the flexibility of this test. A low-cost daycare organized to provide services to

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Wexford factor three, inquires "whether the beneficiaries of the 'charity' are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives[.]" *North Star*, 306 Minn at 6; see also *Worthington Dormitory, Inc v Comm'r of Revenue*, 292 NW2d 276, 280-282 (Minn, 1980) (holding that a foundation's dormitory was tax-exempt when the only restriction on the beneficiaries of the charity was a requirement that residents be students at nearby community college, because such a restriction reasonably related to the foundation's purpose of providing nonprofit housing to students).

low-income families could reasonably prioritize the applications of single-parent families. Single-parent households might often, for wholly obvious and understandable reasons, have lower income than households with two parents. Single-parent households might also be less likely to have a parent able to stay home with the child and, therefore, are again more likely to be in need of daycare services. This restriction would thus bear a reasonable relationship to the organization's charitable goals because it seeks to provide its services to those most in need of such services.[4]

By contrast, a low-cost daycare that prioritizes the applications of families who cheer for a certain baseball team should fail this test if the daycare cannot show how the restriction bears a reasonable relationship to a permissible charitable goal. That is not to say that such a restriction would not be permissible under any circumstances. Suppose a scholarship, which is funded through a baseball team's charitable foundation, restricts its applications to fans of the team. If the foundation can show that its fundraising is more successful when the application process is limited to fans of the team, then even this restriction might pass the test articulated today because the baseball team cannot offer scholarships if it is not able to gain the necessary donations to fund them.[5]

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[4] As the Minnesota Supreme Court has put it, a restriction on the charitable institution's services that is "designed to assure that the benefits will inure to those most deserving, most in need, or most likely to be of increased public usefulness when the benefits have been assimilated" would likely bear a reasonable relationship to the charitable goal. *State v Evans Scholars Foundation of Minn, Inc*, 278 Minn 74, 78; 153 NW2d 148 (1967). A charity is not required, however, to implement only such restrictions.

[5] Whether the desire to attract donors or the need to increase an organization's funds will always justify restrictions on the charitable services offered is not something we decide today; the relationship

In short, the relationship between the institution's restriction and its charitable goal need not be the most direct or obvious. Any reasonable restriction that is implemented to further a charitable goal that passes factor four is acceptable. While this test is quite deferential to the charitable institution, we note that charity is, by definition, "a gift." See *Retirement Homes of Detroit*, 416 Mich at 349 (concluding that the petitioner's retirement home provided no gift to residents and therefore was not charity). The Legislature has deemed gifts that are beneficial to members of society worthy of encouragement. A deferential test is warranted given that the tax statute itself is silent as to the restrictions a charity may or may not place on its services. MCL 211.7o; MCL 211.9(a). Therefore, we hesitate to stringently limit charitable institutions.

Accordingly, rather than focusing on the "group" that a charitable institution "exist[s] to serve," *Wexford*, 474 Mich at 213, we hold that the key question a court must ask when evaluating whether an institution has met *Wexford*'s third factor is whether the restrictions or conditions the institution imposes on its charity bear a reasonable relationship to a permissible charitable goal. The question in this case, then, is whether the conditions for entry into Baruch's charitable Income Based Program—specifically, the requirement that an individual be a resident and make 24 monthly payments before being accepted into the program—violates factor three of the *Wexford* test. Under our clarification of this factor, Baruch's conditions will fail only if they are not reasonably related to a permissible charitable goal under factor four.

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between the proffered restriction and the charitable goal must be evaluated for reasonableness on a case-by-case basis.

Because the Tax Tribunal and the Court of Appeals decided the question in this case on the basis of an incorrect understanding of *Wexford* factor three, we vacate those portions of the opinions discussing the third factor and remand this case to the Tax Tribunal for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with MCCORMACK, J.

CLAM LAKE TOWNSHIP v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

TERIDEE LLC v HARING CHARTER TOWNSHIP

Docket Nos. 151800 and 153008. Argued December 8, 2016 (Calendar No. 3). Decided July 3, 2017.

In Docket No. 151800, Clam Lake Township and Haring Charter Township (the Townships) appealed in the Wexford Circuit Court the determination of the State Boundary Commission (the Commission) that an agreement entered into under the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq.* (Act 425 agreement) between the Townships was invalid. The Townships entered into the agreement on May 8, 2013, and filed it with the Wexford County Clerk and the Secretary of State on June 10, 2013. The Act 425 agreement sought to transfer to Haring Charter Township an undeveloped parcel of roughly 241 acres of land in Clam Lake Township that was zoned for forest-recreational use. The agreement provided a description of the Townships' desired economic development project, including numerous minimum requirements for rezoning the property. Approximately 141 acres of the land were owned by TeriDee LLC, the John F. Koetje Trust, and the Delia Koetje Trust (collectively, TeriDee), who wished to develop the land for commercial use. To achieve this goal, TeriDee petitioned the Commission to have the land annexed by the city of Cadillac. The Commission found TeriDee's petition legally sufficient and concluded that the Townships' Act 425 agreement was invalid because it was created solely as a means to bar the annexation and not as a means of promoting economic development. The Townships appealed the decision in the circuit court, and the court, William M. Fagerman, J., upheld the Commission's determination, concluding that the Commission had the power to determine the validity of an Act 425 agreement. The Townships sought leave to appeal in the Court of Appeals, which the Court of Appeals denied in an unpublished order, entered May 26, 2015 (Docket No. 325350).

In Docket No. 153008, as the Commission proceedings in Docket No. 151800 were ongoing, TeriDee brought an action in the Wexford

Circuit Court against the Townships, seeking a declaratory judgment that the Act 425 agreement was void as against public policy because it contracted away Haring's zoning authority by obligating Haring's zoning board to rezone pursuant to the agreement. The court, William M. Fagerman, J., struck down the agreement, holding that the agreement required Haring to enact specific zoning ordinances, which was an impermissible delegation of zoning authority. The Townships appealed, and the Court of Appeals affirmed in an unpublished per curiam opinion, issued December 8, 2015 (Docket No. 324022). The Townships sought leave to appeal both cases in the Supreme Court, and the Supreme Court granted the Townships' applications. *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 499 Mich 896, as amended 499 Mich 949 (2016); *TeriDee LLC v Haring Charter Twp*, 499 Mich 896, as amended 499 Mich 950 (2016).

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

Because *Casco Twp v State Boundary Comm*, 243 Mich App 392 (2000), improperly concluded that MCL 124.29 authorized the State Boundary Commission to examine the validity of an Act 425 agreement, *Casco Twp* was overruled. When faced with an Act 425 agreement in annexation proceedings, the Commission may only review whether the agreement is "in effect." An Act 425 agreement is "in effect" if it is entered into and properly filed pursuant to MCL 124.30. The Townships' agreement met those conditions; therefore, the Commission and circuit court erred by invalidating the agreement on other grounds. Act 425 authorizes local units to provide for zoning ordinances in their conditional land transfer agreements. Because the Townships' agreement properly included such provisions, the Court of Appeals' contrary decision was reversed.

1. Under MCL 24.306(1), a decision by the Commission will be set aside if substantial rights of the petitioner have been prejudiced because the decision or order is in violation of the Constitution or a statute, in excess of the statutory authority or jurisdiction of the agency, or affected by other substantial and material error of law. MCL 123.1011a grants the Commission jurisdiction over petitions or resolutions for annexation as provided in MCL 117.9, and MCL 117.9 tasks the Commission with determining the validity of the petition or resolution and endows it with the powers and duties it normally has when reviewing incorporation petitions. While these statutes furnish broad powers concerning annexations, none mentions Act 425 agreements or purports to grant the Commission authority over them.

2. Act 425 provides that two or more local units may conditionally transfer property for a renewable period of not more than 50 years for the purpose of an economic development project. MCL 124.29, the only provision in Act 425 that implicates the Commission, provides that while a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract. Therefore, all that is required to preempt an annexation petition is for the Act 425 agreement to be "in effect." Because an Act 425 agreement conditionally transfers property, it is "in effect," or operative, when the property has been conditionally transferred. MCL 124.30 provides that a conditional transfer of property occurs when the parties enter into the contract and file the appropriate documents with the county clerk and Secretary of State. At that point, the agreement is "in effect" and preempts any other method of annexation. Act 425 does not condition preemption on a finding that the contract is otherwise valid, and it does not expressly grant to the Commission the power to determine the agreement's validity; instead, the Commission may only make an initial determination of whether the Act 425 agreement is in effect, i.e., whether the contract was entered into by the parties and filed in accordance with MCL 124.30. *Casco Twp*, 243 Mich App 392, which improperly concluded that MCL 124.29 authorized the Commission to examine the validity of an Act 425 agreement, was overruled. In this case, there was no dispute that the parties had entered into the Act 425 agreement and that it was properly filed at the time the Commission considered the annexation petition. Accordingly, the Townships' agreement was "in effect" and preempted TeriDee's annexation petition.

3. A zoning ordinance is an "ordinance" under MCL 124.26(c). MCL 124.26(c) provides, in relevant part, that a contract under Act 425 may provide for the adoption of ordinances and their enforcement by or with the assistance of the participating local units. MCL 124.26(c) authorizes local units to bargain over the adoption of ordinances, which includes bargaining over their content and substance; i.e., it authorizes contract zoning. The Legislature can empower—and has empowered—municipalities to zone or take other action by agreement even though the agreement will bind those municipalities in the future and constrain their legislative discretion. Accordingly, MCL 124.26(c) authorized the Townships' zoning provisions.

Circuit court judgment in Docket No. 151800 reversed; Court of Appeals judgment in Docket No. 153008 reversed; both cases remanded to the circuit court for further proceedings.

1. BOUNDARIES — STATE BOUNDARY COMMISSION — ACT 425 AGREEMENTS — VALIDITY.

Under the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq.* (Act 425), two or more local units of government may conditionally transfer property pursuant to a written contract agreed to by the affected local units (Act 425 agreement) for a renewable period of not more than 50 years for the purpose of an economic development project; MCL 117.9 tasks the State Boundary Commission with determining the validity of annexation petitions; however, when faced with an Act 425 agreement in annexation proceedings, the commission may only review whether the agreement is "in effect"; an Act 425 agreement is "in effect" if it is entered into and properly filed pursuant to MCL 124.30.

2. ZONING — ZONING ORDINANCES — ACT 425 AGREEMENTS.

MCL 124.26(c) provides, in relevant part, that a contract under Act 425 may provide for the adoption of ordinances and their enforcement by or with the assistance of the participating local units; a zoning ordinance is an "ordinance" under MCL 124.26(c); Act 425 authorizes local units to provide for zoning ordinances in their conditional land transfer agreements even though such agreements will bind those local units in the future and constrain their legislative discretion; i.e., it authorizes contract zoning.

Mika Meyers Beckett & Jones, PLC (by *Ronald M. Redick*), for Clam Lake Township and Haring Charter Township in Docket Nos. 151800 and 153008.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Patrick Fitzgerald*, Assistant Attorney General, for the Department of Licensing and Regulatory Affairs/State Boundary Commission in Docket No. 151800.

Varnum LLP (by *Randall W. Kraker* and *Brion B. Doyle*) for TeriDee LLC in Docket Nos. 151800 and 153008.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*), for the city of Cadillac in Docket No. 151800.

Amici Curiae:

McClelland & Anderson, LLP (by *Gregory L. McClelland*, *David E. Pierson*, and *Melissa A. Hagen*), for Michigan Realtors.

Bloom Sluggett Morgan, PC (by *Jeffrey V. H. Sluggett* and *Crystal L. Morgan*), for the Michigan Municipal League.

VIVIANO, J. These consolidated cases present two issues. First, in *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, we must decide whether the State Boundary Commission (Commission), when reviewing an annexation petition, has authority to determine the validity of a separate agreement entered into under the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425 agreement). We hold that it does not. Instead, the Commission may only make the more limited determination of whether an Act 425 agreement is "in effect," as described by the statute, in which case the agreement preempts the annexation petition.[1] The Commission here failed to properly limit its consideration of the Act 425 agreement between appellants Clam Lake Township and Haring Charter Township (Townships). Rather than asking whether the agreement was "in effect" under the statute, the Commission erred by more broadly reviewing the agreement's validity. The circuit court affirmed this determination, which we now reverse. Because we find the Townships' Act 425 agreement meets the statutory requirements for being "in effect," it preempts the annexation petition.

Second, in *TeriDee LLC v Haring Charter Twp*, we must decide whether an Act 425 agreement can include

[1] MCL 124.29.

requirements that a party enact particular zoning ordinances. The plain language of MCL 124.26(c) permits these requirements. Accordingly, the Court of Appeals erred by determining that they were prohibited, and we reverse.

I. FACTS AND PROCEDURAL HISTORY

This case involves an undeveloped parcel of roughly 241 acres of land surrounding the interchange of M-55 and US-131 that was zoned for forest-recreational use. The land sits in Clam Lake Township. Approximately 141 acres are owned by appellees TeriDee LLC, the John F. Koetje Trust, and the Delia Koetje Trust (collectively, TeriDee), who have long wished to develop a mixed-use project on the property, including stores and other commercial entities. This would require connecting the land to sewer and water systems. To that end, in 2008, TeriDee sought approval of an Act 425 agreement[2] between appellant Clam Lake Township and appellee city of Cadillac. The agreement would have transferred the property to Cadillac's jurisdiction to facilitate its commercial development. But a voter referendum rejected the agreement.

Undeterred, TeriDee filed a petition to have the land annexed by Cadillac in 2011. About the same time, Clam Lake Township and Haring Charter Township entered into an Act 425 agreement to transfer the land to Haring. The Commission reviewed both the annexation petition and the Act 425 agreement, which, if effective,

[2] As discussed in more detail below, Act 425 agreements permit "[t]wo or more local [government] units" to "conditionally transfer property for a period of not more than 50 years for the purpose of an economic development project." MCL 124.22.

would have preempted the petition.[3] In its decision, the Commission rejected the petition and also invalidated the Act 425 agreement, finding, among other things, that the agreement failed to define any economic development project and was instead a ploy to prevent Cadillac's annexation.

The current round of disputes began in 2013, when the Townships learned that TeriDee was again planning to file for annexation. Cadillac, the proposed annexor, had public water and sanitary sewer services available near the proposed annexation area. In 2013, neither of the Townships could provide those services. However, that year Haring obtained financing for a new wastewater treatment plant that would enable it to extend water and sewer lines to the property. In light of this development, as well as TeriDee's impending petition, the Townships entered into an Act 425 agreement on May 8, 2013, transferring the land to Haring. The agreement was signed by the Townships and filed with the Wexford County Clerk and the Secretary of State on June 10, 2013.

The agreement, as subsequently amended, describes the Townships' desired economic development project as having two components. First, the project would include "the construction of a mixed-use, commercial/residential development . . . in order to balance the property owners' desire for commercial use with the need to protect the interests of surrounding residential property owners[.]" Second, the project required "the provision of public wastewater services and public water supply services to the Transferred Area, so as to foster the new mixed-use, commercial/residential development . . . ." Further, the

[3] MCL 124.29 ("While a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.").

agreement provides that the forest-recreation zoning would remain in effect only until Haring could enact various zoning standards, including numerous minimum requirements. The agreement also states that the area's residential portions "shall be zoned in a Haring zoning district that is comparable" to the Township's existing zoning. The remaining property "shall be rezoned" according to the agreement's minimum requirements. The development had to comply with Haring's zoning ordinances, but "[w]here the [agreement's] regulations are more stringent, the more stringent regulations shall apply." Haring was required to make reasonable efforts to adopt these ordinances within one year.

TeriDee subsequently filed its annexation petition. Though the petition mirrors TeriDee's 2011 attempt, the Commission this time found the petition legally sufficient. On review, the Commission concluded that the Act 425 agreement was invalid because it "was created solely as a means to bar the annexation and not as a means of promoting economic development." It cited five factual findings supporting this conclusion: (1) the economic project was "not believed by the Commission to be viable" because the Townships did not consult TeriDee, the landowner; (2) Clam Lake received no tax revenues from the agreement; (3) e-mails between Township officials indicated that the agreement was meant to prevent annexation; (4) the Commission questioned Haring's "ability to effectively and economically provide the defined public services"; and (5) the agreement's timing, shortly before TeriDee's annexation petition, suggested that it was a sham.

The Townships appealed in the circuit court, which upheld the Commission's determination. Relying on *Casco Twp v State Boundary Comm*,[4] the court held

[4] *Casco Twp v State Boundary Comm*, 243 Mich App 392, 399; 622 NW2d 332 (2000).

that the Commission had the power to determine the validity of the agreement. The court then found that competent, material, and substantial evidence supported the Commission's determination that the agreement was an invalid sham. Next, the court found sufficient evidence supporting the Commission's decision to grant the annexation petition. The Court of Appeals denied the Townships' application for leave to appeal.

As the Commission proceedings were ongoing, TeriDee sued the Townships, seeking a declaratory judgment that the Act 425 agreement was invalid. It argued that the agreement was a contrivance meant to block the annexation. Alternatively, it asserted that the agreement was void as against public policy because it contracted away Haring's zoning authority by obligating Haring's zoning board to rezone pursuant to the agreement. The circuit court declined to consider the first argument, finding that the Commission had primary jurisdiction over that contention. However, the court struck down the agreement based on TeriDee's alternative argument. It found that the agreement required Haring to enact specific zoning ordinances, an impermissible delegation of zoning authority.

The Townships appealed, and the Court of Appeals affirmed.[5] It agreed that "the plain language of the agreement [improperly] contracts away Haring's zoning authority over the undeveloped property by providing how Haring must zone the property."[6] The Court of

[5] *TeriDee LLC v Charter Twp of Haring*, unpublished per curiam opinion of the Court of Appeals, issued December 8, 2015 (Docket No. 324022), p 1.

[6] *Id*. at 3.

Appeals also concluded that MCL 124.26(c), part of Act 425, did not permit the parties to engage in this contract zoning.[7]

The Townships appealed both cases in this Court. We granted leave in each, ordering that the cases be argued together.[8] Among the issues we ordered briefed in *Clam Lake* was

> whether *Casco Twp v State Boundary Comm*, 243 Mich App 392, 399 [622 NW2d 332] (2000), correctly held that the State Boundary Commission (SBC) has the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425)[.][9]

In *TeriDee LLC*, two of the issues we asked the parties to address were

> whether *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241 [687 NW2d 869] (2004), applies to the defendant townships' Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq*. (Act 425); . . . [and] if so, whether the challenged provisions of the Act 425 Agreement were nevertheless authorized by Section 6(c) of Act 425, MCL 124.26(c)[.][10]

II. STANDARD OF REVIEW AND INTERPRETIVE PRINCIPLES

Our Constitution requires that we review administrative agency decisions to determine whether they

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[7] *Id*. at 5-7.

[8] *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 499 Mich 896 (2016); *TeriDee LLC v Haring Charter Twp*, 499 Mich 896 (2016).

[9] *Clam Lake Twp*, 499 Mich at 896, as amended 499 Mich 949 (2016).

[10] *TeriDee LLC*, 499 Mich at 896-897, as amended 499 Mich 950 (2016).

"are authorized by law."[11] The Administrative Procedures Act[12] also governs our review of the Commission's final decisions.[13] We will set aside a Commission decision "if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following," including "[i]n violation of the constitution or a statute," "[i]n excess of the statutory authority or jurisdiction of the agency," or "[a]ffected by other substantial and material error of law."[14] An agency's statutory interpretations are entitled to "respectful consideration," but they "cannot conflict with the plain meaning of the statute."[15] We must also determine whether the decisions, findings, and rulings "are supported by competent, material and substantial evidence on the whole record,"[16] remaining sensitive to the deference owed to administrative expertise and not invading exclusive administrative fact-finding.[17]

"We review de novo a trial court's determination regarding a motion for summary disposition."[18] "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."[19] Similarly,

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[11] Const 1963, art 6, § 28.

[12] MCL 24.201 *et seq*.

[13] MCL 123.1018 ("Every final decision by the commission shall be subject to judicial review in a manner prescribed in Act No. 197 of the Public Acts of 1952, as amended . . . ."); see also *Midland Twp v State Boundary Comm*, 401 Mich 641, 671-672; 259 NW2d 326 (1977).

[14] MCL 24.306(1).

[15] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).

[16] Const 1963, art 6, § 28.

[17] *Midland Twp*, 401 Mich at 673.

[18] *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

[19] *Id*. at 467 (citation and quotation marks omitted).

we review de novo the interpretation of statutes.[20] We interpret statutes to discern and give effect to the Legislature's intent, and in doing so we focus on the statute's text.[21] Undefined terms are presumed to have their ordinary meaning, unless they "have acquired a peculiar and appropriate meaning in the law," in which case we accord them that meaning.[22] The statute must be considered as a whole, "reading individual words and phrases in the context of the entire legislative scheme."[23] Unambiguous statutes are enforced as written.[24]

III. ANALYSIS

A. ACT 425 AGREEMENTS

We first address the scope of the Commission's power to review Act 425 agreements when considering an annexation petition.[25] The Commission, like other

[20] *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016).

[21] *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

[22] MCL 8.3a.

[23] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

[24] *Id*.

[25] Appellees argue that the Townships did not properly preserve this issue and are otherwise estopped from raising it. We disagree and find that we may reach this issue because the Townships properly preserved it. Indeed, in the Townships' initial challenge to the annexation petition, they argued that the Commission had no authority because the Act 425 agreement had already transferred the land. Their basic argument—that the Commission lacks power to make certain determinations—has remained unchanged throughout the proceedings.

Appellees have also claimed that the Townships are judicially estopped from challenging *Casco Twp*, 243 Mich App 392, because in *TeriDee*, the Townships successfully relied on *Casco* to obtain partial dismissal under the primary jurisdiction doctrine. A party is judicially

administrative agencies, only has the powers expressly granted to it or necessarily implied.[26] The Commission has authority over the incorporation and consolidation of local governments as well as over various alterations of those governments' boundaries.[27] With respect to the Commission's authority over annexation petitions, MCL 123.1011a grants the Commission "jurisdiction over petitions or resolutions for annexation as provided in [MCL 117.9]." That statute, in turn, tasks the Commission with "determining the validity of the petition or resolution" and endows it with the powers and duties it normally has when reviewing incorporation petitions.[28] Those powers include the ability to

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estopped from asserting a position inconsistent with one it successfully and unequivocally asserted in a prior proceeding. *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994). There is nothing inconsistent in the Townships' positions. In *TeriDee*, they claimed that *Casco* required the Commission, rather than the circuit court, to have the first opportunity to review the Act 425 agreement. In *Clam Lake*, the theory they offer, and prevail on, is that *Casco* gave the Commission too much authority to review Act 425 agreements, and that the statute limits review to determining whether an agreement is "in effect" under MCL 124.29. In both cases, the Commission can examine the agreement; the pertinent argument here, and the one that the Townships have consistently made, concerns the scope of that examination. Therefore, the Townships are not estopped from challenging this aspect of *Casco*.

[26] *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951); see also *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 736; 330 NW2d 346 (1982) ("It is beyond debate that the sole source of an agency's power is the statute creating it. If a certain power . . . is withheld in the statute, the agency may not act.").

[27] *Midland Twp*, 401 Mich at 650. None of the statutory provisions regarding the Commission's authority over incorporation, consolidation, or reannexation expressly or impliedly pertains to Act 425 agreements. See, e.g., MCL 123.1008 (granting the Commission power over incorporation); MCL 123.1009 (listing criteria for incorporation); MCL 123.1012 to 1012a (addressing consolidation); MCL 123.1012b (addressing reannexation).

[28] MCL 117.9(2).

consider, among other things, population statistics, the need for governmental services in the incorporated area, and the general effect on the entire community.[29] While these statutes furnish "broad powers concerning annexations,"[30] none mentions Act 425 agreements or purports to grant the Commission authority over them.

Next, we must consider whether Act 425 provides the Commission authority to review agreements created under that statute. Act 425 provides that "[t]wo or more local units may conditionally transfer property for a period of not more than 50 years for the purpose of an economic development project. A conditional transfer of property shall be controlled by a written contract agreed to by the affected local units."[31] An "economic development project" is defined, in relevant part, as the "land and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water."[32]

Local governmental units must consider various factors when entering into an Act 425 agreement, including the natural environment, population statistics, the need for and cost of government services, existing services, and the general effects of the transfer.[33] These factors are very similar to the ones the Commission must consider when reviewing proposed

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[29] MCL 123.1009.

[30] *Owosso Twp v City of Owosso*, 385 Mich 587, 590; 189 NW2d 421 (1971).

[31] MCL 124.22(1). The "local units" refer to cities, townships, and villages. MCL 124.21(b).

[32] MCL 124.21(a).

[33] MCL 124.23.

incorporations and annexations.[34] And like the Commission, the local units must hold public hearings on their proposed actions.[35] This indicates that, with respect to conditional land transfers under Act 425, the local units do much of the same work that the Commission does in its areas of assigned responsibility.

Only one provision in Act 425 implicates the Commission, but it does so in a manner that circumscribes the Commission's involvement. MCL 124.29 states that "[w]hile a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract." Thus, all that is required to preempt an annexation petition is for the Act 425 agreement to be "in effect." The ordinary meaning of "effect" is "the quality or state of being operative."[36] Because an Act 425 agreement conditionally transfers property, it is "in effect," or operative, when the property has been conditionally transferred. The statute designates when this occurs: "The conditional transfer of property pursuant to a contract under this act takes place when the contract is filed in the manner required by this section."[37]

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[34] MCL 123.1009.

[35] Compare MCL 123.1008(3) ("At least 60 days but not more than 220 days after the filing with the commission of a sufficient petition proposing incorporation, the commission shall hold a public hearing at a convenient place in the area proposed to be incorporated."), with MCL 124.24(1) (providing that the "legislative body of each local unit affected by a proposed transfer of property under this act shall hold at least 1 public hearing before entering into a contract under this act").

[36] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Black's Law Dictionary* (10th ed) (defining "effect" as the "result that an instrument between parties will produce on their relative rights, or that a statute will produce on existing law, as discovered from the language used, the forms employed, or other materials for construing it").

[37] MCL 124.30. The statute goes on to state:

Thus, the conditional land transfer takes place when the parties enter into the contract and file the appropriate documents with the county clerk and Secretary of State. At that point, the agreement is operative, or "in effect," and the agreement preempts any other method of annexation. Act 425 does not condition preemption on a finding that the contract is otherwise valid, and it does not expressly grant to the Commission the power to determine the agreement's validity. Instead, the Commission may only make an initial determination of whether the Act 425 agreement is operative, i.e., whether the contract was entered into by the parties and filed in accordance with the statute.[38]

Only one Court of Appeals case has essayed a serious interpretation of Act 425. In *Casco Twp*, landowners in Casco and Columbus Townships petitioned to have Richmond City annex their lands; however, Lenox Township had shortly before acquired the land through two Act 425 agreements.[39] As in the present case, the Commission suspected the agreements were a ploy to avoid annexation and rejected them as invalid.[40] The Court of Appeals affirmed.[41]

> After the affected local units enter into a contract under this act, the clerk of the local unit to which the property is to be conditionally transferred shall file a duplicate original of the contract with the county clerk of the county in which that local unit, or the greater part of that local unit, is located and with the secretary of state. That county clerk and the secretary of state shall enter the contract in a book kept for that purpose. The contract or a copy of the contract certified by that county clerk or by the secretary of state is prima facie evidence of the conditional transfer. [*Id*.]

[38] MCL 124.30.

[39] *Casco Twp*, 243 Mich App at 399.

[40] *Id*. at 396.

[41] *Id*. at 395.

In *Casco Twp*, the Court of Appeals erred by concluding that MCL 124.29 authorizes the Commission to examine an Act 425 agreement's validity rather than simply to determine its effectiveness. The Court interpreted MCL 124.29 to "expressly require[] an Act 425 agreement that is 'in effect' and, therefore, necessitates a valid agreement. Consequently, this statutory bar to the commission's consideration of an annexation petition requires an agreement that fulfills the statutory criteria . . . ."[42] Accordingly, the Commission could canvass the agreement for violations of the Act 425 "criteria."[43]

The problem with this analysis is that an Act 425 agreement preempts annexation when the agreement is "in effect." The statute makes no mention of validity. The Legislature could have employed this potentially broader term had it intended the Commission to wield more expansive review powers. For example, the Legislature expressly provided the Commission power to examine "the validity of the [annexation] petition . . . ."[44] No such language appears in Act 425; instead, as mentioned above, the agreement must merely be "in effect," and effectiveness occurs when the local units have entered into and properly filed the agreement.[45]

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[42] *Id*. at 398-399.

[43] *Id*.

[44] MCL 117.9(2).

[45] Our opinion in *Shelby Charter Twp v State Boundary Comm*, 425 Mich 50; 387 NW2d 792 (1986), does not, as *Casco* asserted, support a contrary conclusion. There we addressed MCL 42.34, which exempted charter townships from annexation if they met certain statutory criteria. *Id*. at 53. One criterion was that the charter township provide water or sewer services. MCL 42.34(1)(f). We framed the issue narrowly as "whether the lower courts correctly construed [this statute] to require only the provision of any water or sewer services" rather than a non-*de*

In sum, *Casco* misinterpreted Act 425, and we take this opportunity to overrule it. The plain language of the Act provides that the Commission must find any annexation petition preempted if a relevant Act 425 agreement is "in effect." In that situation, the Commission lacks the power to make any further determination of the agreement's validity.

Here, there is no dispute that the parties had entered into the Act 425 agreement and that it was properly filed with the Wexford County Clerk and the Secretary of State at the time the Commission considered the annexation petition.[46] Accordingly, the agreement was "in effect" and preempted TeriDee's annexation petition.[47] We reverse the circuit court's decision to the contrary.[48]

B. ZONING ORDINANCES

We next consider whether the Townships' Act 425 agreement is void as against public policy for impermissibly contracting away Haring's legislative zoning authority. The Court of Appeals concluded that it was.

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minimis amount. *Shelby*, 425 Mich at 72. We determined that the Commission correctly construed the statute to require more than a *de minimis* level of services. *Id*. at 72-77. As we do in this case, *Shelby* merely specified what the Commission had to consider in order to determine whether the annexation was preempted. Accordingly, *Shelby* does not implicitly stand for the proposition that the Commission has expanded authority over statutes related to annexation.

[46] The Commission's decision noted this filing, and the record contains a letter from the Department of State acknowledging receipt of the filing and assigning an effective date of June 10, 2013.

[47] MCL 124.29.

[48] It is important to highlight the limits of our holding. We do not opine on whether a party could seek to invalidate an Act 425 agreement in the circuit court on other grounds. We merely hold that the Commission, when faced with an annexation petition and an Act 425 agreement that is "in effect," must find the petition preempted.

To reach this result, it first found that the Act 425 agreement required Haring to enact specific zoning standards, thus restraining the Township's discretion in how to zone the property.[49] In other words, it held that the agreement contracted away Haring's zoning powers. Relying on the general proposition that such contract zoning is prohibited unless specifically authorized by statute,[50] the Court then examined whether the Legislature had authorized it in Act 425, specifically in MCL 124.26.[51] That statute states, in relevant part:

> If applicable to the transfer, a contract under this act may provide for any of the following:
>
> * * *
>
> (c) The fixing and collecting of charges, rates, rents, or fees, where appropriate, and *the adoption of ordinances and their enforcement by or with the assistance of the participating local units*.[52]

The Court of Appeals concluded that this provision did not permit the local units to agree to zoning ordinances. A contrary interpretation, it feared, "reads more words into the statute than are present."[53] The plain language only allows the agreement to provide for the adoption and enforcement of ordinances; it does not state that the "agreement may provide for the manner in which the participating local units will adopt ordinances, such as dictating how a local unit

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[49] *TeriDee*, unpub op at 3-4.

[50] *Id*. at 2-3, citing *Inverness Mobile Home Community*, 263 Mich App at 247-248.

[51] *TeriDee*, unpub op at 5-6.

[52] MCL 124.26 (emphasis added).

[53] *TeriDee*, unpub op at 6.

must zone or rezone the property."[54] It does "nothing more than determin[e] which local unit has jurisdiction over the property . . . and does not necessarily encompass the right to contract zone."[55]

We disagree with this analysis of MCL 124.26(c) and hold that the statute authorizes the Townships' zoning provisions.[56] We find nothing in the provision limiting the local units to a determination of which unit has jurisdiction. It is MCL 124.28,[57] not MCL 124.26(c), that allows the units to select which side has jurisdiction and for what purposes. We must reject the Court of Appeals' analysis. Instead, we interpret MCL 124.26(c) to authorize local units to bargain over the adoption of ordinances, which includes bargaining over their content and substance.

The only remaining question is whether a zoning ordinance is an "ordinance" under MCL 124.26(c). The Court of Appeals thought not, because the statute does not mention zoning. But no specific types of ordinances are named in the statute. Therefore, the Court of Appeals' observation does not end the inquiry of whether a zoning ordinance qualifies under the statute as an "ordinance." An "ordinance" is simply "a law set forth by a governmental authority," specifically "a municipal regulation."[58] Michigan statutes and caselaw are rife with references to zoning regulations as

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[54] *Id*.

[55] *Id*. at 6-7.

[56] Because the statute permits these provisions, *Inverness Mobile Home Community*, 263 Mich App at 247-248, is inapplicable.

[57] MCL 124.28 ("Unless the contract specifically provides otherwise, property which is conditionally transferred by a contract under this act is, for the term of the contract and for all purposes, under the jurisdiction of the local unit to which the property is transferred.").

[58] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Black's Law Dictionary* (10th ed) (defining "ordinance" as "[a]n authoritative

ordinances, which demonstrate that an "ordinance" can zone.[59] Accordingly, when MCL 124.26(c) says "ordinance" and does not expressly exclude zoning ordinances, that term must be read to include them.

From here, completing the statutory analysis is syllogistic. MCL 124.26(c) permits the local units to specify the content and substance of ordinances in their Act 425 agreement, and a zoning ordinance is an ordinance for purposes of the statute. It follows that MCL 124.26(c) allows the units to specify the content and substance of *zoning* ordinances in their Act 425 agreement. As applied here, MCL 124.26(c) authorizes the Townships' zoning provisions.[60]

Neither the parties nor the courts below suggest any reason why the Legislature would be prohibited from authorizing this form of contract zoning. True, the zoning power "constitutes a legislative function" that municipalities may exercise.[61] But a township "has no

law or decree," especially "a municipal regulation . . . on matters that the state government allows to be regulated at the local level").

[59] See, e.g., MCL 125.3201(1) ("A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction . . . ."); *Kyser v Kasson Twp*, 486 Mich 514, 529; 786 NW2d 543 (2010) ("[A] zoning ordinance is presumed to be reasonable, and a person challenging *such an ordinance* carries the burden . . . .") (emphasis added); *Paragon Props Co v City of Novi*, 452 Mich 568, 574; 550 NW2d 772 (1996) ("Because *zones established by ordinance* will not always reflect the realities of all land controlled by *a zoning ordinance* . . . .") (emphasis added); *Bengston v Delta Co*, 266 Mich App 612, 614; 703 NW2d 122 (2005) ("Because the township *ordinance zoning the property* for commercial use is controlling . . . .") (emphasis added).

[60] It is notable that since Haring derives its zoning authority from the Act 425 agreement, Haring would have no authority to zone the transferred lands but for the agreement. Thus, the agreement does not contract away any zoning powers Haring would have otherwise possessed.

[61] *Kyser*, 486 Mich at 520.

inherent power to zone" and can only do so to the extent the power is granted by the Constitution or Legislature.[62] Accordingly, the Legislature can empower—and has empowered[63]—municipalities to zone or take other action by agreement even though the agreement will bind those municipalities in the future and constrain their legislative discretion. As a leading treatise notes, "Statutes and charters sometimes authorize municipal boards to make contracts which will extend beyond their own official term, and the power of the legislature in this respect is well settled."[64] And, indeed, our Constitution encourages legislation such as Act 425 that allows local governments to "enter into contractual undertakings or agreements with one another . . . for the joint administration of any of the functions or powers which each would have the power to perform separately . . . [or to] transfer functions or responsibilities to one another . . . ."[65]

Accordingly, the Legislature in Act 425 enabled local units to contract for zoning. We reverse the Court of Appeals' contrary conclusion.

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[62] *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 493-494; 378 NW2d 402 (1985); see also *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010) ("A local unit of government may regulate land use through zoning only to the limited extent authorized by that legislation.").

[63] See, e.g., MCL 125.3405 (authorizing conditional rezoning).

[64] 10A McQuillin, Municipal Corporations (3d ed, 2009), § 29.102, p 67. See also 1 Salkin, Am Law Zoning (5th ed), § 9:21, p 9-65 ("It is clear that if conditional zoning . . . is 'contract zoning' in the sense that the municipality has bargained away a portion of its zoning power, such zoning is unlawful except in the unusual situation where a statute authorizes agreements between governmental units."); 83 Am Jur 2d, Zoning and Planning, § 38, p 75 ("Absent valid legislative authorization, contract zoning is impermissible . . . .").

[65] Const 1963, art 7, § 28.

IV. CONCLUSION

In *Clam Lake*, we hold that the Commission, when faced with an Act 425 agreement in annexation proceedings, may only review whether the agreement is "in effect."[66] An agreement is "in effect" if it is entered into and properly filed.[67] Here, those conditions were met, and the Commission and circuit court erred by invalidating the agreement on other grounds. Accordingly, TeriDee's annexation petition was preempted, and we reverse the circuit court's decision. In *TeriDee*, we hold that Act 425 authorizes local units such as the Townships to provide for zoning ordinances in their conditional land transfer agreements. The Townships properly included such provisions in their agreement, and we reverse the Court of Appeals' decision to the contrary. We remand both cases to the circuit court for further proceedings consistent with this opinion.[68]

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, LARSEN, and WILDER, JJ., concurred with VIVIANO, J.

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[66] MCL 124.29.

[67] MCL 124.30.

[68] Because these holdings fully resolve the appeals, we do not address the other issues raised in our grant orders.

PEOPLE v DENSON

Docket No. 152916. Argued on application for leave to appeal April 12, 2017. Decided July 17, 2017.

Defendant, Tmando A. Denson, was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, after a jury trial in the Genesee Circuit Court. Defendant's conviction arose from a physical altercation that he had with 17-year-old Shamark Woodward II, who was dating defendant's 15-year-old daughter. At trial, the witnesses presented starkly different versions of the events, but testimony was consistent that defendant had discovered Woodward and defendant's daughter in her bedroom, partially undressed. Defendant claimed that, after hearing his daughter yell in protest, he entered the room to find Woodward forcing his hand down his daughter's pants. According to defendant, he pulled Woodward away from his daughter, and he and Woodward fought. In contrast, Woodward claimed that his actions with defendant's daughter were consensual and that defendant brutally assaulted him. The prosecution introduced photographs of Woodward's injuries, which included lacerations to his body. The prosecution also sought to admit evidence under MRE 404(b) of the facts underlying defendant's 2002 conviction of assault with intent to do great bodily harm less than murder, arguing that this other-acts evidence was admissible to rebut defendant's claims of self-defense and defense of others. Defendant's 2002 conviction arose from an incident in which, after a dispute over an alleged drug debt, defendant bashed in an individual's car window and then shot the individual, who was retreating into his house. Defense counsel objected to admission of this other-acts evidence, arguing that it was an impermissible attempt to use propensity evidence in violation of MRE 404(b). The trial court, Geoffrey L. Neithercut, J., ruled that the prosecution could discuss the facts underlying the prior conviction, but barred the prosecution from introducing evidence of the actual conviction unless defendant denied that the underlying facts occurred. Defendant appealed his conviction in the Court of Appeals, and the Court, MURRAY, P.J., and METER and OWENS, JJ., affirmed in an unpublished per curiam opinion issued October 1, 2015. Defendant sought leave to appeal in the Supreme Court,

which ordered and heard oral argument on whether to grant the application or take other action. 500 Mich 892 (2016).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MARKMAN and Justices ZAHRA, MCCORMACK, VIVIANO, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

When the prosecution seeks to admit evidence of other acts under MRE 404(b), the prosecution must assert a proper noncharacter purpose for admitting the evidence and must demonstrate the logical relevance of the evidence to that purpose by showing its materiality and probative value. In this case, the prosecution claimed to offer the other-acts evidence to rebut defendant's claims of self-defense and defense of others, but the lower courts failed to closely scrutinize the logical relevance of the other-acts evidence. Evaluation of the logical relevance of the evidence revealed that the trial court erred by admitting the evidence because the other act was not strikingly similar to the charged offense and instead served solely to demonstrate defendant's propensity for violence, thereby violating MRE 404(b). Given the facts of the case, the error was not harmless because it undermined the reliability of the verdict, and the case was remanded for a new trial.

1. Under MRE 404(b) evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts, but such evidence may be admissible for other nonpropensity purposes. The proponent of other-acts evidence must first articulate a proper noncharacter purpose for admission of the other-acts evidence. In this case, the prosecution claimed that the other-acts evidence was offered for the purpose of rebutting defendant's claims of self-defense and defense of others. These theories of admission are best understood as an attempt to rebut a defendant's state of mind, that is, to show that a defendant did not honestly and reasonably believe that the use of force was necessary to defend himself or herself or another person. However, merely reciting a proper purpose does not automatically render the evidence admissible; the prosecution must demonstrate the actual existence of a proper purpose by showing the logical relevance of the other-acts evidence at issue.

2. Other-acts evidence is logically relevant if two components are present: materiality and probative value. With respect to materiality, in this case, while the prosecution's burden to disprove defendant's claims of self-defense and defense of others placed these defenses generally at issue, the specific other-acts evidence offered was not material because it was not probative of these defenses. To be probative under MRE 404(b), the prosecu-

tion must not only articulate a proper purpose for the evidence, but must also explain how the evidence is relevant to that purpose without relying on a propensity inference. Ultimately, the court must determine whether the prosecution has established an intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in the case. If the prosecution's theory of relevance is based on the alleged similarity between a defendant's other act and the charged offense, there must be a striking similarity between the other act and the charged offense to find the other-acts evidence probative and admissible. In this case, the prosecution sought to admit the other-acts evidence particularly based on the alleged similarity between the 2002 incident and the charged offense. However, the prosecution failed to show striking similarity between the acts. The fact that defendant had previously assaulted a completely different individual in a completely different scenario years earlier had no probative force other than to demonstrate defendant's propensity for violence and that defendant acted consistently with that tendency in attacking Woodward. Therefore, the other-acts evidence was not probative of anything other than defendant's allegedly bad character and propensity to commit the charged offense, the very inference forbidden by MRE 404(b). Although the prosecution nominally recited what could be a proper purpose for admission of the other-acts evidence, evaluation of the probative value of the evidence revealed that no such purpose actually existed; the articulated purpose was merely a front for the admission of improper other-acts evidence. The trial court and the Court of Appeals erred by failing to closely scrutinize the probative value of the other-acts evidence and by concluding that the other-acts evidence was admissible.

3. Under harmless-error review, a preserved nonconstitutional error is presumed not to be a ground for reversal unless it affirmatively appears more probable than not that the error was outcome-determinative. An error is outcome-determinative if it undermines the reliability of a verdict. The reviewing court must focus on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. The admission of improper other-acts evidence creates a severe risk that the jury will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person and that if he did it before he probably did it again. In this case, defendant and Woodward gave very different accounts of the events in question. In addition to proving the elements of the crime charged, the prosecution was required to disprove defen-

dant's claims of self-defense and defense of others. To do so, the prosecution needed the jury to believe that defendant had unjustifiably attacked Woodward. In pursuit of that objective, the prosecution questioned several defense witnesses about the 2002 incident in a manner that suggested that defendant was an aggressive and violent man and that Woodward was simply another victim of defendant's violent tendencies. Such use of the impermissible propensity inference prohibited by MRE 404(b), which the prosecution repeatedly made to the jury, created prejudice that entitled defendant to relief. The prosecution further compounded the problem in closing argument by remarking on defendant's allegedly violent nature. Although the prosecution also introduced photographs and medical testimony regarding Woodward's injuries, the mere presence of some corroborating evidence does not automatically render an error harmless. Defendant's version of the events was not wholly inconsistent with the injuries Woodward sustained. Given the nature of the error and assessing its effect in light of the weight and strength of the untainted evidence, the error was not harmless.

Reversed and remanded for a new trial.

Justice WILDER, dissenting, would have denied defendant's application for leave to appeal. Even if the other-acts evidence was improperly admitted under MRE 404(b), the error did not require reversal because defendant did not establish that it was more probable than not that he would have been acquitted were it not for the introduction of that evidence. By claiming self-defense and defense of others, defendant necessarily admitted the commission of the crime, but sought to excuse its commission. While defendant claimed the assault was justified in order to prevent his daughter from being sexually assaulted, the prosecution sought to prove that defendant's claim of attempted sexual assault was false, devised by defendant afterward in order to escape criminal responsibility for Woodward's assault. The evidence of Woodward's injuries did not support defendant's claims of self-defense. Woodward's most serious injuries, requiring 21 sutures and 8 staples to close, were located on the back and side of his body. Moreover, the post-altercation conduct of defendant and his family members was not remotely consistent with defendant's claim that his daughter had been the victim of an imminent sexual assault. Because there was more than ample evidence for the jury to conclude that the claim of an imminent sexual assault had been fabricated, defendant failed to establish entitlement to reversal of his conviction.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, Assistant Prosecuting Attorney, for the people.

Tmando A. Denson, *in propria persona*, and *Grabel & Associates* (by *Scott A. Grabel* and *Timothy A. Doman*) for defendant.

Amicus Curiae:

Mark Reene, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

BERNSTEIN, J. In this case, we consider whether evidence of defendant's prior act was admissible under MRE 404(b) to rebut defendant's claims of self-defense and defense of others, that is, defendant's claim that he honestly and reasonably believed his use of force was necessary to defend himself or another. We hold that the trial court erred when it admitted defendant's prior act because the prosecution failed to establish that it was logically relevant to a proper noncharacter purpose. We also conclude that this error was not harmless. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the trial court for a new trial.

I. FACTS AND PROCEDURAL HISTORY

This case stems from a physical altercation between defendant Tmando Allen Denson and 17-year-old Shamark Woodward II on the evening of October 22, 2012. As a result of this incident, defendant was charged with assault with intent to do great bodily harm less than murder, MCL 750.84.

At trial, Woodward and defendant presented very different accounts of what occurred on the night in question. Testifying for the prosecution, Woodward explained that he had previously met defendant's 15-year-old daughter, DD, at school and the two started dating. On the evening of October 22, DD invited Woodward to her house at a time when defendant and Rosemary Denson—defendant's wife and DD's mother—were not home. Woodward and DD began talking and kissing on the couch in the living room. When they heard a car outside, DD suggested that they go upstairs to her room, where the two continued to kiss. Eventually, Woodward and DD removed their pants. Woodward testified that he suddenly heard footsteps on the stairs and that defendant burst into the room, finding the two teenagers in this compromising position. Defendant immediately attacked Woodward, punching and kicking him and then hitting him with a lamp. Defendant then forced both teenagers to undress and took photographs of them. Defendant left the room and returned with two knives. Defendant instructed Woodward to sit in the corner and proceeded to slash Woodward repeatedly across his back, shoulders, and legs. Woodward denied possessing a weapon during the attack, denied fighting back against defendant, and denied sexually assaulting or threatening DD in any way.

Woodward further testified that when he arrived home, he told his brothers what had happened and was taken to the hospital, where he received numerous staples and stitches. Photographs of Woodward's injuries were admitted into evidence at defendant's jury trial. The photos showed two lacerations on Woodward's back and lacerations on his arm, shoulder, and leg. The attending doctor, Dr. Faisal Mawri, testified that Woodward reported being assaulted and that his

multiple injuries were consistent with wounds inflicted by a sharp object. Woodward's mother and a police officer who spoke to Woodward at the hospital also confirmed the nature of Woodward's injuries.

Defendant testified in his own defense, presenting a starkly different version of the events. Defendant explained that, after arriving home from work, he went downstairs to the basement to watch a football game with his two sons. DD, he believed, was upstairs alone. All of a sudden, he heard a loud noise and immediately ran upstairs to investigate. He heard DD yell, "[N]o, stop," and "[W]hat are you doing, my daddy is downstairs." Defendant ran into DD's room, where he saw DD on the floor and Woodward leaning over her, trying to force his hand down her pants. Defendant admitted to physically striking Woodward. Woodward then broke loose and ran downstairs. Defendant followed Woodward downstairs, testifying that he was scared for his two sons, who were still in the basement. Defendant and Woodward met once more in the kitchen, where both individuals grabbed knives, and Woodward threw a glass at defendant, striking defendant's hand. Woodward then ran back upstairs where he and defendant threw their knives at each other. At some point, shortly thereafter, the fighting ceased and Woodward left. Defendant denied taking pictures of the teenagers and denied using a knife in the manner Woodward alleged. Defendant claimed that he honestly believed that DD was being sexually assaulted and that he was protecting her and himself from Woodward.

Defendant further testified that he immediately called his parole officer to report the incident, but no one answered. He also went to the local police precinct but found that it was closed. Defendant told the jury

that he suffered a broken finger, puncture wounds to his hand, and cuts on his arms. Although defendant sought to introduce jail medical records to further substantiate these injuries, the trial court barred their admission because defense counsel's effort to obtain the records was dilatory.

Several witnesses testified on defendant's behalf. Tmando Denson, Jr., one of defendant's sons, confirmed that he had been watching a game with defendant and that defendant left the basement after hearing a loud noise upstairs. DD also took the stand, largely corroborating defendant's account of the incident and asserting that Woodward had tried to sexually assault her. However, DD testified that she never saw defendant or Woodward with a knife. She also denied seeing any cuts on Woodward's body. Rosemary Denson testified that DD had called her that evening to tell her what had happened and that DD had received sexual assault counseling shortly afterward.

At trial, pursuant to MRE 404(b), the prosecution sought to admit the facts underlying defendant's prior 2002 conviction for assault with intent to do great bodily harm less than murder, MCL 750.84.[1] This prior conviction arose from an unrelated incident involving an unrelated individual named Tyrone Bush. Apparently, after becoming upset with Bush over a supposed drug debt, defendant had driven to Bush's home in Detroit, bashed in his car window, and shot Bush when he appeared on his porch and turned to retreat back inside his home. Defense counsel objected to the ad-

[1] Before trial, the prosecution had filed notice under MRE 404(b), indicating its intent to admit the facts underlying the 2002 conviction "[f]or the purpose of proving absence of self-defense or defense of others, absence of mistake, modus operandi, scheme[,] plan and knowledge." See MRE 404(b)(2).

mission of any evidence related to the 2002 incident, arguing that it was an impermissible attempt to use propensity evidence in violation of MRE 404(b). Citing this Court's decision in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), defense counsel argued that the 2002 incident was irrelevant, unfairly prejudicial, and offered for the improper purpose of showing that defendant had acted in conformity with his allegedly violent character. The prosecution responded that admission of the facts underlying the 2002 conviction did not violate MRE 404(b) because the evidence was not being offered to show propensity, but rather to rebut defendant's claims of self-defense and defense of others. The trial court ruled that the prosecution could discuss the facts underlying the conviction, but it barred the prosecution from introducing evidence concerning the actual conviction unless defendant denied that the underlying facts occurred.

The prosecution subsequently elicited evidence of the 2002 incident from several defense witnesses. The prosecutor asked defendant whether the specific facts of the 2002 incident were true. The prosecutor then suggested to defendant, "You have a bad temper, don't you?" Later, the prosecutor asked defendant to admit that beating Woodward got the "rage out of your system, because you are a bully . . . , aren't you? Yes or no?"

The prosecutor also brought up defendant's alleged temper when questioning members of defendant's family. In cross-examining DD, the prosecutor informed her that he was going to inquire "a little bit about your family history." The prosecutor then asked if DD was aware that defendant had previously gotten into trouble for losing his temper and shooting someone. Driving the point home, the prosecutor continued,

"[Y]ou wouldn't want your dad to lose control with you like he lost control with [Woodward]." In contrast, the prosecutor sought to confirm with DD that Woodward was "a nice boy." Turning to Rosemary Denson, the prosecutor asked Rosemary whether she was aware of the "family history" involving the 2002 incident and whether defendant's bad temper and loss of control caused her to fear defendant. The prosecutor also brought up the 2002 incident when questioning DD's sexual assault crisis counselor, Christina Delikta. The prosecutor asked whether defendant had told her about the 2002 incident in which he had "gotten into trouble in the past for assaulting somebody in Detroit." Defense counsel repeatedly, but unsuccessfully, objected to the questions posed to all four defense witnesses, at one point moving for a mistrial, which the trial court denied.[2]

The prosecution returned to the 2002 incident in closing argument. Addressing defendant directly, the prosecutor stated:

> And you know, we have no reasonable doubt; no doubt that's fair that there was any kind of defense of anybody. This was just a savage beating, Mr. Denson. You lost control, just like you did in Detroit when you shot that guy. You're a bully, Mr. Denson and you're a coward. . . .
>
> * * *
>
> . . . Cause you have Mr. Denson intending to cause great bodily harm to just a boy.

In comparison, the prosecutor assured the jury that

[2] Additionally, when the trial court solicited witness questions from the jury, one juror sought to inquire of a police witness, "[D]o you think Mr. Denson is a violent person, or can be a violent person or have a bad temper[?]" The trial court did not permit this question to be asked.

Woodward was "a good guy." And in rebuttal, the prosecutor again argued:

> The [2002] incident in Detroit. Hey, not a coincidence, okay. Not a coincident [sic] that the bully over a $75 . . . drug debt takes his gun, bashes the car window and shoots the guy while he's retreating into the house. No self defense in that circumstance.
>
> * * *
>
> . . . And um, this guy pounded on [Woodward] with his hands, pounded on [Woodward] with his feet, kicking [Woodward] in the face, trying to wack [sic] him with the chair, bashing a lamp over his head and breaking it. . . . Then taking photos so he would have some evidence. . . . They're not coincidences. No self defense.

The trial court gave self-defense and defense-of-others instructions to the jury. Ultimately, the jury convicted defendant of assault with intent to do great bodily harm less than murder, and defendant was sentenced as a fourth-offense habitual offender to a prison term of 5 to 20 years.

On appeal, defendant argued that the trial court had erred by admitting under MRE 404(b) the evidence related to the 2002 incident. The Court of Appeals rejected this claim and affirmed defendant's conviction. *People v Denson*, unpublished per curiam opinion of the Court of Appeals, issued October 1, 2015 (Docket No. 321200). Specifically, the Court of Appeals believed that "[t]he contradiction of [defendant's] self-defense theory constituted a proper, non-character purpose for admission under MRE 404(b)." *Id*. at 5. Further, while the Court of Appeals acknowledged that the evidence was somewhat prejudicial to defendant, the panel concluded that there was no danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id*.

In this Court, defendant has again raised a challenge under MRE 404(b). We scheduled oral argument on the application.[3]

II. STANDARD OF REVIEW

A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). However, whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo. *Id*. A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

When we find error in the admission of evidence, a preserved nonconstitutional error "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (quotation marks and citations omitted); *Lukity*, 460 Mich at 495-496.[4] This inquiry "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Lukity*, 460 Mich at 495 (quotation marks and citation omitted). "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine

[3] In his application in this Court, defendant raised several additional claims and requested a remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Because we grant defendant a new trial on the basis of his MRE 404(b) challenge, we decline to address those other issues and deny the motion to remand for a *Ginther* hearing.

[4] Defendant preserved his MRE 404(b) challenge by objecting to the admission of the other-acts evidence in the trial court.

whether it is more probable than not that a different outcome would have resulted without the error." *Id*.

III. MRE 404(b)

MRE 404 governs the admissibility of other-acts evidence. The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Such evidence may, however, be admissible for other purposes under MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The first sentence of this rule represents the deeply rooted and unwavering principle that other-acts evidence is inadmissible for propensity purposes. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000); *Crawford*, 458 Mich at 383. Far from "a mere technicality," this prohibition "gives meaning to the central precept of our system of criminal justice, the presumption of innocence." *Crawford*, 458 Mich at 383-384 (quotation marks and citation omitted). This rule reflects the fear that a jury will convict a defendant on the basis of his or her allegedly bad character rather than because he or she is guilty beyond a reasonable doubt of the crimes charged. *Id*. at 384. Indeed, the very danger of other-acts evidence "is not that it is irrelevant, but, to the contrary, that using bad

acts evidence can weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id*. (quotation marks and citation omitted). Woven inextricably into the fabric of our jurisprudence is the principle that "we try cases, rather than persons . . . ." *People v Allen*, 429 Mich 558, 566; 420 NW2d 499 (1988). The second sentence of MRE 404(b)(1) establishes that other-acts evidence may be admissible for other nonpropensity purposes. *Sabin*, 463 Mich at 56; *Crawford*, 458 Mich at 390 n 8.

In *VanderVliet*, this Court articulated the following standard for the admission of other-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*VanderVliet*, 444 Mich at 55.]

A. PROPER PURPOSE

Under the first prong of the *VanderVliet* test, the question is whether the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence. *Crawford*, 458 Mich at 385-386. The prosecution bears the burden of establishing that purpose. *Id*. at 385. MRE 404(b) prohibits the admission of other-acts evidence when the prosecution's only theory of relevance is that the other act demonstrates the defendant's inclination for wrongdoing in general and thus indicates that the defendant committed the conduct in question. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998), citing *VanderVliet*, 444 Mich at

63. On the other hand, such other-acts evidence may be admissible whenever it is also relevant to a noncharacter purpose, such as one of the purposes specifically enumerated in MRE 404(b)(1). *Starr*, 457 Mich at 496-497.

In the instant case, defendant presented testimony from several witnesses to show that he honestly and reasonably believed that his use of force was necessary to defend himself and his family. See MCL 780.972(2). Once defendant presented a prima facie claim of self-defense or defense of others, the prosecution bore the burden of disproving the claim beyond a reasonable doubt. See *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). In the instant case, the prosecution claimed that it offered evidence of the 2002 incident to rebut defendant's claims of self-defense and defense of others.[5] Other courts have recognized these theories of admission,[6] and they are best understood as an attempt to rebut a defendant's claimed state of mind, that is, to show that a defendant did not have an honest and reasonable belief that his or her use of force was necessary to defend himself or herself or another. See *State v Dukette*, 145 NH 226, 230; 761 A2d 442 (2000) ("By filing a notice of self-defense, the defendant has placed her state of mind at issue.").

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[5] We note that the prosecution listed several additional possible purposes in its MRE 404(b) pretrial notice, specifically absence of mistake, modus operandi, scheme, plan, and knowledge. However, at trial, the prosecution did not offer these purposes as a basis for admission of the other-acts evidence. We have previously criticized such a "shotgun" approach, *People v Golochowicz*, 413 Mich 298, 314-315; 319 NW2d 518 (1982), and we now reiterate that the prosecution must articulate its evidential hypothesis with precision and "the trial court must identify specifically the purpose for which the evidence is admitted[.]" *Crawford*, 458 Mich at 386 n 6 (quotation marks and citation omitted).

[6] See, e.g., *Yusem v People*, 210 P3d 458, 465 (Colo, 2009); *State v Payano*, 320 Wis 2d 348, 389; 768 NW2d 832 (2009); *United States v Haukaas*, 172 F3d 542, 544 (CA 8, 1999).

However, we have warned that "a common pitfall in MRE 404(b) cases" is that trial courts tend to admit other-acts evidence merely because the proponent has articulated a permissible purpose. *Crawford*, 458 Mich at 387. The "mechanical recitation" of a permissible purpose, "without explaining how the evidence relates to the recited purpose[], is insufficient to justify admission under MRE 404(b)." *Id*. It is incumbent on a trial court to "vigilantly weed out character evidence that is disguised as something else." *Id*. at 388. In other words, merely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible. Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test. *Id*.; *Sabin*, 463 Mich at 60.

B. LOGICAL RELEVANCE

Under the second prong of the *VanderVliet* test, logical relevance is determined by the application of MRE 401[7] and MRE 402.[8] *Crawford*, 458 Mich at 388.

[7] MRE 401 provides:

> "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.

[8] MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

We have emphasized the importance of logical relevance, calling it the "touchstone" of the admissibility of other-acts evidence. *Id*. Other-acts evidence is logically relevant if two components are present: materiality and probative value. *Id*.

1. MATERIALITY

Materiality is the requirement that the other-acts evidence be related to " 'any fact that is of consequence' " to the action. *Id*., quoting MRE 401. "In other words, is the fact to be proven truly in issue?" *Crawford*, 458 Mich at 388 (quotation marks and citation omitted). The prosecution bears the burden of proving every element of a charged offense beyond a reasonable doubt. *Id*. at 389. At trial, defendant presented prima facie claims of self-defense and defense of others, and therefore the prosecution bore the burden of disproving the claims beyond a reasonable doubt. See *Dupree*, 486 Mich at 709-710. Because the prosecution was required to disprove defendant's claims of self-defense and defense of others, these defenses were generally at issue. However, because the specific other-acts evidence offered in this case was not probative of these defenses, the other-acts evidence itself was not material.

2. PROBATIVE VALUE

The prosecution must demonstrate the probative value of the other-acts evidence. *Crawford*, 458 Mich at 389-390. In this case, the absence of probative value establishes the inadmissibility of the other-acts evidence under MRE 404(b).

Evidence is probative if it tends "to make the existence of any fact that is of consequence to the determi-

nation of the action more probable or less probable than it would be without the evidence." MRE 401; *Crawford*, 458 Mich at 389-390. Generally, "[t]he threshold is minimal: 'any' tendency is sufficient probative force." *Crawford*, 458 Mich at 390. "In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id*. Thus, although the prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also *explain how* the evidence is relevant to that purpose without relying on a propensity inference. See *id*. Ultimately, the court must determine whether the prosecution has established "some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in [the] case . . . ." *Crawford*, 458 Mich at 391. If not, the evidence is inadmissible. *Id*. at 390.

In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a defendant's other act and the charged offense. *Id*. at 394-395. In this case, we note that the prosecution sought to admit the other-acts evidence *particularly* based on the alleged similarities between the 2002 incident and the charged offense.[9] The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in

[9] The prosecutor told the jury that defendant violently assaulted Bush "just like" he violently assaulted Woodward. The prosecutor further stated that defendant's acts in 2002—bashing a window and shooting Bush—were similar to defendant's acts in this case—striking Woodward and bashing him with a lamp. And since there was no self-defense in the 2002 incident, there could be no self-defense here: "They're not coincidences. No self defense."

which the prosecution intends to use the other-acts evidence. See *Mardlin*, 487 Mich at 616; *Crawford*, 458 Mich at 395 n 13; *VanderVliet*, 444 Mich at 67. The *VanderVliet* Court explained:

> If we ask, does [the] misconduct have to exhibit striking similarity with the misconduct being investigated, the answer is, only if similarity is relied on. Otherwise not. There are only two classes of case[s,] [those in which similarity is relied on and those in which it is not], and they do not depend on the nature of the evidence, but on the nature of the argument. [*VanderVliet*, 444 Mich at 67 (quotation marks and citation omitted; alterations in original).]

This principle is clear. If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a "striking similarity" between the two acts to find the other act admissible. *Id*. When the prosecution's theory of relevancy is not based on the similarity between the other act and the charged offense, a "striking similarity" between the acts is not required. *Id*.

In cases in which the prosecution has relied on similarity in seeking to admit other-acts evidence, this Court and other courts have frequently prohibited the admission of that evidence under MRE 404(b) due to the dissimilarity between the other acts and the charged offenses. In *Crawford*, the prosecution introduced evidence of the defendant's prior drug conviction, emphasizing the similarity between the prior offense and the charged offense of possession with intent to deliver cocaine. *Crawford*, 458 Mich at 392-393. This Court found an "insufficient factual nexus" between the prior act and the charged offense to warrant admission. *Id*. at 395-396. The Court highlighted the distinct natures of the prior act and the

charged offense; in the prior act involving the delivery of cocaine, the defendant had been caught in the act of selling drugs, a fact that was not present in the charged offense of possession. *Id*. at 396. The Court further explained:

> If, however, defendant's prior crime involved the concealment of drugs in the dashboard of his car, that evidence would likely be admissible under the doctrine of chances because of the stark similarity of the two crimes. There is, then, a continuum upon which each proffered prior act must be placed; the more similar the prior act to the charged crime, the closer the evidence to the admissibility threshold. [*Id*. at 395 n 13.]

Given the lack of similarity between the defendant's prior and charged offenses, the *Crawford* Court concluded that the prior conviction only demonstrated that the defendant was "the kind of person" who would distribute drugs and that the conviction was logically relevant solely by way of this forbidden intermediate inference of bad character. *Id*. at 397. Therefore, we ruled that the defendant's prior conviction was character evidence "masquerading" as evidence purportedly offered for a proper purpose and was inadmissible. *Id*.

In *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004), to prove that the defendant had physically abused and murdered his infant son, the prosecution introduced evidence that the defendant had become angry with the child's mother in the past, and had physically abused her. *Id*. at 506. The Court considered whether the prior violent act and the charged violent offense were "sufficiently similar" to render the prior act relevant under MRE 404(b), ultimately finding the prior act inadmissible. *Id*. at 512-515. The *Knox* Court noted that the prior act of violence and the charged offense were distinct in nature, emphasizing that the defen-

dant's prior manifestations of anger towards the mother bore no resemblance to the acts determined to have caused the death of the child. *Id*. at 512. The Court also highlighted that the violent acts were committed against two different people. *Id*.

In *United States v Sanders*, 964 F2d 295, 298 (CA 4, 1992), the prosecution introduced, under FRE 404(b), evidence of the defendant's prior assault conviction to rebut the defendant's assertion of a self-defense claim to the charged assault offense.[10] The United States Court of Appeals for the Fourth Circuit found error requiring reversal. *Id*. at 299. The court noted that because the defendant had admitted to stabbing the complainant, the only factual issue was whether his claim of self-defense provided the reason for the stabbing. *Id*. at 298. The Fourth Circuit reasoned, "The fact that [the defendant] had committed an assault on another prisoner . . . had nothing to do with his reason for—his intent in—stabbing [the complainant]." *Id*. at 298-299. Although the prosecution was able to articulate a permissible purpose for admission—rebutting defendant's self-defense claim—the court concluded that there was no relevance to the prior assault conviction. *Id*. The evidence only established the defendant's propensity to commit assaults on other individuals or his general propensity to commit violent crimes, the exact kind of propensity evidence prohibited by FRE 404(b). *Id*. at 299.

In *United States v Commanche*, 577 F3d 1261, 1265 (CA 10, 2009), the trial court admitted testimony about

[10] "Because the Michigan Rules of Evidence in general parallel the text of the federal rules on which the state committee's product was based, we find helpful and, in some instances, persuasive, commentary and case law that refers to the Federal Rules of Evidence." *VanderVliet*, 444 Mich at 60 n 7.

the defendant's two prior assault convictions to rebut the defendant's self-defense claim. The United States Court of Appeals for the Tenth Circuit reversed, finding that the rebuttal of the defendant's self-defense claim using the prior assault convictions only served to establish "a chain of inferences dependent upon the conclusion that [the defendant] has violent tendencies and acted consistent with those tendencies during the fight." *Id*. at 1269. The court held that the evidence was inadmissible under FRE 404(b) because the other-acts evidence could not show that "[the defendant's] self-defense theory was invalid unless the jury impermissibly infer[red] that he acted in conformity with a violent predisposition . . . ." *Id*.

In this case, we conclude that the evidence of the 2002 incident was not probative of anything other than defendant's allegedly bad character and propensity to commit the charged offense. As noted earlier in this opinion, the prosecution built a theory of relevance centered upon the supposed similarity between the 2002 incident and the charged offense to rebut defendant's claims of self-defense and defense of others. Consequently, to prove sufficient similarity, the prosecution must show "striking similarity" between the other act and the charged offense. *VanderVliet*, 444 Mich at 67 ("If we ask, does [the] misconduct have to exhibit striking similarity with the misconduct being investigated, the answer is, only if similarity is relied on.") (quotation marks and citation omitted; alteration in original); see also *Mardlin*, 487 Mich at 620 ("The acts or events need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity."). The prosecution has failed to show such similarity.

The 2002 incident and the charged offense bore notable differences. See *Knox*, 469 Mich at 509-513;

Crawford, 458 Mich at 395-397. The 2002 incident involved a completely different situation and a victim who was completely unrelated to the charged offense. The 2002 incident consisted of a seemingly calculated attack to recover a drug debt, whereas the instant offense involved an allegedly spontaneous reaction by defendant after he witnessed his daughter and Woodward in a state of partial undress. The 2002 incident did not involve a claim of self-defense or defense of others, while the current case clearly does.

Indeed, the only similarity between these two incidents is that both were assaults allegedly committed by defendant. Rather than being sufficiently similar and providing a proper noncharacter purpose for admission into evidence, the 2002 incident served solely to demonstrate defendant's propensity for violence. As in *Sanders*, because defendant in this case admitted to using nondeadly force against Woodward, the only issue was whether he used such force in justifiable defense of himself or others. See *Sanders*, 964 F2d at 298. The fact that defendant had previously assaulted a completely different individual in a completely different scenario years earlier had no probative force other than to show that defendant was the "kind of person" who would assault someone. See *Crawford*, 458 Mich at 397; *Knox*, 469 Mich at 512-513; *Sanders*, 964 F2d at 298-299.[11] In other words, the other-acts evidence created a chain of inferences dependent on

[11] In addition to the lack of similarity, we note that the other act in this case was remote in time, occurring approximately 10 years before the charged offense, which further limits its logical relevance. See *People v Yost*, 278 Mich App 341, 405; 749 NW2d 753 (2008) ("Although there is no time limit applicable to the admissibility of other acts evidence, see MRE 404(b), the remoteness in time between the charged conduct and the more serious allegations of physical abuse limits the logical relevance of these other acts . . . .").

the preliminary conclusion that defendant had violent tendencies and acted consistently with those tendencies in attacking Woodward. See *Commanche*, 577 F3d at 1269. This is exactly the kind of propensity evidence that MRE 404(b) prohibits. See *Sanders*, 964 F2d at 298-299. Given the insufficient similarity between the 2002 incident and the charged offense, the prosecution has failed to establish "some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in this case." *Crawford*, 458 Mich at 391. As a result, we hold that the other-acts evidence was inadmissible.

In sum, the circumstances of the prior conviction did not bear a striking similarity to those of the charged offense. Instead, the prosecution relied on the impermissible inference that defendant had committed the charged offense because of his supposed violent character. Therefore, although the prosecution nominally recited what could be a proper purpose under the first prong of the *VanderVliet* test, evaluation of the probative value of the other-acts evidence under the second prong of the *VanderVliet* test reveals that no such purpose actually existed in this case; rather, evidence of the 2002 incident constituted mere character evidence "masquerading" as evidence intended to rebut defendant's claims of self-defense and defense of others. See *Crawford*, 458 Mich at 397.

The lower courts in this case failed to properly examine the purpose and probative value of the 2002 incident and therefore failed to recognize the impropriety of this evidence. The trial court entirely failed to analyze the probative value of the 2002 incident.[12] In

[12] In fact, the trial court inexplicably fueled misuse of the other-acts evidence. In response to a statement by the prosecutor that the evidence was "just an example of Mr. Denson losing control and using excessive

turn, the Court of Appeals summarily concluded that the other-acts evidence had "significant probative value concerning a specialized matter in dispute: defendant's self-defense claim." *Denson*, unpub op at 5. In doing so, the Court of Appeals succumbed to the "common pitfall" of condoning other-acts evidence simply because the prosecution managed to recite a potentially proper purpose. *Crawford*, 458 Mich at 387. By failing to "weed out character evidence that is disguised as something else," and by failing to closely scrutinize the probative value of the proffered act, the lower courts permitted the admission of improper other-acts evidence and thus erred under MRE 404(b). *Id*. at 388.[13]

IV. HARMLESS ERROR

Although we find error in the admission of the other-acts evidence under MRE 404(b), we apply harmless-error review; a preserved nonconstitutional error "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *Douglas*, 496 Mich at 565-566 (quotation marks and citations omitted); *Lukity*, 460 Mich at 495-496. We "focus[] on

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force against an individual," the trial court ruled that the prosecution could use the evidence as part of "an argument that [defendant] has some kind of temper or that he has bad judgment or something like that." This ruling blatantly encouraged the use of an improper propensity inference, which runs squarely counter to the fundamental principle that other-acts evidence is inadmissible for propensity purposes. *Sabin*, 463 Mich at 56; *Crawford*, 458 Mich at 383.

[13] In this case, because we conclude that the other-acts evidence was inadmissible in that it was not logically relevant to a permissible purpose, it is unnecessary to discuss unfair prejudice, the third prong of the *VanderVliet* test, or any limiting instruction, the fourth prong of the *VanderVliet* test. See *VanderVliet*, 444 Mich at 55.

the nature of the error and assess[] its effect in light of the weight and strength of the untainted evidence." *Lukity*, 460 Mich at 495 (quotation marks and citation omitted). In this case, we find that the error was not harmless and, consequently, that defendant's conviction must be reversed.

We have noted that other-acts evidence carries with it a high risk of confusion and misuse. *Crawford*, 458 Mich at 398. When a "defendant's subjective character [is used] as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence." *People v Engelman*, 434 Mich 204, 213 n 16; 453 NW2d 656 (1990), quoting Imwinkelried, Uncharged Misconduct Evidence, § 2:18, pp 48-49. The risk is severe that the jury "will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he 'did it before he probably did it again.' " *Crawford*, 458 Mich at 398. And in *Commanche*, the Tenth Circuit emphasized the dangerous potential of admitting improper other-acts evidence in a self-defense case:

> [O]ther crimes evidence is strong medicine for juries. Even if not argued at closing, when faced with the single disputed issue in the case—self defense—the jury could not escape[] the clear articulation that Commanche was a violent and aggressive person who was merely repeating that tendency. [*Commanche*, 577 F3d at 1269-1270 (citation omitted).]

In this case, defendant and Woodward testified to highly conflicting accounts of the same incident, but the introduction of the inadmissible evidence tipped the scales, buoying Woodward's credibility while helping to sink defendant's. See *Sanders*, 964 F2d at 299;

Knox, 469 Mich at 513. To prove the elements of the charged offense, and to rebut defendant's claims of self-defense and defense of others, the prosecution needed the jury to believe Woodward's testimony that defendant had suddenly and viciously attacked him without justification. To this end, the prosecution introduced evidence of the 2002 incident, the only purpose of which was to convince the jury that defendant was an aggressive and violent man and that Woodward was simply another victim of defendant's violent tendencies. After asking defendant about the 2002 incident, the prosecutor immediately accused defendant of having a bad temper and beating Woodward to release his pent-up rage. In questioning DD, the prosecutor presented defendant's past anger issues as a well-known chapter of "family history" and a character flaw that explained why defendant would "lose control" with Bush, DD, and Woodward. The prosecutor asked Rosemary Denson if defendant's trouble with Bush caused her to fear defendant, implying that defendant's temper was indiscriminate. And, in the middle of questioning DD's sexual assault counselor about the purpose of her consultation with DD, the prosecutor raised the entirely unrelated issue of whether she knew of defendant's previous assaultive conduct in Detroit. These questions evoked the very propensity inference that MRE 404(b) forbids. This was all painted in bare contrast to the prosecutor's presentation of Woodward as a "nice boy" and a "good guy." Such use of the impermissible propensity inference prohibited by MRE 404(b), which the prosecution repeatedly made to the jury, convinces us that the jury "could not escape[]" the impermissible inference invited by this evidence and that the prejudice defendant suffered as a result was severe enough to

entitle him to relief.[14] *Commanche*, 577 F3d at 1270; see also *Crawford*, 458 Mich at 398-399; *Engelman*; 434 Mich at 213 n 16.

The prosecution further compounded the problem in its closing remarks to the jury. Addressing defendant directly, the prosecutor argued that there was no reasonable doubt that defendant did not act in "defense of anybody" because defendant was a "bully" and a "coward" who lost control with Woodward, just as he had lost control with Bush. Thus, it was "not a coincidence" that "this guy pounded on [Woodward]." Because there was no viable self-defense claim in the 2002 incident, asserted the prosecutor, there could be no viable self-defense claim here.

In sum, the prosecution used the other-acts evidence at trial to engineer an argument that the 2002 assault demonstrated that defendant was a violent person in general, which thereby proved that defendant assaulted Woodward without justification in 2012. The message sent to the jury by this evidence was as clear as it was improper, and its "reverberating clang" could not be unheard. *Crawford*, 458 Mich at 399 (quotation marks omitted). The prosecution also paraded this evidence in front of the jury in a manner that encouraged the jury to draw the forbidden propensity inference, repetition which further enhanced the danger of unfair prejudice arising from admission of the other-acts evidence. See *Crawford*, 458 Mich at 400 n 17.

Although the prosecution also introduced photographs and medical testimony regarding Woodward's

[14] Although not necessary to this conclusion, we note that the effectiveness of the prosecution's propensity-based trial strategy and the prejudice it caused are well illustrated by one juror's request that the court ask a police witness, "[D]o you think Mr. Denson is a violent person, or can be a violent person or have a bad temper[?]"

injuries, the mere presence of some corroborating evidence does not automatically render an error harmless. Otherwise, our directive to assess the effect of the error "in light of the weight and strength of the untainted evidence" would have no meaning. See *Crawford*, 458 Mich at 399-400. In this case, defendant's version of events was not wholly inconsistent with the injuries Woodward sustained. On these facts, we believe the improper admission of the other-acts evidence undermined the reliability of the verdict by making it more probable than not that, had this evidence not been admitted, the result of the proceedings would have been different. *Lukity*, 460 Mich at 495-496. The error, therefore, was not harmless.[15]

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[15] We note that whether admission of other-acts evidence is harmless is a case-specific inquiry; the effect of an error should be determined by the particularities of an individual case. See *Crawford*, 458 Mich at 399-400 ("The prejudice inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.' ") (citation omitted). In this case, the lack of any 404(b) permissible probative value combined with the repeated misuse of the evidence makes our decision a relatively straightforward one.

We are not convinced by the dissent's urgings to the contrary. The dissent admits that the prosecution's other-acts evidence was used to show that defendant "employed unjustified and excessive force when faced with situations involving conflict and confrontation." Yet the dissent attempts to minimize the impact of this impermissible evidence by trying to separate it from what the dissent considers the core of the case: "whether the attempted rape actually occurred, or whether the rape claim was concocted after the fact." To the contrary, we believe the improper other-acts evidence influenced this core issue in one of the most problematic manners—it rendered the issue immaterial. If the impermissible evidence caused the jury to believe that defendant was indeed the type of person who used "unjustified and excessive" force in confrontational situations, then whether a sexual assault actually occurred would be inconsequential to resolution of the case. The altercation between Woodward and defendant was undoubtedly a confrontational situation, and the impermissible evidence encouraged the jury to conclude that defendant acted as he previously had in confrontational situations—with unjustified and excessive force—that is, he took ac-

V. CONCLUSION

We hold that the admission of evidence related to the 2002 incident was erroneous because the evidence was not logically relevant to a proper noncharacter purpose under MRE 404(b). We also hold that this error was not harmless. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for a new trial.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, and LARSEN, JJ., concurred with BERNSTEIN, J.

WILDER, J. (*dissenting*). I respectfully dissent from the majority opinion. Assuming arguendo that evidence of defendant's prior act was improperly admitted pursuant to MRE 404(b), the error does not require reversal because, "after an examination of the entire

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tions that by definition cannot support a claim of self-defense or defense of others. Said differently, due to the improper other-acts evidence and the propensity inference it invited, the jury had no need to decide what the dissent labels "the issue that the jury was called on to decide at trial . . . ."

The dissent also seeks to diminish the harm inflicted by the erroneously admitted evidence by emphasizing defendant's post-altercation behavior and the post-altercation behavior of several defense witnesses. In the dissent's view, this post-altercation behavior demonstrates defendant's guilt. But the dissent errs by concluding that the evidence it identifies invariably supports the prosecution's theory of the case. The jury could reasonably have found the evidence to be consistent with defendant's version of events as well. Moreover, the dissent fails to fully consider the nature of the error in this case. As detailed earlier in this opinion, the other-acts evidence in this case had no probative value beyond the propensity inference forbidden by MRE 404(b), and the evidence created a high risk of prejudice to defendant. Further, the prosecutor referred to the evidence throughout the trial to paint defendant as a violent person. Focusing on the nature of the error and assessing its effect in light of the weight and strength of the untainted evidence, we cannot agree with the dissent that the evidentiary error was harmless. See *Crawford*, 458 Mich at 399-400.

cause," MCL 769.26, it does not affirmatively appear that it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Because defendant has not shown that it is more likely than not that he would have been acquitted if the evidence had been excluded, I would simply deny leave to appeal, leaving intact defendant's conviction.

The prosecution and the defense agreed on a few common facts. Defendant's 15-year-old daughter was alone in her bedroom with her boyfriend, Shamark Woodward, in the early evening hours of October 22, 2012. Under either version of events, the couple was in varying stages of undress when defendant appeared in his daughter's bedroom and inflicted serious injuries upon Woodward. There was no question regarding whether defendant committed the assault on Woodward—the only serious point of contention was whether the assault was legally justified. As a general matter, a defendant who asserts the affirmative defense of self-defense "admits the crime but seeks to excuse or justify its commission." *People v Dupree*, 486 Mich 693, 704 n 11; 788 NW2d 399 (2010).

The theory proffered by the defense was that defendant possessed an honest and reasonable belief that his daughter was being sexually assaulted by Woodward, and defendant used the force necessary to prevent an imminent forcible sexual penetration, as well as to protect himself from Woodward. The prosecution, on the other hand, sought to establish that defendant's claim of attempted rape was wholly fictional, concocted by defendant after the assault had occurred in order to escape criminal responsibility for the savage beating of Woodward.

In my opinion, the extent and nature of Woodward's injuries are wholly inconsistent with any claim of self-defense. With the exception of the bruising and swelling Woodward suffered as a result of being punched and kicked in the face by defendant, none of the victim's injuries was on the front of his body. All of the victim's serious injuries, requiring 21 sutures and 8 staples to close, were located on the back and side of his body. Moreover, the actions of defendant and his family after the incident were inconsistent with any claim that defendant possessed an honest and reasonable belief that his daughter was the victim of an imminent sexual assault by Woodward. Simply put, more than ample evidence existed for the jury to conclude that defendant's claim of attempted rape was fabricated.

According to defendant's testimony, after hearing "the holler, the scream" of his daughter, defendant ran up the stairs and saw Woodward, who was naked from the waist down, with his hand "in [his daughter's] pants." Believing he was encountering the imminent rape of his daughter, defendant screamed and began hitting Woodward, who immediately jumped up and began fighting back. After a bit of fisticuffs, Woodward ran downstairs with defendant in pursuit, and Woodward threw a glass at defendant. After Woodward purportedly ran back upstairs, defendant testified that Woodward "threw his hands in the air" and apologized for being "stupid." Defendant testified that he returned Woodward's clothing and permitted him to leave the residence. Only when pressed during cross-examination did defendant acknowledge that he broke a lamp over Woodward's head and that he "probably" kicked and stomped Woodward, but defendant could not recall with "what all" he beat Woodward. Defendant further acknowledged that he "probably" inflicted

the knife wounds on Woodward's back, but did not know how the lacerations occurred. Indeed, defendant testified that he did not "believe" the lacerations "happened" until he was shown pictures. In contrast, Woodward testified that the several knife wounds to his back and shoulders were inflicted by defendant while Woodward was sitting in the corner "in the fetal position."

Defendant did not call the police to have Woodward arrested for the attempted rape of his daughter. Rather, defendant testified that he used his cell phone to call his sister prior to Woodward leaving the residence. Defendant testified that his daughter was "crying so hard that we couldn't communicate[.]" At that point, defendant and his sister left the residence, leaving behind his weeping daughter as well as his 10- and 11-year-old sons. Defendant claimed that he made two telephone calls to "a law enforcement officer" (his parole officer), followed by a trip to the police department to file a police report, only to discover that the police department was closed. Rather than return to his residence to provide comfort and support to his traumatized daughter, defendant testified that he went to his sister's house and had an "anxiety attack." Defendant returned to the residence on the following day, October 23, 2012. Later that day, defendant went to the home of "a couple of buddies . . . computer geeks" who assisted defendant in drawing up a notarized document entitled "Affidavit and Statement of Facts: PRESUMPTION REGARDING SELF-DEFENSE."

Defendant acknowledged that it had "crossed [his] mind" that he might get in trouble as a result of the incident. When asked why he left his children home alone after the alleged attempted sexual assault, defendant testified:

> Um, we went directly--like I said, we went to the police department and I made the phone calls. I came home early in the morning, but my wife was there, I'm sorry. Um, my wife got home shortly after midnight. And that's, you know, I went to the police department. And then I ended up at my sister's house, and um, I was on the phone with my wife too, in and out throughout the, you know. And I went home as soon as I could walk, as soon as I could get up and walk. And that was like 6:30 or 7:00 o'clock in the morning. And I was there. I didn't anticipate leaving (inaudible) I let 'em. You know I go to work and I come home. My daughter's--you know, but she wasn't. That's the answer.

Likewise, defendant acknowledged that he called his parole officer rather than emergency services. When asked why he did not simply call 911 to report the crime, which would have permitted him to remain at the residence with his distraught daughter, defendant provided an explanation that indicated both that he did and did not call 911:

> 911 doesn't come when we call. When we call 911, they do not come, unless someone is dead. Do you know what the 911 operator told me, is the person dead? I said no, he's no longer there. And she said, well wait 'til tomorrow, someone will be there when shift changes.

In contrast, defendant admitted to his parole officer that he made no attempt to contact the police on the night of the incident because "he did not want to have police contact." This same admission was contained in defendant's own notarized affidavit.

Rosemary Denson, defendant's wife, testified that she arrived home from work around 1:00 a.m. on October 23, 2012. She testified that her children were home and that defendant had "left with his sister." After talking to defendant, who indicated that he was going to go to the police station, Mrs. Denson tele-

phoned the Flint Police Department and was instructed to call 911. Mrs. Denson testified that she called 911 and reported the crime to Operator 70, who told her that "someone would be out that day" to talk to her and her daughter. In reality, the 911 records keeper testified that the dates and times of 911 calls are computer generated and that the very first phone call regarding an alleged sexual assault came from Mrs. Denson on October 24, 2012, at 4:00 a.m., approximately 30 hours after the alleged sexual assault occurred and approximately 5 hours before defendant was arrested in the office of his parole officer. In the 911 call, which was played for the jury, Mrs. Denson claimed that the assault took place "last night" while she was at work and that she was "told [about it] this morning."

Defendant's daughter testified that she was alone in her bedroom with Shamark Woodward. Woodward kissed her, pushed her down on the mattress, held her arm down and pulled her jogging pants "halfway down" before defendant pulled Woodward off her and Woodward and defendant began "hitting and pushing." Despite acknowledging that she was present in her bedroom the entire time, defendant's daughter denied ever seeing her father kicking Woodward in the face, beating Woodward with a shoe, or wielding a knife. She testified that she did not "know" whether defendant stomped and kicked Woodward or whether her father smashed a lamp over his head. Indeed, defendant's daughter claimed that she simply "didn't pay attention to" the lamp. She also denied seeing "any cuts" on Woodward, claimed that there "wasn't no blood" on Woodward, and stated that she did not hear "any conversation" between defendant and Woodward. However, the day after the assault, defendant's daughter initiated a messaging conversation with Woodward

on social media, seeking Woodward's forgiveness for "dragging [him] into this," telling him that she loved him, and indicating that she needed to hear his voice. Upon learning that defendant retained possession of Woodward's phone, defendant's daughter responded that she thought Woodward was "just ignoring [her] calls." She inquired whether Woodward could call her from someone else's telephone because if she heard his voice she would "feel better."

Upon review of the entire record, the 404(b) evidence admitted in this case was admitted to show that defendant employed unjustified and excessive force when faced with situations involving conflict and confrontation, in order to counter defendant's claim of self-defense. In actuality, however, the evidence had very little to do with the issue that the jury was called on to decide at trial—whether the attempted rape actually occurred, or whether the rape claim was concocted after the fact. Clearly, the jury opted to believe that the rape claim was fictional, and that defendant committed the crime of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, because Woodward was caught *in flagrante delicto* with defendant's daughter. However, if a defendant is found to act with the intent to do serious injury of an aggravated nature—the requisite intent for AWIGBH—the fact that he was provoked or acted in the heat of passion is irrelevant. *People v Stevens*, 306 Mich App 620, 628-629; 858 NW2d 98 (2014); *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Such is the situation in this case. At sentencing, the judge noted that some parents would "respond forcefully" "if they found their fifteen year old daughter in bed with a young man." However, the trial judge also noted that defendant's use of a knife to slash

Woodward—to inflict serious injury of an aggravated nature—was beyond the pale:

> And that's the difference. The knife is the difference. And I think that's why the jury convicted you. And that's [why] you have to take this penalty. There's a lot of people that would understand why you started doing what you did but they don't understand why you finished doing what you did.

Just as the trial judge specifically linked the defendant's use of a knife to the sentence the trial court imposed, so too must we recognize that the jury had the same evidence before it and considered this same over-the-top conduct when rejecting defendant's self-defense claim.[1] "An appellate court must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002) (quotation marks, citation, and brackets omitted). Because defendant has not shown that he would more likely than not have been acquitted if the evidence had been excluded, I respectfully dissent from the majority opinion and would deny leave to appeal.

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[1] It is for this reason that *United States v Commanche*, 577 F3d 1261, 1266-1269 (CA 10, 2009), is inapposite. *Commanche* held that the other-acts evidence was inadmissible because the evidence could not show that the defendant's self-defense theory was invalid *unless* the jury impermissibly inferred that he acted in conformity with a violent predisposition. In this case, consideration of the other-acts evidence was not required for the jury to invalidate defendant's claim of self-defense—the 21 sutures and 8 staples spoke for themselves.

PEOPLE v REA

Docket No. 153908. Argued on application for leave to appeal April 25, 2017. Decided July 24, 2017.

Gino R. Rea was charged in the Oakland Circuit Court with operating a motor vehicle while intoxicated (OWI), MCL 257.625(1). A police officer parked his patrol vehicle in the street in front of defendant's driveway while responding to noise complaints from defendant's neighbor. As the officer walked up the straight driveway, defendant backed out of his detached garage and down the driveway. When the officer shined his flashlight to alert defendant that he was in the driveway, defendant stopped his car in the driveway, next to the house. Defendant then put his car in drive and pulled forward into the garage, bumping into stored items in the back of the garage. Defendant, who smelled of alcohol and whose speech was slurred, was arrested for operating a motor vehicle while intoxicated after he refused to take field sobriety tests; defendant's blood alcohol level was later determined to be three times the legal limit set forth in MCL 257.625(1)(b). After his arraignment, defendant moved to quash the information. The court, Colleen A. O'Brien, J., granted the motion and dismissed the charge, finding that the upper portion of defendant's driveway, closest to the garage, was not a place generally accessible to motor vehicles for purposes of criminal liability under MCL 257.625(1). On appeal, the Court of Appeals, GLEICHER, P.J., and SHAPIRO, J. (JANSEN, J., dissenting), affirmed the trial court's order, concluding that because the general public is not widely permitted to access the upper portion of a private driveway, defendant's operation of his vehicle while intoxicated did not fit within the purview of behavior prohibited under MCL 257.625(1). 315 Mich App 151 (2016). The Supreme Court ordered and heard oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action. 500 Mich 871 (2016).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MARKMAN and Justices ZAHRA and WILDER, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 257.625(1) of the Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits a person, whether licensed or not, from operating a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles within this state if the person is operating while intoxicated. The phrase "generally accessible" in MCL 257.625(1) is not defined by the Michigan Vehicle Code. In light of the dictionary definitions of these words, "generally accessible" means usually or ordinarily capable of being reached. In contrast to the phrase "open to the general public," which concerns *who* may access the location, the phrase "generally accessible to motor vehicles" concerns *what* can access the location. Accordingly, when determining whether a place is generally accessible to motor vehicles, the focus is not on whether most people can access the area or have permission to use it but on whether most motor vehicles can access the area. In context, MCL 257.625(1) prohibits an intoxicated person from operating a motor vehicle in a place that is usually capable of being reached by self-propelled vehicles. Had the Legislature intended to prohibit driving while intoxicated only in areas actually used by motor vehicles, it would have used different language in the statute. In this case, defendant's driveway was designed for vehicular travel and there was nothing on his driveway that would have prevented motor vehicles on the public street from turning into it. Accordingly, defendant's driveway was generally accessible to motor vehicles for purposes of MCL 257.625(1). The Court of Appeals erred by affirming the trial court's dismissal of the OWI charge against defendant.

Court of Appeals judgment reversed, circuit court order of dismissal vacated, and case remanded.

Justice LARSEN, concurring in the result only, concluded that the case at issue fit easily within the statutory language, and she therefore would have waited for a case that pushed the boundaries of MCL 257.625 to explore the edges of the statutory language. The whole point of a driveway is to provide access to motor vehicles. Where the place is *designed* to be capable of being reached by motor vehicles, the answer to whether it is "generally accessible to motor vehicles" is simple: of course. Nonetheless, the majority's definition of accessibility, which focused on whether a place is physically capable of being reached, might be too broad. And the dissent's understanding, which focused on legal or customary accessibility, failed to consider that if "accessible" means "legally accessible," there is nothing in the statute to suggest that trips up and down one's own driveway should

not count. Driveways, in general, are legally accessible by, at least, *some* motor vehicles. And if "generally" means "usually," or "in general," then driveways are "generally accessible to motor vehicles," whether "accessible" means "physically capable of being reached," "physically easy to reach," or "legally capable of being reached." Only if "generally" includes some idea of volume ("popularly") *and* "accessible" means "legally so" could driveways possibly be out of bounds. But that reading would come at the cost of the most natural reading of the statutory text. Instead, because driveways are clearly included within the statute's prohibition against operating a vehicle while intoxicated upon places generally accessible to motor vehicles, Justice LARSEN would have concluded that it was not necessary to establish the precise boundaries of MCL 257.625(1) in this case.

Justice MCCORMACK, joined by Justice VIVIANO, dissenting, agreed with the majority that the Legislature's 1991 amendment of MCL 257.625(1) prohibited the operation of motor vehicles while intoxicated in other places in that the language "generally accessible" evidenced an intent to expand the scope of the statute to cover additional places not covered by the original language. But Justice MCCORMACK disagreed with the majority's conclusion that MCL 257.625(1) prohibits an individual from driving a vehicle while intoxicated on a private driveway. The majority's broad interpretation of the language—whether a place is usually capable of being physically reached by a motor vehicle—threatened to swallow the original "open to the general public" language in the statute in that the majority's interpretation effectively bans in all places the operation of a vehicle in Michigan while intoxicated. The majority's broad interpretation ignores that when the Legislature has wanted to prohibit driving specific types of motor vehicles in all places while intoxicated, it has clearly done so. Examining the three related clauses in MCL 257.625(1), it is clear that the Legislature did not intend for the "generally accessible" clause to extend the reach of the statute to every place in this state, but rather to cover places that are open to an appreciable number of motor vehicles, even when access is restricted by physical or other barriers to entry; a place is "generally accessible" if it is a place where vehicles are routinely permitted to enter. While many private roads are generally accessible to motor vehicles—and would therefore come within the purview of prohibited conduct in MCL 257.625(1)—private driveways are not. It should not be assumed that the Legislature intended to extend the scope of the statute to include the private property of individual homeowners because the statute has historically focused on areas open to the general public without

restriction. Justice MCCORMACK would have affirmed the result reached by the Court of Appeals.

CRIMINAL LAW — OPERATING A VEHICLE WHILE INTOXICATED — WORDS AND PHRASES — "GENERALLY ACCESSIBLE TO MOTOR VEHICLES."

MCL 257.625(1) of the Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits a person, whether licensed or not, from operating a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles within this state if the person is operating while intoxicated; the phrase "generally accessible" to motor vehicles prohibits an intoxicated person from operating a motor vehicle in a place that is usually capable of being reached by self-propelled vehicles.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Camilla Barkovic for defendant.

BERNSTEIN, J. This case concerns whether defendant, Gino R. Rea, may be charged under MCL 257.625 for operating a motor vehicle in his private driveway while intoxicated. We hold that, because defendant's conduct occurred in an area generally accessible to motor vehicles, the conduct was within the purview of MCL 257.625(1). Accordingly, we reverse the judgment of the Court of Appeals, vacate the trial court's dismissal of the case, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In the early morning hours of March 31, 2014, police officers were dispatched three times to defendant's home because of a neighbor's noise complaints. On the third visit, Northville police officer Ken DeLano parked

his patrol vehicle in the street in front of defendant's driveway, which is paved and straight. The driveway begins on the street, passes to the right of defendant's home, and extends to defendant's garage at the end of the driveway. The garage is detached from the home, and it is situated within defendant's backyard. There are no physical obstructions that block entry to defendant's driveway from the street.

As Officer DeLano walked up defendant's driveway to investigate the noise complaint, the overhead garage door opened, and defendant started to back his car down the driveway. After Officer DeLano shined his flashlight to alert defendant of his presence, defendant stopped his car, coming to a rest in the driveway, next to his house. When Officer DeLano approached defendant, who had remained in his car, the officer noticed a strong odor of intoxicants. Officer DeLano also observed that defendant's eyes were glassy and bloodshot and his speech was slurred. Defendant suddenly put the car in drive and pulled forward into the garage, bumping into stored items in the back of the garage. Defendant then got out of the car and started to walk toward Officer DeLano, swaying as he walked. Officer DeLano asked defendant to perform field sobriety tests, but defendant refused. Defendant was then arrested for operating a vehicle while intoxicated. A blood test later conducted at a hospital revealed a blood alcohol level of .242 grams per 100 milliliters of blood—three times the legal limit. See MCL 257.625(1)(b).

The Oakland County Prosecuting Attorney charged defendant with one count of operating while intoxicated (OWI), MCL 257.625(1). Following a preliminary examination, defendant was bound over to the Oakland Circuit Court, where he moved to quash the information. On October 30, 2014, the trial court

granted defendant's motion and dismissed the case, finding that the upper portion[1] of defendant's driveway did not constitute an area that is "generally accessible to motor vehicles" for purposes of criminal liability under MCL 257.625(1). In a split, published opinion, the Court of Appeals affirmed the trial court's ruling, holding that the upper portion of the driveway did not constitute a place generally accessible to motor vehicles because "[t]he 'general public' is not 'widely'. . . permitted to 'access' that portion of a private driveway immediately next to a private residence." *People v Rea*, 315 Mich App 151, 157; 889 NW2d 536 (2016).

The prosecution sought leave to appeal in this Court. We scheduled oral argument on the application, directing the parties to address "whether the location where the defendant was operating a vehicle was a place within the purview of MCL 257.625." *People v Rea*, 500 Mich 871 (2016).

II. STANDARD OF REVIEW

Whether a defendant's conduct falls within the scope of a penal statute is a question of statutory interpretation that is reviewed de novo. *People v Hill*, 486 Mich 658, 665-666; 786 NW2d 601 (2010). "Statutes . . . are interpreted in accordance with legislative intent . . . ." *People v Mazur*, 497 Mich 302, 308; 872 NW2d 201 (2015). "[T]he most reliable evidence" of that intent is the plain language of the statute. *Id*. (citations and quotation marks omitted). When interpreting a stat-

[1] The parties refer to the driveway as consisting of an upper and a lower portion, although there is no physical barrier or line that splits one from the other. The part of the driveway closest to the garage is referred to as the upper portion of the driveway, whereas the part of the driveway closest to the street is referred to as the lower portion of the driveway.

ute, "we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015) (citation and quotation marks omitted). Nontechnical words and phrases should be interpreted "according to the common and approved usage of the language." *People v Dunbar*, 499 Mich 60, 67; 879 NW2d 229 (2016) (citation and quotation marks omitted). When a word or phrase is not defined by the statute in question, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word or phrase. *People v Feeley*, 499 Mich 429, 437; 885 NW2d 223 (2016).

III. ANALYSIS

The Michigan Vehicle Code, MCL 257.1 *et seq.*, prohibits a person from operating a motor vehicle while intoxicated. Specifically, MCL 257.625(1) provides in pertinent part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated.

Accordingly, MCL 257.625(1) prohibits operating a vehicle while intoxicated in three types of locations: (1) upon a highway, (2) in a place open to the general public, or (3) in a place generally accessible to motor vehicles. The issue before us is whether defendant's driveway was "generally accessible to motor vehicles."[2]

[2] The parties do not argue that defendant's driveway constituted a highway or a place open to the general public under MCL 257.625(1).

The crux of this dispute is the meaning of the phrase "generally accessible" in MCL 257.625(1). Because the Michigan Vehicle Code does not define the phrase "generally accessible," we consult the dictionary definitions of these words. *Feeley*, 499 Mich at 437. The word "generally" is an adverb that modifies the adjective "accessible." "Generally" is defined as "in a general manner"; "in disregard of specific instances and with regard to an overall picture"; and "as a rule: USUALLY." *Merriam-Webster's Collegiate Dictionary* (11th ed).[3] The term "accessible" means "providing access"; "capable of being reached: being within reach" and "capable of being used or seen." *Id*.[4] Therefore, the plain

Therefore, our opinion is confined to considering whether defendant's driveway is a place "generally accessible to motor vehicles." *Id*.

The Court of Appeals dissent opined that whether defendant's driveway was "generally accessible to motor vehicles" was a question for the trier of fact. *Rea*, 315 Mich App at 159 (JANSEN, J., dissenting). We disagree. This case involves a legal question that must be resolved by the court. *Hill*, 486 Mich at 665-666. Accordingly, the dissent was incorrect when it stated that this issue must be submitted to the fact-finder.

[3] *Random House Webster's College Dictionary* (2001) similarly defines "generally" as "usually; ordinarily"; "with respect to the larger part" and "without reference to particular persons, situations, etc., that may be an exception." The use of "generally" in MCL 257.625(1) provides that the place need not *always* be accessible to motor vehicles, but it must be more than *occasionally* accessible to motor vehicles.

The dissent rejects defining "generally" as "usually." However, the dissent later reasons that a private driveway is not "generally accessible to motor vehicles" because it is not "normally used by the public." This reasoning conflates the word "generally" with the word "normally," and "normally" is not meaningfully distinguishable from "usually." "Normally" is defined as "according to rule, custom, etc.; ordinarily; *usually*." *Random House Webster's College Dictionary* (1996) (emphasis added).

[4] *Random House Webster's College Dictionary* (2001) similarly defines "accessible" as "easy to approach, reach, enter, speak with, or use" and "able to be used, entered, or reached." This definition does not require

and ordinary meaning of the phrase "generally accessible" means "usually capable of being reached."

This phrase must be considered in its statutory context: "other place . . . generally accessible to motor vehicles." MCL 257.625(1). The phrase "generally accessible" modifies the preceding noun phrase "other place." Accordingly, the prohibition in MCL 257.625(1) against operating a vehicle while intoxicated does not apply to every place.[5] Instead, the statute's prohibition

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motor vehicles to have *actually reached* that place. Accordingly, the dissent's consideration of places "*accessed* regularly by an appreciable number of vehicles" is inconsistent with the statutory language because it ignores the term "accessible." (Emphasis added.) If the Legislature intended to solely prohibit driving while intoxicated in areas that are actually used by motor vehicles, it would have used "access" as a verb and prohibited driving while intoxicated in places that are "generally accessed by motor vehicles" or in places that "motor vehicles generally access." Instead, MCL 257.625(1) contains the word "accessible," which indicates that the determination is whether motor vehicles *can* access a place, not whether motor vehicles *actually do* access that place. The dissent sidesteps this crucial distinction by noting that "evidence of where motor vehicles actually do go is evidence of where they can go." We agree with this point. However, the dissent's formulation does not consider the number of vehicles using the place as evidence of whether motor vehicles *can* access the place but rather makes actual use of the place the dispositive inquiry. But an area that motor vehicles do not regularly access can still be an area that motor vehicles are *able* to access, and the dissent's approach does not account for this distinction. For these reasons, the dissent's exclusive focus on whether a road is "*accessed* regularly by an appreciable number of vehicles" is misplaced.

[5] The Legislature amended MCL 257.625(1) in 1991 to add the language at issue in this case, specifically to prohibit persons from operating a motor vehicle while intoxicated upon places "generally accessible to motor vehicles." See 1991 PA 98, effective January 1, 1992. Contemporaneously with that amendment, the Legislature enacted MCL 257.625m to expressly prohibit persons with a certain blood alcohol level from operating a "commercial motor vehicle *within the state*." (Emphasis added.) See 1991 PA 94, effective January 1, 1993. The Legislature's omission of similar language when amending MCL 257.625(1) further indicates that the statute does not criminalize driving while intoxicated in *every* place like MCL 257.625m but rather

applies only to highways, to other places open to the general public, and to other places that are generally accessible—that is, usually or ordinarily capable of being reached.[6] Finally, we must incorporate the phrase "to motor vehicles," which is an adverbial prepositional phrase that modifies "generally accessible." The Michigan Vehicle Code defines "motor vehicle" as "every vehicle that is self-propelled . . . ." MCL 257.33. Therefore, as a whole, the relevant statutory provision prohibits an intoxicated person from operating a vehicle in a place that is usually capable of being reached by self-propelled vehicles.

The Court of Appeals majority erred when it concluded that whether a place is "generally accessible to motor vehicles" depends on whether the general public "widely" or "popularly" has permission to enter the

in only three specific areas: (1) upon a highway, (2) in a place open to the general public, or (3) in a place generally accessible to motor vehicles. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

[6] The dissent asserts that our definition "threatens to swallow the 'open to the general public language' in the statute . . . because every place open to the general public will *also* always be 'generally accessible to motor vehicles.' " (Emphasis in original.) MCL 257.625(1) prohibits operating a motor vehicle while intoxicated on "a highway or *other place* open to the general public or generally accessible to motor vehicles . . . ." (Emphasis added.) "Other place" applies to both "open to the general public" and "generally accessible to motor vehicles." Therefore, these two categories need not be entirely independent of each other. This is also evident given that a "highway" is both open to the general public and generally accessible to motor vehicles. Moreover, although there might be significant overlap between these categories, the phrase "generally accessible to motor vehicles" still provides an additional place that may not necessarily be covered under the "open to the general public" category. Therefore, each category does work independent of the other, and neither is rendered useless surplusage by the existence of the other.

location.[7] *Rea*, 315 Mich App at 155-158. This conclusion is inconsistent with the plain language of the statute in several respects. First, the Court of Appeals majority erroneously construed the term "generally" to mean open to an unrestricted number of users. See *id*. at 157. But the use of the modifier "to motor vehicles" shows that the focus is not whether most *people* can access the area, but whether most *motor vehicles* can access the area. The Court of Appeals majority similarly erred by construing "accessible" to mean permission to enter. *Id*. An object, unlike an operator of the object, is not typically given *permission* to enter a location. We therefore read "accessible" to instead refer to whether motor vehicles have the *ability* to enter an unsecured private driveway, not whether their operators have permission to do so. Consequently, the Court of Appeals majority's statement that only a small subset of vehicles are permitted to use the upper portion of the driveway even though the public may access the lower portion of the driveway is simply irrelevant. See *id*. This arbitrary line-drawing between the lower and upper portion of defendant's driveway has no basis in the language of MCL 257.625(1).

Furthermore, to construe the phrase "generally accessible" as dependent on whether the general public has permission to enter the location would conflate the two phrases "open to the general public" and "generally accessible to motor vehicles." In MCL 257.625, these two phrases are separated by the disjunctive term "or," which indicates separate alternatives. See *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011) (" 'Or' is . . . a disjunctive [term], used to indicate

[7] Relying on *Webster's New World College Dictionary* (5th ed), the Court of Appeals majority defined "generally" as "to or by most people; widely; popularly; extensively."

a disunion, a separation, an alternative.") (citation and quotation marks omitted; alteration in original). For that reason, to similarly interpret "generally accessible to motor vehicles" as concerning whether the general public has permission to enter would nullify the disjunctive term "or" and render the phrase "generally accessible to motor vehicles" needless surplusage. This Court must avoid an interpretation that would render any part of the statute nugatory. *Miller*, 498 Mich at 25.

This is especially true in light of the statutory history of MCL 257.625(1). Previously, MCL 257.625(1) only prohibited operating a vehicle under the influence of intoxicating liquor "upon a highway or other place open to the general public." MCL 257.625(1), as amended by 1982 PA 309, effective March 30, 1983. In 1991, the Legislature amended the statute to include an area not previously covered under the statute: a place that is "generally accessible to motor vehicles." See MCL 257.625(1), as amended by 1991 PA 98, effective January 1, 1992. This amendment broadened the scope of the OWI statute to include an additional, alternative place where operating a motor vehicle while intoxicated is prohibited.[8] *People v Nickerson*, 227 Mich App 434, 440; 575 NW2d 804 (1998). Accord-

[8] The inclusion of this alternative place indicates that one of the purposes of the statute is to prevent collisions with other persons or property, not merely to prevent collisions with other *motor vehicles*. *People v Wood*, 450 Mich 399, 404; 538 NW2d 351 (1995). This danger could readily exist even if one were driving in one's own private driveway with no other vehicular traffic at the time. For example, it is commonplace for young children to play in driveways, creating the real danger that such children could be struck by an intoxicated driver. Indeed, in this very case, an individual was placed at risk by defendant's conduct; as defendant reversed his car toward Officer DeLano, the officer needed to shine his flashlight to alert defendant of his presence behind the vehicle.

ingly, the phrase "generally accessible to motor vehicles" must be meaningfully distinguished from the phrase "open to the general public." "Open to the general public" concerns *who* may access the location, while "generally accessible to motor vehicles" concerns *what* can access the location. This interpretation avoids redundancy and provides meaning to both phrases.[9]

We now apply our plain-language interpretation of the statute to the facts at issue in this case. Defendant's private driveway is designed for vehicular travel.[10] Areas designed for vehicular travel are, by their nature, areas a vehicle is usually capable of

[9] This Court has never defined the phrase "open to the general public" in the context of MCL 257.625(1), and it is unnecessary to do so here. However, we are skeptical of the dissent's assertion that all roads that are "privately owned and maintained" are, by definition, not " 'open to the general public.' " See *Holland v Dreyer*, 184 Mich App 237, 239; 457 NW2d 55 (1990) (holding that a road through a mobile home park that "was built and maintained privately" was open to the general public because it was "accessible to the general public"). The dissent asserts that "private roads" are " 'generally accessible to motor vehicles' " but not " 'open to the general public.' " However, the very definition of a "private road" that the dissent relies on states that such a road is "normally open to the public." MCL 257.44(2). We see no meaningful difference in this context between the phrases "normally open to the public" and "open to the general public." Moreover, there is a reasonable argument that an area that places some restrictions on public access may still be an area that is "open to the general public." See *State v Boucher*, 207 Conn 612, 615-616; 541 A2d 865 (1988) (holding that "[f]or an area to be 'open to public use,' it does not have to be open to 'everybody all the time,' " so long as access to the area is "not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public"). Therefore, our reading of the statute more accurately reflects the plain language of the statute, because the dissent's interpretation conflates "open to the general public" and "generally accessible to motor vehicles," rendering the last category needless surplusage.

[10] Because defendant's private driveway is designed for vehicular travel, we need not decide whether MCL 257.625(1) also prohibits

accessing. Additionally, there is nothing on defendant's driveway that would *prevent* motor vehicles on the public street from turning into it.[11] Given these facts, defendant's driveway is a place motor vehicles are usually capable of entering. Accordingly, we conclude that defendant's driveway was generally accessible to motor vehicles under MCL 257.625(1).[12]

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driving while intoxicated in other places—such as lawns or open fields—that are not designed for such traffic.

[11] Defendant argues that his driveway was not "generally accessible to motor vehicles" when he operated his vehicle because Officer DeLano parked his car across defendant's driveway before approaching the garage, effectively preventing any vehicles from accessing the driveway. But this temporary obstruction does not change the fact that the driveway is *generally* accessible, as the driveway is not usually obstructed by another vehicle. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "generally" as "in a general manner"; "in disregard of specific instances and with regard to an overall picture"). However, we agree with the concurrence that one's living room is not an area "generally accessible to motor vehicles." Whether it is difficult for motor vehicles to enter an area is certainly relevant to determining whether motor vehicles are "usually capable of reaching" that area. Since there is nothing on defendant's driveway that makes it difficult for motor vehicles to enter it, we need not determine with specificity when entrance to an area is so difficult that it is not "generally accessible to motor vehicles."

[12] The dissent asserts that if the Legislature intended to include a private driveway under MCL 257.625(1), then we "should expect far more clarity." The dissent notes that the Legislature could have listed "private driveways" in MCL 257.625(1), but it chose not to. However, it is not necessary for the Legislature to list every possible place that is "generally accessible to motor vehicles" in order for them to be included under that provision—such is the point of using broader language that encompasses more specific places.

Moreover, there is ample reason for the Legislature to prohibit operating a motor vehicle while intoxicated on an unobstructed driveway. Although the driveway is private property, should an intoxicated driver strike a child crossing his or her driveway, the injury to the child is still as real as it would have been if the child had been playing in the street. And, as the dissent concedes, the Legislature has the authority to "regulate and even outlaw certain conduct on private property."

For the aforementioned reasons, MCL 257.625 encompasses defendant's private driveway. The Court of Appeals majority did not properly apply the plain meaning of MCL 257.625(1) because the Court failed to distinguish between "open to the general public" and "generally accessible to motor vehicles." Therefore, the Court of Appeals erred by upholding the trial court's order to quash the information.

IV. CONCLUSION

We hold that defendant's driveway is an area "generally accessible to motor vehicles" for purposes of MCL 257.625(1). Because defendant allegedly operated a motor vehicle in his driveway while intoxicated, the prosecution established probable cause that defendant violated MCL 257.625. Accordingly, we reverse the judgment of the Court of Appeals, vacate the trial court's dismissal of the case, and remand to the trial court for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA and WILDER, JJ., concurred with BERNSTEIN, J.

LARSEN, J. (*concurring in the result only*). I agree with the majority that defendant may be charged under MCL 257.625 with operating a motor vehicle in his private driveway while intoxicated. I write separately because I believe that the case before us fits easily within the statute; I would, therefore, wait for a case that pushes the boundaries of MCL 257.625 to explore where its edges lie.

MCL 257.625(1) states: "A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally

accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated." Driving drunk is, therefore, prohibited in three places: (1) "upon a highway," (2) in an "other place open to the general public," or (3) in an "other place . . . generally accessible to motor vehicles." We must decide whether driveways are "generally accessible to motor vehicles."

That to ask the question comes close to answering it is not, alone, sufficient to decide the case. But it is a clue that should not be discounted. Sometimes, when exploring the overall scheme of a statute, the initially intuitive reading proves wrong. But it is often the case that the most straightforward meaning is actually the one initially conveyed. A speaker of ordinary English would not readily conclude that driveways are *not* "generally accessible to motor vehicles," and that should give us pause before we conclude that the Legislature chose those words to produce such a result. Further study of the statute does not dislodge the initial impression. The whole point of a driveway is to provide access to motor vehicles. Where the place is *designed* to be capable of being reached by motor vehicles, the answer to whether it is "generally accessible to motor vehicles" is simple: of course.

I. "ACCESSIBLE"

An accessible place, the majority, the dissent, and I all agree, is one that is, in some sense, "capable of being reached." The majority focuses on whether a place is *physically* capable of being reached. While I agree that access often denotes physical access, and might well do so in this context, I share in the dissent's concern that, unmodified, this definition might prove too much. A car may be physically capable of barreling down a barri-

cade or crashing into someone's living room, but no one would say that a living room is "generally accessible to motor vehicles," just as no one would say that a location is wheelchair-accessible merely because, given sufficient momentum, a wheelchair can be made to surmount a curb. These examples help us see that "accessible" might be used in the majority's physical sense but with a narrower reach: some dictionaries define "accessible" as "*easy to* approach, reach, enter, speak with, or use." *Random House Webster's College Dictionary* (2001) (emphasis added). See also *Webster's New World College Dictionary* (5th ed) ("that can be approached or entered" or that is "easy to approach or enter"); *The American Heritage Dictionary* (2d college ed) ("Easily approached or entered."); *Webster's II New College Dictionary* (1995) ("Easily approached or entered."). On this definition, a ramp is wheelchair-accessible; a curb is not. So too with a driveway. Most are readily, or easily, physically accessible by motor vehicles; and even if some might not be—because they are graded too steeply or are in great disrepair—that would make no difference: the category (driveways) need only be "generally" so. The majority, however, focuses not on ease, but on capability. And while a driveway surely fits within the majority's definition, I share the dissent's concern that the majority may have adopted a rule that has few boundaries.[1]

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[1] This is not to say that defining "accessible" as "easy to approach" is free from doubt. It is possible that the Legislature intended to adopt an extremely broad rule, as the majority contends, and to rely on the discretion of police officers and prosecutors to bring charges in appropriate cases. Locations that would be difficult for a car to access but which are nevertheless *capable* of being reached by cars might be locations where, for example, pedestrians would be in greater need of protection. The Legislature might have intended to allow prosecutors to charge under MCL 257.625 an individual who, while driving drunk in such a location, posed a threat to unsuspecting pedestrians; although I

The dissent, on the other hand, asks if the place is one "where vehicles are routinely *permitted* to enter." (Quotation marks and citation omitted; emphasis added.) The dissent, like the Court of Appeals panel below, has thus introduced the idea of *legal* or *customary* as opposed to *physical* accessibility. But if a place is "generally accessible" when "vehicles are routinely permitted to enter" by virtue of rights of ownership or permission granted by the owner, then surely a private driveway is such a place. Vehicles driven by friends and relatives, service providers, and salesmen are all "routinely permitted to enter" one's driveway. Moreover, one's *own* vehicles are routinely, indeed *daily*, permitted to enter one's driveway. The statute, it should be remembered, states only that the area must be "generally accessible to motor vehicles"; it does not say that it must be "generally accessible to motor vehicles owned by others." And so even if "accessible" means "legally accessible," I see nothing in the statute to suggest that one's own trips up and down the driveway should not count. Driveways, in general, are legally accessible by, at least, *some* motor vehicles.

II. "GENERALLY"

Whether "accessible" is defined as "physically capable of being reached," "physically easy to reach," or "legally capable of being reached," I conclude that driveways are "accessible to motor vehicles." But what, then, of "generally?" The majority defines "generally"

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expect the dissent would say that most such places are already covered because they are "open to the general public." There is no need to grapple with these hypotheticals in this case because none of these circumstances is present here. I would thus prefer to resolve this straightforward case and leave the question of the reach of MCL 257.625 for a future case that tests its boundaries.

as "usually."[2] The dissent, however, fears that the majority's rule threatens to "cover[] any land not under water" despite the Legislature's decision not to prohibit driving while intoxicated in all places "within this state." Cf. MCL 257.625m(1) (stating that an intoxicated person "shall not operate a commercial motor vehicle within this state"). To avoid such a broad interpretation, the dissent reads "generally" to mean " 'to or by most people; widely; popularly; extensively.' "[3] Quoting *Webster's New World College Dictionary* (5th ed). The dissent thus requires that the place where

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[2] The majority defines "generally" as " 'in a general manner'; 'in disregard of specific instances and with regard to an overall picture'; and 'as a rule: USUALLY,' " quoting *Merriam-Webster's Collegiate Dictionary* (11th ed). Similar definitions are expressed in *Random House Webster's College Dictionary* (2001) ("usually; ordinarily"; "with respect to the larger part" and "without reference to particular persons, situations, etc., that may be an exception"), *The Oxford English Dictionary* (2d ed) ("So as to include every particular, or every individual; in a body, as a whole, collectively"; "Universally; with few or no exceptions; with respect to every (or almost every) individual or case concerned"; "With respect to the majority or larger part; for the most part, extensively"; "In a general sense or way; without reference to individuals or particulars"; "As a general rule; in most instances, usually, commonly"), *The American Heritage Dictionary* (2d college ed) ("For the most part; widely"; "As a rule; usually"; "In disregard of particular instances and details"), and others.

[3] The dissent supports its understanding of "generally" by arguing that the statute's use of the plural form, " 'motor *vehicles*,' " suggests that "a certain volume of use is required." I find little force in this argument. Our statutory rules of construction caution that the plural form usually includes the singular. See MCL 8.3b ("Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number."). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 130 (noting that the plural "normally include[s] the singular," but "the proposition that many includes only one is not as logically inevitable as the proposition that one includes multiple ones, so its application is much more subject to context and to contradiction by other canons"). Because I think we agree that the question is whether driveways, as a

vehicles are " 'routinely permitted to enter' " also be available " 'to or by most [motor vehicles],' "[4] " 'widely,' " or to "an appreciable number of motor vehicles." (Citations omitted.) And because any *particular* private driveway is not legally accessible to *most* motor vehicles, the dissent concludes that, as a category, private driveways are not generally accessible to motor vehicles.[5]

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category, are "generally accessible to motor vehicles," the Legislature may have chosen the plural over singular ("generally accessible to *a* motor vehicle") to avoid confusion.

[4] Because the statute states "generally accessible to *motor vehicles*," the dissent's definition of "generally" must mean "to or by most [motor vehicles]," not "to or by most people." Even though cars, for now, all require drivers, there are surely places legally or physically accessible to people that are not so to motor vehicles.

[5] The dissent concludes otherwise for private roads: though privately owned and, therefore, not "open to the general public," they are, by statutory definition, still "normally open to the public," and, therefore, "widely," legally, "accessible to motor vehicles." I am not certain that a private road, which is "normally open to the public," is not itself "open to the general public." Accordingly, I question whether the dissent's interpretation of "generally accessible to motor vehicles" leaves the third category to do no work. I am not convinced, as the dissent is, that each of the three categories in MCL 257.625(1) needs to be given distinct meaning; the third category, "generally accessible to motor vehicles," might well be a catch-all provision. If so, then *it* must do some work. Even if it intentionally encompasses either or both of the others, there must be places that were not covered by the previous statutory language that are now covered because they are "generally accessible to motor vehicles." While redundancy is normally to be avoided in statutory interpretation, sometimes it is just baked in, and this seems not unusual when a statute has been successively amended to add broader and broader coverage, as this one has been. See 1927 PA 318 (prohibiting intoxicated driving "upon any highway within this state"); 1941 PA 346 (prohibiting intoxicated driving "upon any highway or any other place open to the general public within this state"); 1956 PA 34 (prohibiting intoxicated driving "upon any highway or any other place open to the general public, including any area designated for the parking of motor vehicles, within this state"); 1991 PA 98 (prohibiting intoxicated driving "upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles").

While the dissent's interpretation of "generally accessible to motor vehicles" might be one way to make the statute work, it certainly takes the long way home when there are much straighter routes to resolving this case. And while I share the dissent's concern that the majority may have adopted a rule that has few, if any, boundaries, the dissent's desire to avoid an overly broad interpretation has caused it to eliminate the obvious case. I cannot agree with the dissent that driveways are *not* "generally accessible to motor vehicles." If "generally" means "usually," or "in general," then driveways are "generally accessible to motor vehicles," whether "accessible" means "physically capable of being reached," "physically easy to reach," or "legally capable of being reached." Only if "generally" includes some idea of volume ("popularly") *and* "accessible" means "legally so" could driveways possibly be out of bounds. But that reading comes at the cost of the most natural reading of the statutory text. One stumbles to say that "driveways are not generally accessible to motor vehicles," and that is sufficient to dispel for me whatever doubt the dissent's complex formulation might raise.

* * *

Because I believe that driveways are "generally accessible to motor vehicles," I would resolve this straightforward case on its own facts and leave for a future case the determination of the precise boundaries of MCL 257.625(1). I, therefore, concur in the judgment only.

MCCORMACK, J. (*dissenting*). I respectfully dissent. I believe we must read the language "generally accessible to motor vehicles" in MCL 257.625(1) as meaning

something more specific than just whether a place is "usually capable of being [physically] reached" by motor vehicles, as the majority does, an interpretation that threatens to swallow the rest of the statute. We should give this language a meaning that respects each clause in the statute.

MCL 257.625(1) sets forth three categories of places in which a person can be penalized for operating a vehicle while intoxicated: (1) upon a "highway," (2) in an "other place open to the general public," or (3) in an other place "generally accessible to motor vehicles." The first two categories are easy to understand; both indisputably cover places that are open to the general public.[1] And I agree with the majority that the Legislature's decision to add the third category in 1991 must have been intended to expand the scope of the statute to cover some areas not covered by the first two clauses, i.e., some areas that are not open to the general public. The question, then, is what places not open to the general public are covered by the third clause: "generally accessible to motor vehicles."

One weakness in the majority's interpretation—whether a place is "usually capable of being [physically] reached" by a motor vehicle—is that it threatens to swallow the "open to the general public" language in the statute. This is so because every place open to the general public will *also* always be "generally accessible to motor vehicles."[2] Put differently, the majority's in-

[1] See MCL 257.20 (defining "[h]ighway or street" as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel").

[2] The majority asserts that its interpretation meaningfully distinguishes the "open to the general public" category of the statute from the "generally accessible to motor vehicles" category because it reads the former as concerning *who* may access a location and the latter as

terpretation is unpersuasive because under the majority's reading, the phrase "generally accessible to motor vehicles" does all the work and makes the surrounding statutory language pointless. Moreover, if the "generally accessible" category encompasses any place that is "usually" *physically* accessible to motor vehicles, what places are excluded that would otherwise be included if the statute read merely "accessible to motor vehicles"? Modern engineering allows motor vehicles to access many places; what does it add to the inquiry that the vehicle be not just capable of physically accessing the area, but "usually" capable of physically accessing the area? I see no answer to that question in the majority's analysis.

There is more. The majority's broad interpretation of "generally accessible" also ignores other statutes that prohibit driving specific types of motor vehicles while intoxicated. When the Legislature has wanted to prohibit drunken driving in all places, it has done so in clear terms. See, e.g., MCL 257.625m(1) (providing that an intoxicated person "shall not operate a commercial motor vehicle within this state"); MCL 324.81134(5) (providing that a person who operates an off-road vehicle "within this state" while intoxicated and causes a serious impairment of a body function of another person is subject to various penalties); MCL 324.82127 (prohibiting the operation of a snowmobile while intoxicated "in this state"). The Legislature's

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concerning *what* can access a location. I find this distinction unhelpful because without a car *and* a person driving it, there is no drunken driving for the statute to prohibit. In other words, each part of the statute requires both a driver and a vehicle; it is unclear to me why the Legislature would be concerned with preventing the operation of a vehicle while intoxicated in a place a vehicle (but not necessarily a driver) is capable of accessing when a driver is a necessary prerequisite for application of MCL 257.625(1).

decision not to use the broadest phrase possible in MCL 257.625(1) obligates us to give a meaning to the phrase "generally accessible to motor vehicles" that does not amount to a complete prohibition on operating while intoxicated anywhere "in this state." Yet the majority's "usually capable of being reached" by motor vehicles standard leaves few to no places uncovered, particularly given the expansive definition of what constitutes a "motor vehicle." See, e.g., MCL 257.33 (defining "motor vehicle" as "every vehicle that is self-propelled," with a few limited exceptions).

Thus, the majority's interpretation gives the statute immense reach—arguably covering any land not under water. Confusingly then, in its application, the majority has apparently decided to impose some limitations on its own standard. The majority states that "defendant's driveway is a place motor vehicles are usually capable of entering" because it is "*designed for vehicular travel*" and "there is nothing on defendant's driveway that would *prevent* motor vehicles on the public street from turning into it." (First emphasis added.) But the majority never explains from where these limitations originate or how they should be interpreted and applied in future cases.

If the Legislature had wanted to limit the statute's reach to places "designed for vehicular travel" it could have done so, just like it did in MCL 691.1402(1), which provides that a governmental agency's duty to "repair and maintain highways . . . extends only to the improved portion of the highway designed for vehicular travel . . . ." Similar language does not appear in MCL 257.625(1). We have had some difficulty interpreting this standard in the context of highway repairs. See, e.g., *Yono v Dep't of Transp*, 499 Mich 636; 885 NW2d

445 (2016). How it will be interpreted and applied outside of that context is anyone's guess.

The second limitation, in my view, is equally problematic. What, precisely, suffices as a preventative check on a vehicle's entry into a given place? Would a security gate with an articulating arm qualify? That would seem to exclude all sorts of places where people congregate in their cars. Does it matter if the arm of the security gate is up or down? Or if the driver has the ability to activate the arm? Or what about a gated community, that is, a subdivision with a large metal gate that restricts access? I am perplexed that the majority's interpretation will sweep in private driveways but exclude these other places that the Legislature likely intended to cover.

In my view, there is a more sensible way to interpret the scope of the statute's third clause. This interpretation "examine[s] the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). To properly interpret the "generally accessible" clause, therefore, we must examine each of the three related clauses in MCL 257.625(1) in turn.

The first and second clauses are separated by the disjunctive "or," and the second clause is prefaced by the word "other"—"other places open to the general public." Both clauses, therefore, encompass places open to the general public. The first, "highway," is defined in the Motor Vehicle Code—so we don't have to guess about its precise meaning. See MCL 257.20. The second clause, "open to the general public," is undefined, so we look to the usual sources to determine its ordinary meaning. That meaning was well explained in *People v Hawkins*, 181 Mich App 393; 448 NW2d 858

(1989), a case that predated the 1991 amendment of MCL 257.625(1). In *Hawkins*, the Court of Appeals held that the statutory phrase "other place[s] open to the general public" focuses on public accessibility and interpreted it to include areas that invite and do not have any barriers to public access. The Court explained:

> "For an area to be 'open to public use' it does not have to be open to 'everybody all the time.' The essential feature of a public use is that it is not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public. It is the indefiniteness or unrestricted quality of potential users that gives a use its public character." [*Hawkins*, 181 Mich App at 398-399, quoting *State v Boucher*, 207 Conn 612, 615; 541 A2d 865 (1988).]

The panel concluded that a shopping center parking lot that was "accessible to the general public without restriction" was a "place open to the general public" for purposes of MCL 257.625(1). *Hawkins*, 181 Mich App at 399.[3] I believe the panel was correct that a place "open to the general public" is a place that is "accessible to the general public *without restriction*." *Id*. at 399 (emphasis added).

What does this mean for the third clause? It means, logically, that the third clause furthers the statute's reach by including places to which access is restricted in some way.[4] But we also know that the third clause

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[3] The following year, another panel of the Court of Appeals, citing *Hawkins*, concluded that a trailer park road was a place open to the general public since the park was open 24 hours a day and those using the road as a shortcut were not prosecuted for trespassing. *Holland v Dreyer*, 184 Mich App 237, 239; 457 NW2d 56 (1990).

[4] *Hawkins* hinted at a potential loophole in the statute for places that are open to the public, but where access is restricted. For the reasons set forth later in this opinion, I believe the 1991 amendment was intended

was not intended to encompass every place "in this state." So what places, beyond those that are "open to the general public," were added by the 1991 amendment? I believe, for the reasons below, that the "generally accessible to motor vehicles" clause was intended to cover places that are open to an appreciable number of motor vehicles, even if their access is restricted by physical or other barriers to entry.

In determining what places are "generally accessible to motor vehicles," the touchstone is accessibility. "Accessible" means some places not open to the general public (because, as noted, places open to the general public are plainly already covered by the first two clauses) "that can be approached or entered" or that are "easy to approach or enter." *Webster's New World College Dictionary* (5th ed). A place where access is restricted, but still possible, is "accessible" because it is "capable of being reached." But while "accessible" reaches places with restrictions, "generally" must

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to close this loophole. And indeed, while not necessary to my conclusion, it is worthwhile to note that the relevant legislative materials indicate that the 1991 amendment was intended to capture these very places, including "trailer parks and other restricted-access areas[.]" See Analysis of the House Judiciary Committee, Highlights of the Drunk Driving Package (May 14, 1991), p 2, ¶ 7.

A subsequent panel of the Court of Appeals applied the new statutory language in precisely this way. In *People v Nickerson*, 227 Mich App 434, 436; 575 NW2d 804 (1998), the defendant relied on *Hawkins* to argue that the drunk driving statute did not apply to a race track pit area because it was a restricted area. In response, the prosecution distinguished *Hawkins*, in part on the basis that *Hawkins* was decided before the new language was added to MCL 257.625(1) in 1991. *Id*. at 437. The prosecution further argued that the admission fee was not dispositive because the pit area was, at the very least, a place "generally accessible to motor vehicles." The Court of Appeals agreed, holding that the pit area was "generally accessible" because motor "vehicles are routinely permitted to enter for the purpose of driving and parking." *Id*. at 440-441.

meaningfully modify "accessible." "Generally" means "to or by most people; widely; popularly; extensively[.]" *Webster's New World College Dictionary* (5th ed).[5] This definition of "generally" finds textual support in MCL 257.625(1), which requires the area to be "generally accessible by motor *vehicles*"—that is, by multiple vehicles, suggesting a certain volume of use is required.[6] A place is "generally accessible," then, if it is a place "where vehicles are routinely permitted to enter." *People v Nickerson*, 227 Mich App 434, 440; 575 NW2d 804 (1998).

In other words, some places are, though not open to the general public without restriction, accessed regularly by an appreciable number of vehicles. Private roads—in private neighborhood associations, motor home parks, private cul-de-sacs, limited rights of way, commercial driveways with limited hours, and so on—would be the paradigm. But an *individual homeowner's* residential driveway is not one of those places, according to our Legislature. Indeed, the Legislature has defined a "private driveway" as "any piece of privately owned and maintained property which is used for vehicular traffic, but is not open or *normally*

[5] While the majority is correct that dictionaries also include "usually" as a common definition of "generally," for the reasons previously described, I do not believe it is possible to use that definition and have the word do any meaningful work in this statute. I therefore conclude that "widely" is the preferable meaning to give "generally."

[6] The majority believes that the relevant "determination is whether motor vehicles *can* access a place, not whether motor vehicles *actually do* access that place." Of course, evidence of where motor vehicles actually do go is evidence of where they can go. And consideration of actual use does not read "accessible" as "accessed," as the majority alleges; it gives meaning to the word "generally" by making actual use *part*, but not all, of the inquiry. In other words, if the place is actually accessed by a lot of vehicles, it must also be "generally," i.e., widely, "accessible."

used by the public." See MCL 257.44(1) (emphasis added).[7] Thus, if a particular driveway is "normally used by the public," it is not a private driveway. Further, if a driveway is not "normally used by the public," it is not accessed by an appreciable number of vehicles, and therefore cannot sensibly be considered "generally accessible."[8]

As I say, many private roads *are* "generally accessible to motor vehicles." That is, they are "widely" accessible to a significant number of motor vehicles despite not being open to the general public. Indeed, there are countless private roads that run through subdivisions, private developments, apartment and condominium complexes, and motor home communities in Michigan. And in fact, the Legislature has defined a "private road" as "*a privately owned or maintained road*, allowing access to more than 1 residence or place of business, which is [nevertheless] *normally open to the public* and upon which persons other than the owners located thereon may also travel." MCL 257.44(2) (emphasis added). Although such roads are privately owned and maintained (and therefore not a "highway" or another place "open to the general public" for purposes of MCL 257.625(1)), they are "normally open to the public" to drive upon. There-

[7] Had the Legislature intended the 1991 amendment to include private driveways, it easily could have used the statutorily defined term "private driveway" in MCL 257.625(1)—like it had previously done in the first clause with "highway"—but it did not.

[8] But I reject the lower courts' analysis to the extent that they drew a distinction between the upper and lower portions of a driveway, and I disagree with the Court of Appeals' conclusion that the portion of a driveway "between one's detached garage and house is not" a place that is generally accessible to motor vehicles but that the lower portion of the driveway might be. *People v Rea*, 315 Mich App 151, 158; 889 NW2d 536 (2016). For the reasons given, I conclude that no portion of a private driveway is "generally accessible to motor vehicles."

fore, they are "widely accessible" to motor vehicles. Private parking structures would be similarly included, as would private roads to and within private country clubs, for another example. It makes sense that the Legislature would want to outlaw intoxicated driving for all of these.

But an individual homeowner's residential driveway is another matter altogether. We should be most hesitant to assume—and should expect far more clarity from our Legislature before we conclude—that the state seeks to extend its reach onto the private property of individual homeowners. Private property rights are, of course, central to our legal system—every person has "exclusive dominion over his own soil."[9] If a private citizen chooses to have a few beers while washing his car (or to wash his car while having a few beers) on a patch of his own land covered by a driveway, that is his right.

Dominion, yes—absolute immunity from regulation, of course not: There is no doubt the state can regulate and even outlaw certain conduct on private property. My point is that we should not lightly assume that our Legislature intends to do so.[10] This is particularly so here because this statute has historically focused on

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[9] 2 Blackstone, Commentaries on the Laws of England, pp **411-412.

[10] Indeed, even if I were more persuaded by the majority's interpretation of the statute, in light of the uncertainty surrounding the statute's scope and whether the defendant's conduct falls within its purview, I would apply the rule of lenity and dismiss the charge against the defendant. The rule of lenity provides that criminal statutes cannot be extended to cases not included within the clear and obvious import of their language and that "if there is doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant." *People v Ellis*, 204 Mich 157, 161; 169 NW 930 (1918). See also *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983) (noting that the rule of lenity applies "in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent"). Under the

areas open to the general public without restriction.[11] While the Legislature would understandably seek to prohibit intoxicated driving on the countless private roads in this state, it does not follow that our Legislature would want to extend that prohibition to an individual homeowner's private driveway or patch of tire-tracked grass.[12]

For these reasons, the defendant was entitled as a matter of law to dismissal of the charge of operating a motor vehicle while intoxicated. Accordingly, I respectfully dissent and would affirm the result reached by the Court of Appeals.

VIVIANO, J., concurred with MCCORMACK, J.

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circumstances presented in this case, "there is doubt" whether the defendant's conduct falls within the statutory language of MCL 257.625(1).

[11] See 1917 PA 164 (prohibiting intoxicated driving "upon any public highway, street, avenue, driveway or alley within this state"); 1925 PA 109 (expanding the prohibition to "other public place[s]"); 1927 PA 318 (prohibiting drunken driving "upon any highway within this state"); 1941 PA 346 (prohibiting intoxicated driving "upon any highway or any other place open to the general public within this state"); 1956 PA 34 (prohibiting intoxicated driving "upon any highway or any other place open to the general public, including any area designated for the parking of motor vehicles, within this state"); 1976 PA 285 (prohibiting intoxicated driving upon any "highway or other place open to the general public, including an area designated for the parking of motor vehicles, within this state").

[12] Of course, if an intoxicated driver on a residential driveway injures another there are certainly criminal statutes that the driver could be charged with violating and common-law remedies that would apply. There is no evidence that the Legislature added the "generally accessible to motor vehicles" language to MCL 257.625(1) as a response to intoxicated drivers striking children crossing driveways, so while I share the majority's concern for victims of intoxicated drivers, I do not see a way to justify its overly broad reading of that language as a result of our shared concern. And once an intoxicated driver exits his or her driveway and enters the public (or well-traveled private) roadway or other place open to the general public, the driver's intoxicated operation of the vehicle becomes unlawful under MCL 257.625(1). But that is not what happened in this case.

PEOPLE v STEANHOUSE

PEOPLE v MASROOR

Docket Nos. 152671, 152849, 152871, 152872, 152873, 152946, 152947, and 152948. Argued January 10, 2017 (Calendar No. 1). Decided July 24, 2017.

Alexander J. Steanhouse was convicted by a jury in the Wayne Circuit Court of assault with intent to commit murder (AWIM), MCL 750.83, and receiving and concealing stolen property, MCL 750.535(3)(a). The court, Patricia P. Fresard, J., departed from the sentencing guidelines' recommended minimum sentence range of 171 to 285 months and sentenced Steanhouse to 30 to 60 years' imprisonment for AWIM, to run concurrently with a sentence of one to five years' imprisonment for receiving and concealing stolen property. Steanhouse appealed his convictions and sentences by right, arguing, in part, that the trial court had violated the Sixth and Fourteenth Amendments by basing his scores for several offense variables on judicially found facts in violation of *Apprendi v New Jersey*, 530 US 466 (2000), and *Alleyne v United States*, 570 US 99 (2013). The Court of Appeals, WILDER, P.J., and OWENS and M. J. KELLY, JJ., affirmed the convictions but ordered a remand under the procedure adopted in *People v Lockridge*, 498 Mich 358 (2015), from *United States v Crosby*, 397 F3d 103 (CA 2, 2005), to determine whether the sentences were reasonable. The panel held that the proper standard for determining whether a sentence was reasonable was not the approach employed by federal courts, which is guided by the factors in 18 USC 3553(a), but rather the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630 (1990). 313 Mich App 1 (2015). Both the defendant and the prosecution sought leave to appeal. The Supreme Court granted the prosecution's application for leave to appeal in Docket No. 152849, ordered the appeal to be argued and submitted with the prosecution's application for leave to appeal in *People v Masroor*, Docket Nos. 152946 through 152948, and kept Steanhouse's application for leave to appeal in Docket No. 152671 pending. 499 Mich 934 (2015).

Mohammad Masroor was convicted by a jury in the Wayne Circuit Court of 10 counts of first-degree criminal sexual conduct

(CSC-I), MCL 750.520b, and five counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. At sentencing, defense counsel objected to the scoring of the guidelines on the basis of judicial fact-finding and also objected that the scores of several offense variables were unsupported by a preponderance of the evidence. The court, Michael M. Hathaway, J., departed from the sentencing guidelines' recommended minimum sentence range of 108 to 180 months and imposed concurrent prison terms of 35 to 50 years for each of the CSC-I convictions and 10 to 15 years for each of the CSC-II convictions. The Court of Appeals, GLEICHER, P.J., and MURPHY, J. (SAWYER, J., concurring in the result only), affirmed Masroor's convictions but ordered a *Crosby* remand and directed the trial court to apply the proportionality standard adopted in *Steanhouse*. However, the majority stated that but for the *Steanhouse* decision, it would have affirmed Masroor's sentences by applying the federal "reasonableness" standard from *Gall v United States*, 552 US 38 (2007), which was specifically rejected in *Steanhouse*, and it called for a conflict panel to determine which standard was the proper one. 313 Mich App 358 (2015). The Court of Appeals declined to convene a conflict panel. Both Masroor and the prosecution applied for leave to appeal in the Supreme Court. The Supreme Court granted the prosecution's application for leave to appeal in Docket Nos. 152946 through 152948, ordered those cases to be argued and submitted with the prosecution's application for leave to appeal in *Steanhouse*, Docket No. 152849, and kept Masroor's applications for leave to appeal in Docket Nos. 152871 through 152873 pending. 499 Mich 934 (2015).

In an opinion by Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and LARSEN, the Supreme Court *held*:

The legislative sentencing guidelines are advisory in all applications. The proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*. It was unnecessary to reach the question whether *People v Stokes*, 312 Mich App 181 (2015), correctly held that the remedy for a Sixth Amendment sentencing violation should be the same regardless of whether the sentencing error was preserved in light of the fact that both defendants received departure sentences and therefore could show no harm from the application of the mandatory guidelines. For the same reason, *Crosby* remands were unnecessary. The judgments of the Court of Appeals in both cases were reversed to the extent that they remanded to the trial court for further sentencing proceedings under *Crosby*. In lieu of

granting defendants' applications for leave to appeal in Docket Nos. 152671 and 152871 through 152873, the cases were remanded to the Court of Appeals under MCR 7.305(H)(1) for plenary consideration of whether the departure sentences imposed by the trial courts were reasonable under the standard set forth in this opinion. In all other respects, leave to appeal with regard to those applications was denied.

1. The remedial holding in *Lockridge* that rendered the guidelines advisory in all applications was reaffirmed. The constitutional holding in *Lockridge* was premised on the interplay between the requirement of judicial fact-finding to score the guidelines and their mandatory nature. What made the guidelines unconstitutional was the combination of the two mandates of judicial fact-finding and adherence to the guidelines. MCL 769.34(2), which imposed the second mandate, was therefore held to be constitutionally deficient. Assuming without deciding that mandatory guidelines would remain constitutional in some applications, MCL 8.5 does not require a different result. Even if the proposed bifurcated mandatory/advisory guidelines system fully avoided any constitutional problems, it would be an inoperable scheme if trial courts were statutorily directed to score the highest number of points possible but were constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant. The distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear, and it is not always evident whether a jury's findings on a point of fact are sufficiently conclusive to determine that it found that fact beyond a reasonable doubt. Further, it is unclear what standard trial judges would use to determine whether a jury had made the requisite finding to support a proposed OV score or what standard appellate courts would apply when reviewing those determinations. The result of adopting a system in which the guidelines' mandatory-versus-advisory nature hinged on whether judicial fact-finding had occurred in a particular case would be endless litigation and perpetual uncertainty, and MCL 8.5 does not require this result. Finality interests also strongly supported adherence to the holding in *Lockridge*, given that scores of *Crosby* remands have been ordered since *Lockridge* was decided and that trial courts have seemingly uniformly understood *Lockridge* to have imposed a purely advisory system.

2. The rule of decision to be applied by the trial courts is the principle of proportionality set forth in *Milbourn*, not the federal statutory factors listed in 18 USC 3553(a). The statutory factors in 18 USC 3553(a) were created by Congress for use by the federal courts and include reference to policy statements issued by the Sentencing Commission or by act of Congress that have no counterpart in Michigan law, whereas the principle of proportionality has a lengthy jurisprudential history in this state. None of the constitutional principles announced in *United States v Booker*, 543 US 220 (2005), or its progeny compelled a departure from Michigan's longstanding principles applicable to sentencing, and the principle of proportionality was not irreconcilable with *Gall*, 552 US at 46, because it did not create an impermissible presumption of unreasonableness for sentences outside the guidelines range.

3. Remand for a *Crosby* hearing in cases involving departure sentences is unnecessary. The *Crosby* remand procedure was adopted for the specific purpose of determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those guidelines. Departure sentences were specifically exempted from that remand procedure, at least for cases in which the error was unpreserved, because a defendant who had received an upward departure could not show prejudice resulting from the constraint on the trial court's sentencing discretion. Therefore, the purpose for the *Crosby* remand is not present in cases involving departure sentences. The analysis of the *Masroor* panel was affirmed to the extent that it rejected the *Steanhouse* panel's decision to order a *Crosby* remand, and the *Steanhouse* panel should have reviewed the departure sentence for an abuse of discretion using the "principle of proportionality" standard. Both cases were remanded to the Court of Appeals to consider the reasonableness of the defendants' sentences under the standards set forth in this opinion, and if the Court of Appeals determined that either sentencing court abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed, it had to remand to the trial court for resentencing.

In Docket Nos. 152849 and 152946 through 152948, Court of Appeals judgments affirmed to the extent they held that appellate review of departure sentences for reasonableness required review of whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*; Court of Appeals judgments reversed to the extent they ordered *Crosby*

remands. In Docket Nos. 152671 and 152871 through 152873, in lieu of granting leave to appeal, cases remanded to the Court of Appeals for plenary review of whether defendants' sentences were reasonable under *Milbourn*; leave to appeal denied in all other respects.

Justice LARSEN, joined by Justice VIVIANO, concurring, wrote separately to address the points raised by the partial dissent, stating that, while some of the language in *Lockridge* could raise a question about the extent of *Lockridge*'s remedial holding if read in isolation, the Court in *Lockridge* clearly chose to render the guidelines fully advisory as a remedy for the constitutional violation identified in that case, and the fact that *Lockridge* imposed this remedy has been clearly understood by the participants in Michigan's criminal justice system. Justice LARSEN noted that the question whether this remedy was the one most reasonably consistent with the Legislature's intentions was the issue before the Court in *Lockridge*, not in the present case, and she stated that any changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced. Justice LARSEN further noted that if the *Lockridge* remedy was not the best effectuation of the Legislature's intent, it was within the Legislature's power to install a different sentencing scheme.

Chief Justice MARKMAN, joined by Justice ZAHRA, concurring in part and dissenting in part, concurred in the majority opinion to the extent that it (1) reaffirmed the holding that a defendant receiving a sentence that represents an upward departure is not entitled to a *Crosby* remand and (2) held that the proper inquiry when reviewing a departure sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *Milbourn*. He dissented from the portion of the majority opinion that held that the legislative sentencing guidelines are always advisory, regardless of whether a mandatory application of the guidelines would violate the Sixth Amendment, on the ground that, under separation-of-powers principles, the Court has the authority to strike down statutes only to the extent that they are unconstitutional and is required to give the constitutional portions of a statute effect as long as they are not inoperable or rendered inconsistent with the manifest intent of the Legislature. Chief Justice MARKMAN noted that there were multiple alternative remedies that were more consistent with the Legislature's intent

to impose mandatory guidelines, including rendering the floor advisory and the ceiling mandatory, rendering both the floor and the ceiling mandatory but prohibiting judicial fact-finding when determining the floor, rendering the guidelines advisory when the court engages in fact-finding to score offense variables that increase the guidelines range and mandatory when it does not, allowing the guidelines to be mandatory by prohibiting judicial fact-finding when scoring offense variables, and allowing the guidelines to be mandatory by requiring the jury to find any facts that the defendant did not admit when scoring the offense variables. Chief Justice MARKMAN would have held that the guidelines are mandatory to the extent that a mandatory application does not run afoul of a defendant's Sixth Amendment right to a jury trial.

Justice WILDER took no part in the decision of this case.

1. SENTENCING — SENTENCING GUIDELINES — ADVISORY.

The legislative sentencing guidelines, MCL 777.1 *et seq*., are advisory in all their applications.

2. SENTENCING — APPELLATE REVIEW — REASONABLENESS — PRINCIPLE OF PROPORTIONALITY.

The proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630 (1990), which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender; a reviewing court should not employ the approach to reasonableness review used by the federal courts, including the factors listed in 18 USC 3553(a).

3. SENTENCING — SENTENCING GUIDELINES — DEPARTURES — REVIEW.

Sentences that constitute an upward departure from the range recommended by the advisory sentencing guidelines are subject to review by the Court of Appeals to determine whether the trial court abused its discretion by violating the principle of proportionality; departure sentences need not be remanded to the trial court for a hearing under the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, *David A. McCreedy*, Lead Appellate

Attorney, and *Timothy A. Baughman*, Special Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*, *Adrienne N. Young*, and *Chari K. Grove*) for Alexander J. Steanhouse.

Michael J. McCarthy, PC (by *Michael J. McCarthy*), for Mohammad Masroor.

Amici Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

Bradley R. Hall and *Warner Norcross & Judd LLP* (by *Gaëtan Gerville-Réache*) for Criminal Defense Attorneys of Michigan.

MCCORMACK, J. Two terms ago, in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), this Court, applying binding United States Supreme Court precedent, held that Michigan's sentencing guidelines scheme violates the Sixth Amendment of the United States Constitution. To remedy the constitutional violation, we held that the guidelines would thereafter be merely advisory rather than mandatory. In these consolidated cases, we address residual issues stemming from our decision in *Lockridge*. We hold the following:

(1) In *Lockridge*, we held, and today reaffirm, that the legislative sentencing guidelines are advisory *in all applications*.

(2) We affirm the Court of Appeals' holding in *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), that the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its

discretion by violating the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."

(3) We decline to import the approach to reasonableness review used by the federal courts, including the factors listed in 18 USC 3553(a), into our jurisprudence.

(4) We agree with the Court of Appeals that defendant Alexander Steanhouse did not preserve his Sixth Amendment challenge to the scoring of the guidelines and that defendant Mohammad Masroor did preserve his challenge, but we decline to reach the question whether *People v Stokes*, 312 Mich App 181; 877 NW2d 752 (2015), correctly decided that the remedy is exactly the same regardless of whether the error is preserved or unpreserved in light of the fact that both defendants received departure sentences, and that, therefore, neither defendant can show any harm from the application of the mandatory guidelines.[1]

(5) We reverse, in part, the judgments of the Court of Appeals in both cases to the extent they remanded to the trial court for further sentencing proceedings under *United States v Crosby*, 397 F3d 103 (CA 2, 2005).[2]

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[1] Defendant Masroor also concedes that judicial fact-finding did not affect his guidelines range because removing points from his OV score to account for any judicial fact-finding would not change the applicable guidelines range. See *Lockridge*, 498 Mich at 394-395 (stating that in "cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced . . . the defendant suffered no prejudice from any error").

[2] For ease of reference, hereinafter we will use the shorthand "*Crosby* remand" to refer to such proceedings.

Both of the trial courts imposed upward departure sentences on the defendants, and we made clear in *Lockridge* that defendants who receive upward departure sentences cannot show prejudice from the Sixth Amendment error. Accordingly, the Court of Appeals in *People v Masroor*, 313 Mich App 358, 396; 880 NW2d 812 (2015), correctly concluded that ordering *Crosby* remands in such cases "unnecessarily complicates and prolongs the sentencing process." Instead, the proper approach is for the Court of Appeals to determine whether the trial court abused its discretion by violating the principle of proportionality.

(6) Because of our ruling in (5), in lieu of granting leave to appeal in the defendants' appeals (Docket Nos. 152671 and 152871 through 152873), pursuant to MCR 7.305(H)(1), we remand those cases to the Court of Appeals for plenary consideration of whether the departure sentences imposed by the trial courts were reasonable under the standard set forth in this opinion. In all other respects, leave to appeal with regard to those applications is denied because we are not persuaded that the questions presented should be reviewed by this Court.

I. LEGAL BACKGROUND

In *Lockridge*, we relied on the United States Supreme Court's recent decision in *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), to conclude that Michigan's mandatory sentencing guidelines violated the Sixth Amendment because they require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increased the floor of the guidelines' minimum sentence range. As a remedy for the constitutional infirmity, we held that

the guidelines were advisory only and that many defendants sentenced under the mandatory guidelines were entitled to *Crosby* remands for the trial court to determine whether it would have imposed a materially different sentence if it had been aware that the guidelines were not mandatory. We also held that departure sentences post-*Lockridge* would be reviewed for reasonableness, though we did not elaborate on the proper standard for this reasonableness review. *Lockridge*, 498 Mich at 392.

Notably for purposes of these cases, we also held that the defendant in *Lockridge* was not entitled to a *Crosby* remand because he had received an upward departure sentence; we concluded that "[b]ecause he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*." *Id*. at 394.

II. FACTS AND PROCEDURAL HISTORY

A. *STEANHOUSE*

The defendant was jury-convicted of assault with intent to murder (AWIM), MCL 750.83, and receiving and concealing stolen property with a value between $1,000 and $20,000, MCL 750.535(3)(a). Defense counsel objected at sentencing to the evidentiary basis for scoring OVs 5, 6, and 7, MCL 777.35, MCL 777.36, and MCL 777.37. The trial court upheld the scoring of OVs 5 and 6 but eliminated points for OV 7 for lack of factual support. The trial court departed from the applicable guidelines range (calling for a minimum prison term of 171 to 285 months) and imposed a 30- to

60-year (360- to 720-month) prison sentence for the AWIM count, concurrent with a 1- to 5-year sentence for the stolen-property count.

The Court of Appeals affirmed the defendant's convictions in a published opinion but ordered a *Crosby* remand. The panel then proceeded to evaluate two potential approaches it could adopt to frame the "reasonableness" review of sentences post-*Lockridge*: (1) the standard currently employed by the federal courts, which is guided by the factors in 18 USC 3553(a), or (2) the "principle of proportionality" standard from *Milbourn*. The panel adopted the latter standard. *Steanhouse*, 313 Mich App at 46-47.

Both the defendant and the prosecution sought leave to appeal in this Court. We granted the prosecution's application for leave to appeal, ordered it to be argued and submitted with the prosecution's application for leave to appeal in *Masroor*, and kept the defendant's application for leave to appeal pending. *People v Steanhouse*, 499 Mich 934 (2016).[3]

B. *MASROOR*

The defendant, in three cases tried together, was jury-convicted of 10 counts of first-degree criminal

[3] Our grant order asked the parties to address:

> (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*. [*Steanhouse*, 499 Mich at 934.]

sexual conduct (CSC-I), MCL 750.520b, and five counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. At sentencing, defense counsel made a general objection to scoring the guidelines on the basis of judicial fact-finding, citing *Alleyne*, 570 US 99, and objected to the scoring of several OVs on the basis that the scoring was unsupported by a preponderance of the evidence. After resolving those challenges, the trial court departed from the applicable guidelines range (calling for a minimum prison term of 108 to 180 months) and imposed concurrent prison terms of 35 to 50 years (420 to 600 months) for each of the CSC-I convictions and 10 to 15 years for each of the CSC-II convictions.

The Court of Appeals affirmed the defendant's convictions in a published opinion but ordered a *Crosby* remand and directed the trial court to apply the "proportionality" standard adopted in *Steanhouse*. But the panel majority said that but for the *Steanhouse* decision, it would have affirmed the defendant's sentences by applying the federal "reasonableness" standard from *Gall v United States*, 552 US 38, 46; 128 S Ct 586; 169 L Ed 2d 445 (2007), which was specifically rejected in *Steanhouse*, and it called for a conflict panel to resolve which standard was the proper one and "so that the procedure established by [the *Steanhouse*] panel may be more carefully considered by a larger number of the judges of this Court."[4] *Masroor*, 313 Mich App at 361.

On December 17, 2015, the Court of Appeals issued an order announcing that a special panel would convene pursuant to MCR 7.215(J) to resolve the conflict between these cases "concerning the standards applicable to review for reasonableness of sentences consti-

[4] Judge SAWYER concurred only in the result.

tuting departures from the recommendations of the sentencing guidelines, and the extent to which remands are required in cases involving sentencing decisions before *People v Lockridge*, 498 Mich 358 (2015), was decided"; the next day, however, the Court issued another order vacating that order because of a polling error and stating that a special conflict panel would not be convened. *People v Masroor*, 313 Mich App 801 (2015).

As in *Steanhouse*, both the defendant and the prosecution appealed in this Court. We granted the prosecution's application for leave to appeal, ordered it to be argued and submitted with the prosecution's application for leave to appeal in *Steanhouse*, and kept the defendant's application for leave to appeal pending. *People v Masroor*, 499 Mich 934 (2015).

III. ANALYSIS

A. THE *LOCKRIDGE* REMEDIAL HOLDING/MCL 8.5

The prosecution contends that this Court's decision in *Lockridge* rendered the legislative sentencing guidelines advisory only in cases that involved judicial fact-finding that increased the applicable guidelines range and that the guidelines remain mandatory in all other cases. Despite its argument that our holding in *Lockridge* was unclear, the prosecution has cited no case—and we have found none—in which a lower court has held that the guidelines remained mandatory in any application post-*Lockridge*. Additionally, we note that no party in *Lockridge*—including the prosecution as amicus—argued that the remedy set forth in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), should extend only to cases in which judicial fact-finding occurred. Indeed, in *Lockridge*,

"the prosecution . . . ask[ed] us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree[d] that this [was] the most appropriate remedy." *Lockridge*, 498 Mich at 391. The prosecution, albeit a different prosecutor's office than in *Lockridge*,[5] now asks us to *Booker*-ize the Michigan sentencing guidelines only in part. The prosecution cites MCL 8.5[6] for the proposition that we lacked the authority in *Lockridge* to impose fully advisory guidelines when the guidelines were not unconstitutional in all their applications.[7]

We disagree and reaffirm *Lockridge*'s remedial holding rendering the guidelines advisory in all applications. As we stressed in *Lockridge*, our constitutional

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[5] The Oakland County Prosecutor's Office represented the People in *Lockridge*. The Wayne County Prosecutor's Office, which represents the People in both cases here, participated in *Lockridge* as amicus curiae.

[6] MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

[7] Steanhouse also argues that MCL 8.5 requires that the top of the guidelines range remain mandatory. We explicitly rejected this remedy in *Lockridge*, 498 Mich at 389-390. Moreover, neither defendant sought leave to appeal on this basis, and this argument is outside the scope of our grant order, which asked "(1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in" *Lockridge* "and, if so, how *stare decisis* should affect this Court's analysis . . . ." *Steanhouse*, 499 Mich at 934.

holding was premised on the interplay of two key aspects of the guidelines: the requirement of judicial fact-finding to score them and their mandatory nature. *Lockridge*, 498 Mich at 364 (outlining the constitutional error as "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*"). What made the guidelines unconstitutional, in other words, was the combination of the two mandates of judicial fact-finding and adherence to the guidelines. *United States v Pirani*, 406 F3d 543, 551 (CA 8, 2005) (describing the constitutional error as "the *combination* of" a sentencing enhancement based on judge-found facts and a mandatory guidelines regime). We therefore held MCL 769.34(2), which imposed the second mandate, to be constitutionally deficient.

Assuming without deciding that mandatory guidelines would remain constitutional in some applications—i.e., cases in which no judicial fact-finding occurs that increases the applicable guidelines range[8]—we believe MCL 8.5 does not require a different result. Even if the proposed bifurcated mandatory/advisory guidelines system fully avoided any constitutional problems, we reject the operability of a guidelines scheme in which trial courts are statutorily directed to score the "highest number of points" possible but are constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are

[8] See *Booker*, 543 US at 267-268 (concluding that a sentence set solely on the basis of the jury's verdict, i.e., without judicial fact-finding, does not violate the Sixth Amendment).

found by a judge rather than by a jury or admitted by a defendant. See MCL 8.5 (providing that the remaining constitutional applications of the statute are to be given effect unless determined to be "inoperable").

First, the distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear.[9] Second, whether a jury's "findings" on a point of fact are sufficiently conclusive to determine that it "found" that fact beyond a reasonable doubt is not always evident.[10] Third, what standard would trial judges use to determine whether a jury in fact made the requisite finding to support a proposed OV score? Moreover, what standard would appellate courts apply to those determinations by the trial court to decide whether they were correctly made? All of these issues would be left unsettled in a system in which the guidelines' mandatory-versus-advisory nature hinged

[9] See, e.g., *People v Collins*, 500 Mich 930 (2017) (ordering oral argument on the application and directing the parties to brief "whether a defendant who was sentenced prior to *People v Lockridge*, 498 Mich 358 (2015), sufficiently waived his constitutional rights to notice and jury proof beyond a reasonable doubt of facts used to score offense variables under MCL 777.1 *et seq*., where those facts were not charged in an indictment or information, but where he pleaded guilty or no contest and stipulated under oath to the aggravating facts in the context of a general waiver of his jury trial rights"); see also, e.g., *State v Dettman*, 719 NW2d 644, 650-651 (Minn, 2006) (holding that "a defendant must expressly, knowingly, voluntarily, and intelligently waive his right to a jury determination of facts supporting an upward sentencing departure before his statements at his guilty-plea hearing may be used to enhance his sentence").

[10] For example, one theory of conviction for CSC-I is that the "actor is in a position of authority over the victim and used this authority to coerce the victim to submit" to the sexual abuse. MCL 750.520b(1)(a)(*iii*). May a defendant convicted under that theory be scored 15 points for OV 10 for "predatory conduct," or at least 10 points for "abus[ing] his or her authority status," without judicial fact-finding? MCL 777.40.

on whether judicial fact-finding had occurred in a particular case. The result would be endless litigation and perpetual uncertainty. See *Booker*, 543 US at 266 (noting the "administrative complexities" that such a bifurcated system would create). We will not travel that ill-advised road when MCL 8.5 does not require us to.[11]

Finally, we believe that finality interests strongly support adherence to our holding in *Lockridge*. We decided *Lockridge* almost two years ago and have ordered scores of *Crosby* remands in the interim. Trial courts have seemingly uniformly understood our decision to have imposed a purely advisory system.[12] It

[11] Moreover, the proposed bifurcated system has a bit of a "[w]hat a neat trick" flair: two mandatory components are unconstitutional when used in tandem until . . . they aren't. *Williams v Illinois*, 567 US 50, 133; 132 S Ct 2221; 183 L Ed 2d 89 (2012) (Kagan, J., dissenting) (discussing the Confrontation Clause). Such an approach certainly seems to at least undervalue the constitutional principle on which *Booker* was decided. And by delaying a determination of the guidelines' mandatory or advisory nature until sentencing, the proposed system would give no weight to the notice interests protected by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny. See *id*. at 476 (noting that the constitutional principle is grounded in part in the notice and jury trial guarantees of the Sixth Amendment).

[12] See also *People v Rice*, 318 Mich App 688, 692; 899 NW2d 752 (2017):

> Addressing the entire scheme and system of MCL 769.34, the *Lockridge* Court held that the guidelines are advisory and struck down the MCL 769.34(3) requirement that a trial court articulate substantial and compelling reasons to depart from the guidelines. It is clear from this language that the Court drew no distinction between cases that applied judge-found facts and cases that did not. The Court's language was precise and explicit, and the Court in no way limited its holding to cases in which judicial fact-finding actually occurred.
>
> For these reasons, we conclude that the trial court properly held that the legislative sentencing guidelines are advisory in every case, regardless of whether the case involves judicial fact-finding.

would sow much greater confusion to retreat from *Lockridge* than to adhere to it.[13]

We therefore decline to modify the remedial holding in *Lockridge*, which rendered the sentencing guidelines advisory in all cases. "Sentencing courts must . . . continue to consult the applicable guidelines range and take it into account when imposing a sentence . . . [and] justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392.

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[13] With regard to the dissenting opinion, we make the following observations: the dissent's constitutional separation-of-powers concern is not shared by the parties, who argue only that a different remedy from fully advisory guidelines per *Booker* is mandated by MCL 8.5 because there is no federal severance statute. This is unsurprising insofar as if this Court's decisions in *Lockridge* and these cases violate the constitutional separation of powers, so did the United States Supreme Court's decision in *Booker*. We disagree with the dissent that the passage it cites from *Sears v Cottrell*, 5 Mich 251, 259 (1858), stands for the proposition that we only possess the authority to strike down statutes to the extent they are unconstitutional. Instead the quoted language stands for the proposition that legislation is to be presumed constitutional and may only be voided by a court when it is *clearly* unconstitutional.

Finally, to the dissent's footnote 21—the dissent asserts that "[i]f it is the 'combination' of these two 'mandates' that makes the guidelines unconstitutional, removing a single one of these 'mandates' presumably would eliminate the constitutional problem." Precisely right. That is exactly what we did in *Lockridge* by eliminating the mandatory nature of the guidelines. The proposed remedy discussed by the dissent at this point of its opinion—a bifurcated advisory/mandatory system—would not *remove* one of the mandates; it would have it blink on or off on a case-by-case basis. Again, quite a neat trick, but not one that sufficiently protects the constitutional interest. Similarly, the dissent opines that a bifurcated system would not undervalue the constitutional principle vindicated in *Booker* because the *Booker* Court admitted that sentences not based on judicial fact-finding do not violate the Sixth Amendment. Yet this ignores the fact that despite that recognition, the *Booker* Court nonetheless *fully invalidated* the federal guidelines scheme. That result certainly suggests that the remedial majority thought the constitutional violation sufficiently egregious that a broad remedy was appropriate.

B. REASONABLENESS REVIEW

Next, we turn to an issue that divided the *Steanhouse* and *Masroor* panels: the proper standard to use to determine whether a defendant's departure sentence is so unreasonable as to constitute an abuse of the trial court's discretion and warrant reversal on appeal.[14] One important note on which the panels did *not* disagree is significant: the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion. See *Steanhouse*, 313 Mich App at 45; *Masroor*, 313 Mich App at 394. The sticking point is the *rule of decision* to be applied by the trial courts: the principle of proportionality adopted by our opinion in *Milbourn*, or the federal statutory factors listed in 18 USC 3553(a). In other words, is the relevant question for appellate courts reviewing a sentence for reasonableness (1) whether the trial court abused its discretion by violating the principle of proportionality or (2) whether the trial court abused its discretion in applying the factors set forth in 18 USC 3553(a)?

In light of the substantial overlap and the identical standard of review for appellate courts, little likely separates the two approaches in terms of the outcomes they would produce in a given case. But we affirm the *Steanhouse* panel's adoption of the *Milbourn* principle-of-proportionality test in light of its history in our jurisprudence. The statutory factors in 18 USC 3553(a) were created by Congress for use by the federal courts and include reference to "policy statements" issued by

[14] Because both defendants received departure sentences, we do not reach the question of whether MCL 769.34(10), which requires the Court of Appeals to affirm a sentence that is within the guidelines absent a scoring error or reliance on inaccurate information in determining the sentence, survives *Lockridge*.

the Sentencing Commission or by act of Congress that have no counterpart in Michigan law.

The principle of proportionality has a lengthy jurisprudential history in this state. See *Milbourn*, 435 Mich at 650, quoting *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910). In *Milbourn*, we described that principle as one in which

> a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender. [*Milbourn*, 435 Mich at 651.]

In describing how that principle interacted with the then-existing advisory judicial sentencing guidelines, we said that "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Id*. at 661.

In *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), this Court held that the Legislature had incorporated the principle of proportionality into the newly adopted legislative sentencing guidelines. *Id*. at 263 (stating that the Legislature "subscribed to this principle of proportionality in establishing the statutory sentencing guidelines"); see also *People v Smith*, 482 Mich 292, 304-305; 754 NW2d 284 (2008) (holding that in order "to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review").

Although in *Lockridge* we followed the lead of the United States Supreme Court in *Booker*, 543 US at

233, in the remedy we adopted for the constitutional flaw in the sentencing guidelines (making the guidelines fully advisory), and the United States Court of Appeals for the Second Circuit in *Crosby*, for its remand procedure, nothing else in our opinion indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker* or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in *Babcock* and *Smith*.[15]

That being said, we feel compelled to address the *Masroor* panel's concern that our proportionality test cannot be reconciled with *Gall v United States*, 552 US 38; 128 S Ct 586; 169 L Ed 2d 445 (2007). *Masroor*, 313 Mich App at 398. Our proportionality test differs from the one the United States Supreme Court rejected in *Gall*. In *Gall*, the United States Supreme Court rejected a federal circuit court's requirement that deviations from the guidelines range be justified in proportion to the extent of the deviation. *Gall*, 552 US at 47. In particular, the Supreme Court held:

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[15] We disagree with the panel in *Masroor* that adhering to the principle of proportionality necessarily entails doing so "to the exclusion of other concepts," thereby "erod[ing] a court's sentencing discretion." *Masroor*, 313 Mich App at 396. First, we note that the panel did not identify any particular concepts that it believed were excluded by the principle of proportionality. Second, we do not purport to require a trial court to consider the principle to the exclusion of any other permissible concepts. We merely decline to import "other concepts" from 18 USC 3553(a) when some of those concepts have no history in Michigan law. See *Steanhouse*, 313 Mich App at 47 (observing that the Michigan Legislature "does not issue policy statements under the statutory sentencing scheme, MCL 777.1 *et seq*., so . . . it is effectively impossible for a trial court or this Court to consider a factor analogous to § 3553(a)(5) to determine whether a sentence is reasonable").

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. [*Id.*]

The Court reasoned that these approaches would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id.* The Michigan principle of proportionality, however, does not create such an impermissible presumption. Rather than impermissibly measuring proportionality by reference to deviations from the guidelines, our principle of proportionality requires "sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. The *Masroor* panel was concerned that dicta in our proportionality cases could be read to have "urg[ed] that the guidelines should almost always control," thus creating a problem similar to that identified in *Gall*. *Masroor*, 313 Mich App at 398, citing *Milbourn*, 435 Mich at 656, 658; see also *Milbourn*, 435 Mich at 659 (stating that departure sentences should "alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme"). We agree that such dicta are inconsistent with the United States Supreme Court's prohibition on presumptions of unreasonableness for out-of-guidelines sentences, see *Gall*, 552 US at 51, and so we disavow those dicta. We repeat our directive from *Lockridge* that the guidelines "remain a highly rel-

evant consideration in a trial court's exercise of sentencing discretion" that trial courts " 'must consult' " and " 'take . . . into account when sentencing,' " *Lockridge*, 498 Mich at 391, quoting *Booker*, 543 US at 264, and our holding from *Milbourn* that "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range," *Milbourn*, 435 Mich at 661.

C. THE NEED FOR A *CROSBY* REMAND

Regarding the appropriate procedures for review of departure sentences, we agree with the *Masroor* panel's conclusion that "remand for a *Crosby* hearing in cases like that now before us unnecessarily complicates and prolongs the sentencing process." *Masroor*, 313 Mich App at 396. This Court adopted the *Crosby* remand procedure for a very specific purpose: determining whether trial courts that had sentenced defendants under the mandatory sentencing guidelines had their discretion impermissibly constrained by those guidelines. We specifically exempted departure sentences from that remand procedure, at least for cases in which the error was unpreserved,[16] because a defendant who had received an upward departure could not show prejudice resulting from the constraint on the trial court's sentencing discretion. *Lockridge*, 498 Mich at 395 n 31 (stating that "[i]t defies logic that the court

[16] In *Lockridge*, the error was unpreserved. Here, defendant Masroor preserved the Sixth Amendment challenge based on counsel's general objection to guidelines scoring based on judicial fact-finding. Although we did not address the question of preserved errors in *Lockridge*, that fact is irrelevant to our consideration whether *Crosby* remands are appropriate in cases in which the defendant received an upward departure.

in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory").

Therefore, the purpose for the *Crosby* remand is not present in cases involving departure sentences. We therefore affirm the *Masroor* panel's analysis to the extent that it rejected the *Steanhouse* panel's decision to order a *Crosby* remand; the panel in *Steanhouse* should have reviewed the departure sentence for an abuse of discretion, i.e., engaged in reasonableness review for an abuse of discretion informed by the "principle of proportionality" standard. We therefore remand these cases to the Court of Appeals to consider the reasonableness of the defendants' sentences under the standards set forth in this opinion. If the Court of Appeals determines that either trial court has abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed, it must remand to the trial court for resentencing. See *Milbourn*, 435 Mich at 665 (stating that "[i]f and when it is determined that a trial court has pursued the wrong legal standard or abused its judicial discretion according to standards articulated by the appellate courts, it falls to the trial court, on remand, to exercise the discretion according to the appropriate standards"); *Smith*, 482 Mich at 304 (noting that "an appellate court cannot conclude that a particular substantial and compelling reason for departure existed when the trial court failed to articulate that reason").

IV. CONCLUSION

In Docket Nos. 152849 and 152946 through 152948, we reaffirm our holding in *Lockridge* that the sentencing guidelines are advisory only. We affirm the Court of

Appeals' holding in *Steanhouse* that appellate review of departure sentences for reasonableness requires review of whether the trial court abused its discretion by violating the principle of proportionality set forth in our decision in *Milbourn*. But we reverse the Court of Appeals to the extent it ordered *Crosby* remands to the trial courts. In Docket Nos. 152671 and 152871 through 152873, we remand to the Court of Appeals for plenary review of whether the defendants' sentences are reasonable under the standard elucidated in our 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.

VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred with MCCORMACK, J.

LARSEN, J. (*concurring*). I join the Court's opinion in full but write separately to address the points raised by the dissent. Two terms ago, in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), this Court announced two propositions that dramatically altered sentencing law and practice in Michigan. First, compelled by the United States Supreme Court's decision in *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), this Court held that Michigan's system of applying mandatory sentencing guidelines was unconstitutional. *Lockridge*, 498 Mich at 388-389. Second, as a remedy for that unconstitutionality, the Court "*Booker*-ize[d]" the Michigan guidelines—which is to say, it adopted the remedy chosen by the United States Supreme Court in *United States v Booker*[1] to remedy similar unconstitutionality in the operation of the

[1] See *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005).

federal sentencing guidelines. *Lockridge*, 498 Mich at 391. The dissent acknowledges, with some lament, the first of these events of 2015, but, curiously, writes as if the second had never happened—as if this Court were today, for the first time, announcing a remedy for the constitutional violation identified in *Lockridge*. But that is decidedly not so. The Court clearly announced its remedial holding in *Lockridge*, and the evidence clearly reflects that the participants in Michigan's criminal justice system understood. That fact deprives the dissent of much of its force.

The Court was clear in *Lockridge*: the sentencing guidelines were rendered advisory. The dissent is right that some of the language in *Lockridge*, if read in isolation, could raise a question about the extent of *Lockridge*'s remedial holding. See, e.g., *id*. at 364 ("To remedy the constitutional violation, we sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory."). But any doubts on this score should have been resolved by the Court's plain statement in *Lockridge*: "[T]he prosecution, in turn, asks us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree that this is the most appropriate remedy." *Id*. at 391; see also *id*. at 365 n 1 ("To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary."); *id*. at 391 ("[W]e need only substitute the word 'may' for 'shall' in MCL 769.34(2) and remove the requirement in MCL 769.34(3) that a trial court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that depar-

ture."); *id*. ("Like the Supreme Court in *Booker*, however, we conclude that although the guidelines can no longer be mandatory, they remain a highly relevant consideration in a trial court's exercise of sentencing discretion."); *id*. ("Accordingly, we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."); *id*. at 392 ("Because sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion."); *id*. at 399 ("To remedy the constitutional flaw in the guidelines, we hold that they are advisory only."). The Court's directive in *Lockridge* cannot be reasonably mistaken. Neither the parties, the amici, nor the dissent cites any case in which a lower court has expressed confusion over whether *Lockridge* rendered the guidelines fully advisory. The dissent too once understood the remedy adopted in *Lockridge* to be clear:

> Because I conclude that Michigan's sentencing system does not violate the Sixth Amendment, I need not address the appropriate remedy for what I view as a nonexistent violation. Nonetheless, I submit that the majority has not been persuasive in its adoption *without modification* or significant analysis the so-called *Booker* remedy that *renders the sentencing guidelines 'advisory only' (meaning that the guidelines no longer have any binding effect)* . . . . [*Id*. at 462 n 40 (MARKMAN, J., dissenting) (emphasis added).]

Now, however, the dissent states that "*Lockridge* was not entirely clear regarding whether the guidelines were always to be advisory or whether they could

remain mandatory in limited respects."[2] The dissent instead states that "[t]he question in the instant case is whether the majority's remedy of rendering the mandatory guidelines 'fully advisory' or 'advisory in all applications' constitutes the remedy that is most reasonably consistent with the Legislature's intentions or rather strikes down more of the guidelines than is necessary to render them constitutional"; that is, "the question now is only which alternative is *next* best [to fully mandatory guidelines] . . . ." Respectfully, that is not the question in the instant case; that was the question in *Lockridge*, and the Court answered it by opting to *Booker*-ize the guidelines, i.e., render them fully advisory. *Lockridge*, 498 Mich at 365, 389-391. As I see it, the only appropriate question now[3] is whether to maintain the *Lockridge* remedy of fully advisory guidelines or instead to *overrule* our prior decision.[4]

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[2] Even accepting the dissent's argument that the Court could have been clearer in *Lockridge* in articulating the contours of its remedial decision, the Court *explicitly rejected* two of the alternative remedies that the dissent now proposes: (1) rendering only the bottom of the guidelines advisory, see *Lockridge*, 498 Mich at 389-390 ("[W]e consider the remedy suggested in Judge SHAPIRO's concurring opinion in this case, which would render advisory only the floor of the applicable guidelines range. . . . [W]e decline to limit the remedy for the constitutional infirmity to the floor of the guidelines range."), and (2) submitting additional facts to the jury, see *id*. at 389 ("[T]he defendant asks us to require juries to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict. We reject this option.").

[3] The only appropriate question, that is, other than how to conduct proportionality review, which was a focus of our grant order.

[4] The dissent queries why stare decisis is in play, since, by its lights, the mere fact that the Court granted leave to appeal in this case is proof that *Lockridge* did not settle the remedy question. I set forth here our grant order:

> (1) whether MCL 769.34(2) and (3) remain in full force and effect where the defendant's guidelines range is not dependent on

The dissent places much emphasis on MCL 8.5 and argues that the effect of this statute, although brought to this Court's attention in *Lockridge*, was not given proper consideration by the Court. If we were to properly consider the effect of MCL 8.5, the dissent claims, we would come to the conclusion that the Legislature would have preferred *any other remedy* than the one adopted in *Lockridge*.[5] That strikes me as unlikely. But even if it were true, that would only go to whether *Lockridge* was wrong to have *Booker*-ized the guidelines; it would not tell us what to do about it now.

The remedy adopted in *Lockridge* two terms ago brought dramatic change to Michigan's criminal sentencing scheme. The dissent draws from *Lockridge*'s jurisprudential youth the conclusion that the decision "has hardly '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.' " *Post* at 517, quoting

> judicial fact-finding, see MCL 8.5; (2) whether the prosecutor's application asks this Court in effect to overrule the remedy in *People v Lockridge*, 498 Mich 358, 391 (2015), and, if so, how *stare decisis* should affect this Court's analysis; (3) whether it is proper to remand a case to the circuit court for consideration under Part VI of this Court's opinion in *People v Lockridge* where the trial court exceeded the defendant's guidelines range; and (4) what standard applies to appellate review of sentences following the decision in *People v Lockridge*. [*People v Steanhouse*, 499 Mich 934 (2016) (emphasis added).]

[5] The dissent also states that it is in agreement with "*all* of the parties and *all* of the amici—prosecutors, defendants, the Attorney General and criminal defense organizations alike— . . . that this Court should not adopt a 'fully advisory' remedy." But each party does not state that it would prefer *any* remedy over the remedy adopted in *Lockridge*. In fact, when specifically asked at oral argument, the prosecution stated that, if the Court did not adopt its proposed bifurcated mandatory/advisory guidelines system, it would prefer fully advisory guidelines to any other remedy.

Robinson v Detroit, 462 Mich 439, 466; 613 NW2d 307 (2000). It is true, in the run of cases, that a decision two terms old is less likely to have produced substantial real-world effects than one two decades its senior. But not every youngster takes time to make its presence felt. In the two years since *Lockridge* was decided, this Court and the Court of Appeals have each remanded hundreds of cases for resentencing in light of the guidelines having been rendered advisory,[6] and tens of thousands of defendants have been initially sentenced under the now-advisory guidelines.[7] Any changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced.

Against the prospect of this turbulence, we should ask: What is to be gained? When a court decides how to remedy a constitutional violation, it is necessarily operating with uncertainty. As the dissent rightly and repeatedly points out, the task, beyond eliminating the constitutional violation, is to ascertain, as best it can, the will of the Legislature. E.g., *post* at 492 ("The bottom-line question concerning severability is always one of legislative intentions."). But a court is only approximating the will of the Legislature. The Legislature can tell us its actual will. In *Lockridge*, this

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[6] A July 18, 2017 Westlaw search reveals that this Court alone has issued approximately 220 *Lockridge* remands. The Court of Appeals has surely issued at least that many.

[7] Nearly 50,000 felony offenders are convicted, and sentenced, each year in Michigan. See Mich Dep't of Corrections, *2015 Statistical Report*, p A-2, available at <https://www.michigan.gov/documents/corrections/MDOC_2015_Statistical_Report_-_2016.08.23_532907_7.pdf> (accessed July 12, 2017) [https://perma.cc/34BD-NKKH] (reporting that from 2011 to 2015 there were, on average, 49,800 felony offenders convicted each year).

Court decided, as was its duty then, on a remedy that it believed best effectuated the Legislature's intent. If it erred, the Legislature is empowered to install any sentencing scheme that it considers best for the Michigan criminal justice system, limited only by the state and federal constitutions.[8] It is certainly better

[8] The dissent criticizes my adherence to *Lockridge*'s remedial holding, and my understanding of the separation of powers, citing *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014). In *Tanner*, this Court stated:

> When questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent. . . . This is because the policy of stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. [*Id*. (quotation marks and citations omitted).]

The dissent's reliance on *Tanner* is curious because the *remedial* holding in *Lockridge* did not "interpret the Constitution." Instead, it rendered the guidelines fully advisory because the Court believed that remedy best effectuated the legislative will. See, e.g., *Lockridge*, 498 Mich at 390 ("Opening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment."). Once the Sixth Amendment violation in *Lockridge* was identified, the remedial question was one of legislative intent, a point that the dissent makes repeatedly. E.g., *post* at 492 ("The bottom-line question concerning severability is always one of legislative intentions."); *post* at 503 ("In determining the appropriate remedy, the dominant factor is . . . to assess which remedy is the most consistent with the Legislature's intentions."); *post* at 513 ("[W]hen we are forced to engage in the instant process of severance under MCL 8.5, as we are here, we must remember that it is the Legislature's intentions . . . to which we are striving to give effect.") (emphasis omitted).

The dissent's conviction that *Lockridge* erred in its remedial holding seems to have caused the dissent to confuse the constitutional and statutory (or "legislative intent") questions in this case. No legislature could authorize a court to take an unconstitutional action. And so, if "striking down a greater part of the guidelines than was necessary to remedy the Sixth Amendment violation" were itself unconstitutional, then whether to do just that (the *Lockridge* majority's remedy), or instead to retain as much as was constitutional (the dissent's preferred

equipped than this Court to weigh the policy options. The ball is in the Legislature's court. *Booker*, 543 US at 265. In the meantime, I join the majority's opinion in full.

VIVIANO, J., concurred with LARSEN, J.

MARKMAN, C.J. (*concurring in part and dissenting in part*). In *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015), this Court held that Michigan's statutory sentencing guidelines were unconstitutional for violating a defendant's Sixth Amendment right to a jury trial; the remedy set forth was to make the guidelines advisory or optional.[1] However, Lockridge was not entirely clear regarding whether the guidelines were always to be advisory or whether they could

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remedy), would not be a question of legislative will but of constitutional law. And it should go without saying that even if the majority misconstrued that will as expressed in a statute, MCL 8.5, that would be a problem of statutory, not constitutional, construction.

If the *Lockridge* remedy were based on this Court's construction of the Constitution, the Legislature would be powerless to alter our course. But, as the dissent and I agree, it is not. The Legislature remains at liberty to correct us in any way that does not contravene *Lockridge*'s only constitutional holding: that the application of Michigan's mandatory guidelines to increase sentencing ranges based on facts not found by a jury violated the Sixth Amendment. Accord *post* at 520 n 30 ("It should clearly be understood by our Legislature that, notwithstanding that aspects of its guidelines have been struck down by the Court, it retains the constitutional authority to restore such aspects to the law of this state that are not incompatible with *Lockridge*.").

[1] In other words, although trial courts must continue to score offense variables and to "take into account when sentencing" the resulting guidelines range, they are no longer required to sentence within that range. Thus, legislatively determined guidelines that had previously been binding—at least in the absence of a determination subject to appellate review that "substantial and compelling" factors existed to support a specific sentence above or below the guidelines range—are now replaced by nonbinding or "advisory" guidelines.

remain mandatory in limited respects. Today, this Court clarifies that the guidelines are never mandatory as they were intended by the Legislature always to be; instead, the guidelines are now always advisory, regardless of whether a mandatory application of the guidelines would violate the Sixth Amendment. I respectfully dissent from this part of the Court's opinion.[2] I would not hold that the guidelines are always advisory; instead, I would hold that the guidelines remain mandatory to the extent that a mandatory application does not run afoul of a defendant's Sixth Amendment right to a jury trial, as interpreted by this Court in *Lockridge* itself.[3]

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[2] This Court today also reaffirms its holding in *Lockridge* that a defendant receiving a sentence that represents an upward departure is not entitled to a *Crosby* remand, see *United States v Crosby*, 397 F3d 103 (CA 2, 2005), and holds that "the proper inquiry when reviewing a [departure] sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) . . . ." I concur in these two holdings.

[3] I dissented in *Lockridge* because I did not believe that the sentencing guidelines violate the Sixth Amendment, *Lockridge*, 498 Mich at 400-465 (MARKMAN, J., dissenting). Although I continue to believe that to be the case, my position did not prevail, and I write here in a manner that fully accepts *Lockridge*'s holding that the guidelines *do* violate a defendant's Sixth Amendment right to a jury trial to the extent that the guidelines require judicial fact-finding beyond facts admitted by the defendant, or found by the jury, to score offense variables that mandatorily increase the floor of the guidelines' minimum sentence range. However, I take this opportunity to note that if the United States Supreme Court does not share the view that Michigan's guidelines violate the Sixth Amendment, it would be beneficial to this state, and perhaps to other states that have similar guidelines, for it to provide greater clarity on this issue. This Court in *Lockridge* specifically relied on United States Supreme Court caselaw to conclude that our guidelines are unconstitutional. See *Lockridge*, 498 Mich at 364 ("We conclude that the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing

This Court possesses the authority to strike down statutes under its power of judicial review only to the extent that they are unconstitutional. The corollary proposition is that to the extent a statute is *not* unconstitutional—specifically, in this case, to the extent that mandatory application of the guidelines does not violate the Sixth Amendment—this Court lacks the authority to strike down the mandatory application of the guidelines. Because there are multiple alternative remedies that are more consistent with that proposition and more consistent with the Legislature's intentions to impose mandatory guidelines than the majority's "fully advisory" remedy,[4] I conclude that the majority here strikes down far more of the sentencing guidelines than is necessary to render them constitutional, and thus acts beyond its authority. And I am not alone in this regard as, quite remarkably, *all* of the parties and *all* of the amici—prosecutors, defendants, the Attorney General, and criminal defense organizations alike—are in full agreement that this Court should not adopt a "fully advisory" remedy.[5]

The ironic result of the Court's decision today is the effective reversion to the system this state had *before*

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guidelines and renders them constitutionally deficient."). If *Apprendi* as extended by *Alleyne* is, in fact, inapplicable to Michigan's pre-*Lockridge* guidelines system, the Supreme Court might wish to avail itself of an opportunity to so instruct us because this Court's contrary conclusion in *Lockridge* has resulted in the effective nullification and transformation of a criminal sentencing system adopted by the people of this state and their Legislature intended to render criminal sentencing more fair, more consistent, and more equitable. And yet that system has now been deemed to be unconstitutional.

[4] The majority also refers to this as an "advisory in all applications" remedy.

[5] Possibly, these parties and amici might be joined in their opposition to a "fully advisory" remedy by at least a few members of the Legislature in which, in 1998, the House and Senate voted 95-0 and 34-2 respectively in support of mandatory guidelines.

the Legislature adopted its statutory sentencing guidelines: a system in which trial courts were unconstrained by guidelines, one that in the Legislature's judgment resulted in overly broad exercises of judicial discretion and often-unjustified disparities in sentencing. See *Lockridge*, 498 Mich at 415 n 8, 462 n 40 (MARKMAN, J., dissenting). Such a system was overturned in 1998 when the Legislature enacted the mandatory guidelines rejected in their entirety today. As a result, Maximum Mike will once again be empowered to sentence defendants as high as he chooses and Lenient Larry will once again be empowered to sentence defendants as low as he chooses because they will now once again be unconstrained by the legislative reforms implemented to impose a measure of equity from case to case and from judge to judge. As a result, criminal defendants' sentences will once again be more significantly a function of *who* the sentencing judge is rather than of the *gravity* of the defendant's conduct and criminal history. Defendants who have committed similar crimes and who have similar criminal histories will be meted out increasingly disparate sentences, just as they were before the enactment of the guidelines.

This undoing of the Legislature's mandatory guidelines system is done in the name of the defendant's jury-trial rights. Whatever the nature of the disagreement I expressed concerning this rationale in *Lockridge*, what seems inarguable to me is the following. When there is *no* such constitutional consideration—when even *Lockridge* acknowledges that there is no issue of defendant's jury-trial rights—what conceivable authority does this Court have to nullify legislative efforts to limit judicial sentencing discretion and thereby seek to render criminal sentences more fair and consistent? We simply have no warrant to return defendants to a sentencing system in which they are subject to a largely

unconstrained discretion on the part of individual trial judges when the Legislature has chosen to do otherwise *and* when there are no constitutional barriers to what the Legislature has chosen to do.

I. ANALYSIS

In *Lockridge*, 498 Mich at 364, this Court held that the statutory sentencing guidelines violate the Sixth Amendment to "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." To remedy this asserted constitutional violation, the Court struck down "MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory," as well as the "requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. Today, the Court clarifies that the guidelines are *never* mandatory; rather, they are now *always* advisory, *regardless* of whether the OVs were scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt —thus, in essence, *regardless* of whether they are unconstitutional. For the reasons discussed in this opinion, I do not believe that the Court has the authority to adopt this remedy.

A. SEPARATION OF POWERS

"The powers of government are divided into three branches: legislative, executive and judicial," and "[n]o

person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The Legislature is to exercise the "legislative power" of the state, Const 1963, art 4, § 1; the Governor is to exercise the "executive power," Const 1963, art 5, § 1; and the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1. The "legislative power is the power to make laws." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008). The "judicial power" is the power to "interpret[] the law . . . ." *Id*. "In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." *Id*. (quotation marks and citation omitted; alteration in original). However, because "the Legislature cannot . . . 'trump' the Michigan Constitution," *Sharp v Lansing*, 464 Mich 792, 810; 629 NW2d 873 (2001), and "it is unquestioned that the judiciary has the power to determine whether a statute violates the constitution," *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998), this Court can, of course, strike down statutes to the extent that they are unconstitutional. Nevertheless, as this Court observed in *Sears v Cottrell*, 5 Mich 251, 259 (1858):

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and *it is only when they manifestly infringe some provision of the constitution that they can be declared void for that reason*. In cases of doubt, every possible presumption, not clearly inconsistent with the

> language and the subject matter, is to be made in favor of the constitutionality of the act. [Some emphasis added.][6]

That is, this Court only has the authority to strike down statutes to the extent that they are unconstitutional. As the concurring Court of Appeals opinion in *People v Lockridge*, 304 Mich App 278, 316; 849 NW2d 388 (2014) (SHAPIRO, J., concurring), recognized, "[W]hen ruling a portion of an act unconstitutional, courts are required, when possible, to invalidate only the portions of the act necessary to allow it to pass constitutional muster." We do not have the authority to strike down statutes merely because we disagree with their wisdom or prudence. As this Court explained in *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004):

> Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

This "separation of powers" principle, i.e., that this Court has the authority to strike down statutes only to the extent that they are unconstitutional, has been codified in MCL 8.5, which provides:

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[6] The majority contends that *Sears* does not "stand[] for the proposition that we only possess the authority to strike down statutes to the extent they are unconstitutional." However, *Sears*, 5 Mich at 259, specifically stated that "it is *only when* [statutes] manifestly infringe some provision of the constitution that they can be declared void for that reason." (Emphasis added.) If we can "only" declare statutes void "when they manifestly infringe some provision of the constitution," then does it not follow that the Court *cannot* declare statutes void when they do *not* manifestly infringe some provision of the constitution?

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be *inconsistent with the manifest intent of the legislature*, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity *shall not affect* the remaining portions or applications of the act which can be *given effect* without the invalid portion or application, provided such remaining portions are not determined by the court to be *inoperable*, and to this end acts are declared to be severable. [Emphasis added.][7]

In other words, this Court can strike down statutes only to the extent that they are unconstitutional, and the constitutional portions of the statutes must be

[7] Although the majority is correct that the *parties* do not expressly raise a "constitutional separation-of-powers concern," they do raise MCL 8.5, which is an obvious codification of the separation-of-powers principle that this Court has the authority to strike down statutes only to the extent that they are unconstitutional. See Brief Amicus Curiae, Criminal Defense Attorneys of Michigan (CDAM), p 28 ("MCL 8.5 is simply an additional codification of the principle that it is the Legislature's responsibility to make law and the Court's responsibility to interpret it."). Furthermore, CDAM did expressly raise this constitutional separation-of-powers concern in its amicus curiae brief. *Id*. at 31 ("The problem with *Lockridge* . . . is that the Court dismantled more of the sentencing guidelines than the Sixth Amendment requires, contrary to MCL 8.5 and the *separation of powers doctrine* . . . .") (emphasis added). In addition, the defendant in *Lockridge* raised the separation-of-powers doctrine. See Defendant's Brief on Appeal, *People v Lockridge* (Docket No. 149073), p 27 (The jury remedy "is also consistent with well-established rules of statutory construction, and it best respects the separation of powers and duties between the Legislature and Judiciary."), and p 35 ("Separation of powers principles further compel this Court to reject Justice Breyer's *Booker* remedy."). Finally, even if *no* party had raised the separation-of-powers principle, this Court has an independent obligation to adopt a remedy that conforms with that principle. See, e.g., Const 1963, art 3, § 2. That is, this Court does not have the authority to displace the Legislature's authority simply because no party expressly asked the Court not to breach the separation-of-powers principle.

"given effect" provided that they are not "inoperable" and not "inconsistent with the manifest intent of the legislature." That is, "by enacting MCL 8.5, the Legislature has informed us that when we sever unconstitutional language, this Court should leave intact all other language, as long as that language is 'operable' and not 'inconsistent with the manifest intent of the legislature.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 349 n 56; 806 NW2d 683 (2011). Indeed, "[t]his Court has long recognized that '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.' " *Id*. at 345 (citation omitted).[8]

The bottom-line question concerning severability is always one of legislative intentions. Whenever this Court strikes down any portion of a statute for its lack of constitutionality, we are obviously doing something that is inconsistent with the Legislature's intentions. However, that is the *singular* circumstance in which we may act incompatibly with the Legislature's intentions (only because that is consistent with the *people's* intentions when ratifying our Constitution), but in doing so we must ensure that we are only acting incompatibly with the Legislature's intentions to the extent that it is *necessary* for us to do so, i.e., to the extent required by the Constitution. As this Court has explained:

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[8] *Lockridge* did not address either the separation-of-powers doctrine or MCL 8.5 (even though the parties in *Lockridge* did), and the majority in the present case still does not address the separation-of-powers doctrine and only addresses MCL 8.5 in a passing and cursory fashion. However, it is these constitutional and statutory considerations that are central to this case.

> [*W*]*henever* the Legislature enacts legislation that this Court deems unconstitutional, it is our responsibility to rectify that unconstitutionality, notwithstanding the Legislature's intent. The next question for any Court confronted with such a situation is to determine whether the unconstitutional language can be severed from the rest of the act without undermining the act, and in this regard, the Legislature's intent *is* controlling. [*Id*. at 349 n 56.]

In other words, when this Court determines that a statute is unconstitutional, it *must* strike down that statute to the extent it is unconstitutional, but at the same time it *must* preserve whatever portions are not unconstitutional in a manner most consistent with the Legislature's intentions.[9]

B. "FULLY ADVISORY" REMEDY

In *Lockridge*, 498 Mich at 364, we held that the sentencing guidelines are unconstitutional to "the extent to which [they] *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." The question in the instant case is whether the majority's remedy of rendering the mandatory guidelines "fully advisory" or "advisory in all applications" constitutes the remedy that is most reasonably consistent with the Legislature's intentions or rather strikes down more of the guidelines than is necessary to render them constitutional. For the following rea-

[9] We must preserve whatever portions of a statute are not unconstitutional in a manner that is *most* reasonably consistent with the Legislature's intentions because our dual responsibilities are to ensure that a statute does not violate the Constitution and to ensure that the statute is being interpreted as consistently with the Legislature's intentions as possible without breaching the Constitution.

sons, I believe that the majority strikes down considerably more of the guidelines than is necessary.

In 1983, this Court promulgated *judicial* sentencing guidelines by administrative order. "However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges." *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Finally, in 1998, the Legislature enacted statutory sentencing guidelines. MCL 777.1 *et seq*. Unlike the judicial guidelines, the statutory guidelines had the full force of law and were mandatory. See MCL 769.34(2) ("Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 *shall* be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.") (emphasis added). As *Lockridge*, 498 Mich at 390, itself recognized, "The legislative intent in this provision is plain: the Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases (other than those in which a departure was appropriate) . . . ." Accordingly, rendering the statutory guidelines advisory in all cases is, I believe, directly contrary to the Legislature's intentions. Indeed, the Legislature has already considered and rejected the very system the majority adopts today.[10]

Of course, as discussed earlier, anytime this Court strikes down a portion of a statute as unconstitutional,

[10] As appellate defense counsel in *Lockridge* explained at oral argument:

it is doing at least *something* that is contrary to the Legislature's intentions. Therefore, the appropriate question is whether there are other available remedies that are somewhat *less* inconsistent with the Legislature's intentions than the majority's "fully advisory" remedy. If there are, then the majority strikes down more of the Legislature's guidelines than is necessary to render them constitutional, which, as discussed, this Court lacks the authority to do. For the reasons that follow, I believe that there are actually multiple alternative remedies that are more consistent with the Legislature's intentions than the "fully advisory" remedy.[11] Indeed, "[u]nlike a rule that would merely require judges and prosecutors to comply with the Sixth Amendment, the Court's systematic overhaul turns the entire system on its head *in every case*, and, in so doing, runs contrary to the central purpose that motivated Congress to act in the first instance." *United States v Booker*, 543 US 220, 302; 125 S Ct 738; 160 L Ed 2d 621 (2005) (Stevens, J., dissenting).

> The key achievement of the sentencing guidelines is that they remove disparity in these cases. Moving to advisory guidelines would be completely contrary to . . . the key achievement of this complicated legislative scheme.

Appellate defense counsel for Steanhouse also made this point at oral argument, stating, "What this Court chose, not only, in a sense — you know, I don't want to be disrespectful, but — mocked the legislature, because you chose to go back to the very system that they had chosen deliberately to abandon."

[11] See CDAM brief, p ix ("*Lockridge*'s remedy undermines the Legislature's intent more than is necessary to remedy the Sixth Amendment concern raised in that case."); *id*. at 28-29 ("By . . . freeing sentencing courts of important limitations on their discretion even where it was not necessary to do so, the Court encroached upon the legislative sphere."); *id*. at 31 ("The problem with *Lockridge* . . . is that the Court dismantled more of the sentencing guidelines than the Sixth Amendment requires, contrary to MCL 8.5 and the separation of powers doctrine . . . .").

C. ALTERNATIVE REMEDIES

1. ADVISORY FLOOR/MANDATORY CEILING[12]

In *Lockridge*, 498 Mich at 364, 373, this Court held that the guidelines are unconstitutional only to the extent that judicial fact-finding is used to mandatorily "increase the *floor* of the guidelines minimum sentence range," because it is "the *floor* of the guidelines range [that] compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict." (Emphasis added.) That is, according to *Lockridge*, 498 Mich at 388-389, 376 n 15, "the Sixth Amendment does not permit judicial fact-finding to score OVs to increase the *floor* of the sentencing guidelines range," but "the *top* of the guidelines range does not implicate the Sixth Amendment . . . ." (Emphasis added.) Given that the top of the guidelines range does not implicate the Sixth Amendment, this Court lacks the authority to strike down the mandatoriness of the top of the guidelines range. In other words, given that the majority acknowledges that the Legislature intended the top of the guidelines to be mandatory, see *id*. at 390 ("The legislative intent in this provision is plain: the Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases (other than those in which a departure was appropriate) at both the top and bottom ends."), and the majority acknowledges that keeping the top of the guidelines mandatory does not violate the Constitution, see *id*. at 376 n 15 ("the top of the guidelines range does not implicate the Sixth Amendment"), the Court lacks the

[12] Defendant Steanhouse argues in favor of this remedy. Although the majority in *Lockridge* addressed this remedy, the majority in the instant case does not, other than to indicate that it was rejected in *Lockridge*.

authority to disturb the Legislature's intentions to have the top of the guidelines be mandatory.

The portion of the guidelines deemed to be unconstitutional and thus invalid in *Lockridge* was exclusively that portion involving the mandatory floor of the guidelines range. However, MCL 8.5 provides that "such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application . . . ." Therefore, the invalidity of the mandatory floor of the guidelines range "shall not affect" the mandatory ceiling of the guidelines range. "[B]y enacting MCL 8.5, the Legislature has informed us that when we sever unconstitutional language, this Court should leave intact all other language, as long as that language is 'operable' and not 'inconsistent with the manifest intent of the legislature.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 349 n 56. It is indeed possible to make the floor of the guidelines range advisory but to retain the ceiling of the guidelines range as mandatory. That is, such an understanding of the guidelines is hardly "inoperable," i.e., it is fully "capable of functioning," *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 96; 803 NW2d 674 (2011), citing *Maki v East Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971), and the majority does not state otherwise.

This construction of the guidelines is also not "inconsistent with the manifest intent of the legislature." MCL 8.5. First, "there is no indication in the act that the drafters of [the guidelines] intended a different severability rule than MCL 8.5 to apply." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 346. And second, "it seems clear . . . that the Legislature would have passed the

statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act." *Id*. (quotation marks and citation omitted). Although the Legislature obviously intended both the bottom and the top of the guidelines range to be mandatory, the question is whether the Legislature would still have adopted the guidelines had it known that it could only make the top of the guidelines mandatory, and I believe that it would have.

As already discussed, before the Legislature enacted the statutory sentencing guidelines, we had judicial sentencing guidelines. The main difference between these is that the former were only advisory and the latter were mandatory. Therefore, the most obvious and straightforward purpose of the statutory guidelines was to constrain the unchecked discretion of trial courts in such a way as to render criminal sentences across the state, and across courtrooms, less disparate and more fair. See *People v Babcock*, 469 Mich 247, 267 n 21; 666 NW2d 231 (2003) (stating that "[t]he Legislature adopted these guidelines intending to reduce unjustified disparities in sentencing," citing 1994 PA 445, § 33(1)(e)(*iv*), which states that sentencing guidelines shall "[r]educe sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"). The Legislature did this by adopting a scheme in which the trial court was required to sentence defendants within a sentencing range and only allowed to depart either below or above the range if "substantial and compelling" reasons for that specific departure could be articulated. MCL 769.34(3). This would prevent Maximum Mike from sentencing too high or Lenient Larry from sentencing too low. The question

is whether, had the Legislature known that it could *only* prevent Maximum Mike from sentencing too high, it would have still enacted the guidelines. I believe that it would have because retaining the top of the guidelines as mandatory would still to a significant extent render criminal sentences less unjustifiably disparate and more fair by constraining the discretion of trial courts. There would remain some reasonable semblance of a guidelines range—a narrowed but still consequential realm within which the sentencing discretion of judges would be replaced by legislative judgments.

Before the enactment of the statutory sentencing guidelines, there were, from one point of view, essentially two problems: excessively low sentences and excessively high sentences. From this perspective, the question posed in this case is whether, had the Legislature been required to choose between addressing only *one* of these two problems or addressing *neither*, what would it have done? I cannot imagine that the Legislature would not have sought to ameliorate at least one of these problems, in particular because to have done so would have done nothing to worsen the other; it simply would have left the other problem unaddressed, just as it had been before the statutory guidelines were enacted in the first place. That is, presumably the Legislature would have preferred to address one of two problems rather than addressing zero of two problems. Moreover, even if one looks at the enactment of the statutory guidelines as addressing only a single larger problem—excessive judicial sentencing discretion and unjustified sentencing disparities—I believe that the Legislature would have chosen to solve the problem to some *limited* extent rather than to *no* extent at all.

Perhaps even more significantly, there are almost certainly far more judges within the state judiciary disposed to mete out sentences above rather than below the guidelines range; thus, rendering only the ceilings and not the floors of the guidelines mandatory would solve by far the greatest number of the unjustified sentencing disparities that the Legislature sought to remedy by adopting the guidelines in the first place.[13] In other words, although the extent to which the guidelines addressed unjustified sentencing disparities would "be diminished to a small degree as the result of the severance, what [would] remain [would] nonetheless enable[] the Legislature to realize its stated objective" in large part. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 346. By contrast, the majority's "fully advisory" remedy will not allow the Legislature to realize its stated objective *to any degree* because the guidelines will *never* be mandatory and, as a result, trial courts will be enabled to sentence defendants above the top of the guidelines without ever having to articulate any "substantial and compelling" reason for doing so.[14]

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[13] Both the prosecutor and defense counsel for Steanhouse indicated at oral argument that the heavily preponderant number of departures are above, rather than below, the guidelines range. In my own experience on the Court, the number of upward departures from the guidelines range is many times greater than the number of downward departures.

[14] In other words, defendants will now be incarcerated for lengthier periods than the Legislature intended, but at least they will be able to take comfort in knowing this to be done in exchange for their Sixth Amendment right to a jury trial (or at least this Court's interpretation of that right) being better protected. See my dissent in *Lockridge*, 498 Mich at 457-462, for a more thorough discussion of the notable ironies of the majority's conclusion that the guidelines must be rendered advisory in order to protect defendants' Sixth Amendment rights. As counsel for Steanhouse himself put it at oral argument, "You know, from the defendant's perspective, who wants [this] Sixth Amendment right?"

Obviously, the Legislature intended to make both the top and the bottom of the guidelines range mandatory. Then, in *Lockridge*, we held that making the bottom of the guidelines range mandatory violates the Constitution, and "whenever the Legislature enacts legislation that this Court deems unconstitutional, it is our responsibility to rectify that unconstitutionality, notwithstanding the Legislature's intent," *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 349 n 56 (emphasis omitted). "The next question for any Court confronted with such a situation is to determine whether the unconstitutional language can be severed from the rest of the act without undermining the act, and in this regard, the Legislature's intent is controlling." *Id*. (emphasis omitted). For the reasons discussed earlier, I believe that making only the bottom of the guidelines range advisory, which according to *Lockridge* is constitutionally required, rather than making *both* the bottom and the top of the guidelines range advisory, which is not constitutionally required, is more consistent with the Legislature's intentions.

Given that defendants here are imploring this Court to *not* "protect" them in this manner, one might wonder whether the majority's is indeed a correct construction of the constitutional "protection" our founders intended to provide defendants. See Steanhouse Brief, p 3 ("A remedy of a fully advisory guidelines scheme is not constitutionally mandated and it is worse than the disease of the Sixth Amendment violation it sought to cure. The Sixth Amendment is supposed to be a shield for the defendant, not a sword used to harm him."). See also *Booker*, 543 US at 304 (Scalia, J., dissenting) ("The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."); *id*. at 313 (Thomas, J., dissenting) ("Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require.").

While the majority in *Lockridge* observed that this proposed remedy "is a less disruptive remedy that is fairly closely tailored to the constitutional violation," it still declined to adopt it because "[o]pening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment" and because "it would require a significant rewrite of the statutory language to maintain the mandatory nature of the guidelines ceiling but render the guidelines floor advisory only." *Lockridge*, 498 Mich at 390.

Concerning the first of the majority's objections, although opening up only one end of the guidelines range would be inconsistent with the Legislature's explicit preference for equal treatment of these ends, opening up both ends of the guidelines range to mere "advisory" application is also inconsistent with the Legislature's expressed preference for mandatory guidelines. And, for the reasons set forth earlier, I believe that the Legislature would clearly have preferred to make only the bottom end of the guidelines range advisory, a system in which judicial discretion would at least be limited on *some* occasions, rather than to make both the bottom and the top of the guidelines range advisory, a system in which the guidelines would never limit judicial discretion.[15]

Concerning the second of the majority's objections, although this alternative remedy does require the Court to alter more words in the statutes than the majority's approach, I also do not believe that is a particularly

[15] While both the majority and I are engaged necessarily in speculation concerning the Legislature's hypothetical intentions had it been confronted at the time of its enactment of the guidelines with the severance decision made necessary by *Lockridge*, it is clearly the majority that proposes to invalidate a greater part of the *non-unconstitutional* provisions of the Legislature's enactment than do I and thus would seem to bear the burden of justification of this course of action.

relevant consideration in choosing the most appropriate remedy. In determining the appropriate remedy, the dominant factor is not to calculate which remedy requires the Court to alter the fewest number of words in the statute; rather, it is to assess which remedy is the most consistent with the Legislature's intentions. As an illustration, adding the word "not" to a statute that provides that somebody "shall" do something might constitute a minimalist change in regard to the number of words changed; however, it would almost certainly constitute a maximalist change in regard to maintaining consistency with the Legislature's intentions. Largely the same is true in the instant case. *Lockridge* changed "shall" to "may" across the board because it involved the "least judicial rewriting of the statute . . . ." *Id*. at 391. However, while changing "shall" to "may" across the board may consume less paper and ink, it is not the remedy most consistent with the Legislature's intentions. Instead, for the reasons earlier stated, changing "shall" to "may" with regards to *only* the bottom of the guidelines range is more consistent with the Legislature's intentions, whether defined in terms of limiting extreme sentences or in terms of checking judicial discretion and disparate criminal sentencing. It is also more consistent with this Court's authority to strike down statutes only to the extent that they are unconstitutional.

2. MANDATORY FLOOR/MANDATORY CEILING[16]

Another alternative remedy represents a slight variation of the first alternative remedy described

[16] CDAM argues in favor of this remedy, and in *Lockridge*, the Wayne County Prosecuting Attorney argued in support of it. The majority, however, did not address this proposed remedy in either *Lockridge* or in the instant case.

earlier. Under this remedy, the ceiling of the guidelines would always be mandatory just as in the first remedy, but the floor of the guidelines would also be mandatory, although the floor would have to be determined absent judicial fact-finding. A hypothetical example might be helpful to explain this remedy. If the jury's verdict or defendant's admissions supported a guidelines range of 10-20 months, but the judge-found facts supported a range of 60-100 months, the mandatory guidelines range would be 10-100 months. In other words, the trial court could sentence anywhere within that expanded range without having to articulate substantial and compelling reasons for doing so. This remedy would fully address the constitutional problem because judicial fact-finding would not be used to increase the mandatory floor of the guidelines range, yet it is also more consistent with the intentions of the Legislature than the majority's "fully advisory" remedy because both the bottom and the top of the guidelines would be mandatory.[17] It is also an "operable" remedy because it is fully "capable of functioning." *Midland Cogeneration*, 489 Mich at 96. That is, trial courts are altogether capable of determining the top of the guidelines by relying on judicial fact-finding and determining the bottom of the guidelines without relying on judicial

[17] Just as with the first alternative remedy, this remedy would prevent Maximum Mike from sentencing too high, but, unlike the first remedy, it would also prevent Lenient Larry from sentencing too low (or at least lower than the modified floor of the guidelines range as determined without reliance on judge-found facts). Given that this alternative remedy would allow both the top and the bottom of the guidelines to remain mandatory and thus would not "[o]pen[] up only one end of the guidelines range," *Lockridge*, 498 Mich at 390, which is what the majority in *Lockridge* did not like about the first alternative remedy, I do not know why the majority did not even address this proposed remedy in *Lockridge* or why the majority in the instant case still does not address this remedy.

fact-finding. The fact that this might be a slightly more time-consuming process does not render it "inoperable," and the majority does not argue that it does. Many of the fair processes guaranteed by the Constitution are time-consuming, but while this may render these processes more "difficult" or "burdensome" in some regards, it does not render them "inoperable."

3. ADVISORY IF JUDGE-FOUND FACTS/MANDATORY IF NOT[18]

Still another potential remedy is to render the guidelines advisory when the trial court engages in judicial fact-finding to score OVs that increase the guidelines range, but render the guidelines mandatory when the trial court does not engage in judicial fact-finding to score OVs that increase the guidelines range. *Lockridge* held that the guidelines are unconstitutional to the extent that they require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score OVs that mandatorily increase the guidelines range. In order to remedy this constitutional defect, *Lockridge* rendered the guidelines advisory, and now the majority asserts that the guidelines are "fully advisory" or "advisory in all applications." In other words, even when a mandatory application of the guidelines would clearly not violate the Sixth Amendment, i.e., when *no* judicial fact-finding occurs that increases the guidelines range, the majority holds that the guidelines are nonetheless advisory. Respectfully, I do not believe that the Court has the authority to do this. As discussed earlier, this Court only has the authority to strike down a statute to the *extent* that it is unconstitutional. However, in this case, although abiding by the Legislature's command

[18] The prosecutor and the Attorney General argue in favor of this remedy.

to apply the guidelines on a mandatory basis does not violate the Sixth Amendment when there has been no judicial fact-finding that increases the guidelines range, the majority nevertheless strikes down the Legislature's command to apply the guidelines on a mandatory basis in all circumstances, including those in which there has been no judicial fact-finding that increases the guidelines range.

Given that mandatory application of the guidelines does not violate the Sixth Amendment when there has been no judicial fact-finding that increases the guidelines range, the majority once again lacks the authority to strike down this mandatory application of the guidelines. The majority asserts that it does possess this authority because a bifurcated mandatory/advisory guidelines system would be "inoperable." It would be "inoperable," contends the majority, because it would be difficult in some cases to determine whether the trial court had engaged in judicial fact-finding or whether the trial court only relied on the defendant's admissions[19] or the jury's findings in scoring the OVs.[20] However, just

[19] The majority contends that the "distinction between judge-found facts and facts sufficiently admitted by a defendant that they may be used to increase the defendant's sentence is unclear." Undoubtedly, this is true to some extent, but equally undoubtedly, it is no more true than that countless other routine legal distinctions are also sometimes unclear. Once again, this observation bears little relevance to what legal obligations are genuinely "inoperable." Moreover, in its ruminations concerning judge-found facts in *Apprendi* and *Alleyne*, the United States Supreme Court discerned no particular need to opine on any difficulties in distinguishing these concepts. Also noteworthy is *People v Collins*, 500 Mich 930 (2017), in which this Court ordered oral argument on the application and directed the parties to brief this very issue. Therefore, it is to be hoped that any remaining "unclarity" regarding this matter will be promptly addressed by the Court before the end of the next term.

[20] The majority contends that "whether a jury's 'findings' on a point of fact are sufficiently conclusive to determine that it 'found' that fact beyond a reasonable doubt is not always evident." Doubtlessly so.

because a legislative command may be difficult to apply in some circumstances does not render it "inoperable." We have defined "inoperable" as "incapable of functioning." See *Midland Cogeneration*, 489 Mich at 96. While the majority contends that this remedy might result in increased numbers of appeals and elements of legal uncertainty, that is hardly tantamount to concluding that this remedy is "incapable of functioning" or "inoperable." This Court does not have the authority to strike down statutes just because it would prefer a less difficult or onerous approach in some measure. The Legislature enacted a mandatory guidelines system, and this Court has an obligation to give as much reasonable effect to this legislative command as possible under the Constitution.

The essentially bifurcated mandatory/advisory guidelines remedy does not violate the Constitution because the guidelines would be advisory whenever judicial fact-finding increased the guidelines range, which is the only situation in which the mandatory guidelines violate the Sixth Amendment according to *Lockridge*, and it would be more consistent with the Legislature's intentions than the majority's "fully advisory" remedy because whenever judicial fact-finding did *not* increase the guidelines range, the guidelines would be mandatory, which is what the Legislature clearly intended.[21] In other words, as discussed earlier

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However, courts are routinely required to make determinations that are "not always plain." Courts are not "incapable" of making such determinations, and thus this proposed remedy is again hardly "inoperable." See *Midland Cogeneration*, 489 Mich at 96.

[21] The majority contends that "the [prosecutor's] proposed bifurcated system has a bit of a '[w]hat a neat trick' flair: two mandatory components are unconstitutional when used in tandem until . . . they aren't." However, rather than this being a "neat trick" of some kind, the proposal is the straightforward and direct result of the majority's

with regard to the first alternative remedy, I believe

holding that "[w]hat made the guidelines unconstitutional . . . was the *combination* of the two mandates of judicial fact-finding and adherence to the guidelines." (Emphasis added.) If it is the "combination" of these two "mandates" that makes the guidelines unconstitutional, removing a single one of these "mandates" presumably would eliminate the constitutional problem. Contrary to the majority's characterization, this is not a matter of any sort of "trickery," but rather a matter of inexorable logic: 1 + 1 = 2 = unconstitutional, but 1 + 0 ≠ 2 ≠ unconstitutional.

Similarly, the majority contends that "[s]uch an approach certainly seems to at least undervalue the constitutional principle on which *Booker* was decided." However, given that *Booker*, 543 US at 267, held in the companion case regarding defendant Ducan Fanfan that a "sentence . . . authorized by the jury's verdict," i.e., one not based on judicial fact-finding, "does not violate the Sixth Amendment," I fail to see how this approach in any way "undervalue[s]" any such constitutional principle. See also *Lockridge*, 498 Mich at 394-395, in which this Court held that in "cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," i.e., judicial fact-finding did not increase the defendant's guidelines range, "the defendant suffered no prejudice from any error . . . ."

Finally, the majority contends that "by delaying a determination of the guidelines' mandatory or advisory nature until sentencing, the proposed system would give no weight to the notice interests protected by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny." Although under the majority's "fully advisory" system defendants will indeed know from the outset that the trial court will not be bound to sentence within the guidelines range, whereas under the bifurcated system, defendants will not know until sentencing whether the trial court will or will not be bound to sentence within the range because that will depend on whether judge-found facts increase the guidelines range, I suspect that most defendants will prefer this lack of notice over knowing from the outset that the trial court will be unrestrained by the top end of the guidelines range at sentencing. In other words, just as I believe the Legislature would prefer to have the guidelines be mandatory in at least some circumstances rather than never, I believe that defendants would likewise prefer to have the guidelines be mandatory in at least some circumstances rather than never, even if this means that defendants will not know until sentencing whether the guidelines are to be mandatory or advisory. To make clear, I do not view this approach to be ideal; I note merely that among the

the Legislature would prefer a system in which the guidelines are at least sometimes mandatory and would at least sometimes limit judicial discretion, to a system in which the guidelines are never mandatory and thus would never limit judicial discretion. That is, just as I believe the Legislature would prefer a system in which, although the bottom of the guidelines range is advisory, the top of the range would be mandatory, to a system in which both the bottom and the top of the guidelines are advisory (and thus in which effectively there are no guidelines at all), I also believe the Legislature would prefer a system in which, although the guidelines are advisory when the trial court *engages* in judicial fact-finding that increases the guidelines range, the guidelines would be mandatory when the trial court did *not* engage in judicial fact-finding that increases the range. Given that, in the absence of judicial fact-finding that increases the guidelines range, mandatory guidelines are simply not unconstitutional, this Court, again, lacks the authority to hold that the guidelines are not mandatory in the absence of judicial fact-finding that increases the guidelines range. In other words, this Court lacks the authority to adopt its "fully advisory" remedy.

4. NO JUDICIAL FACT-FINDING[22]

Alternatively, if we were to hold that trial courts could *never* score the OVs by using judge-found facts, the guidelines could always be mandatory. In other words, if we required trial courts to rely only on the

options remaining following the Court's decision in *Lockridge*, it is more consistent with the Legislature's intentions than the majority's approach, and it is constitutional.

[22] Defendant Masroor argues in favor of this remedy, but the majority does not address it.

facts found by the jury beyond a reasonable doubt or admitted by the defendant to score the OVs, the guidelines could continue to be mandatory without violating the Sixth Amendment. This remedy would solve the constitutional problem because there would never be reliance on judicial fact-finding to score the OVs, and it would also be more consistent with the Legislature's intentions than the majority's "fully advisory" remedy because it would allow the guidelines always to be mandatory. It is also an "operable" remedy because it is fully "capable of functioning," *Midland Cogeneration*, 489 Mich at 96, and the majority does not dispute this. The trial courts would simply have to score the OVs based on the facts admitted by the defendant or found beyond a reasonable doubt by the jury. While this is certainly an imperfect sentencing approach from the Legislature's perspective, it is also, once more, significantly *less* imperfect than the majority's "fully advisory" approach.

5. JURY-FOUND FACTS[23]

Finally, this Court could also require juries themselves to find the facts used to score all the OVs that are not admitted by the defendant. This remedy would allow trial courts to more accurately score the OVs and enable the guidelines to always be mandatory. The majority in *Lockridge* rejected this remedy because it would be "burden[some]." *Lockridge*, 498 Mich at 389. However, just because something is "burdensome" does not mean that it is "inoperable." This Court does

[23] In *Lockridge*, both the defendant and CDAM argued in favor of this remedy. In the instant case, both defendant Steanhouse and CDAM argued in support of this remedy at oral argument. Although the majority in *Lockridge* addressed this proposed remedy, the majority in this case does not.

not have the authority to choose its own remedy over this remedy simply because its remedy is less burdensome when its own remedy is inconsistent with the Legislature's intentions, while this remedy would be consistent with *both* the Legislature's intentions *and* the requirements of the Constitution. Jury trials themselves can be described as "burdensome," but if they are constitutionally required, they are constitutionally required.

II. REJECTION OF ALTERNATIVE REMEDIES

Because I believe that *each* of these alternative remedies is more compatible with the Legislature's intentions in enacting its mandatory guidelines than the majority's "fully advisory" remedy, I would not adopt the majority's remedy. The majority rejects (either explicitly or implicitly) each of these alternatives for one reason or another. In the present cases, the majority rejects the "bifurcated mandatory/advisory" remedy because that would lead to "endless litigation and perpetual uncertainty." In *Lockridge*, 498 Mich at 390, the majority rejected the "advisory floors/mandatory ceilings" remedy because that would require a "significant rewrite of the statutory language." Also in *Lockridge*, the majority rejected the "jury" remedy because that would "burden[] our judicial system." *Id*. at 389. And the majority in the present cases is silent as to what is deficient concerning the "mandatory ceiling/mandatory floor" and the "no judicial fact-finding" remedies, but these are apparently also unacceptable for one reason or another, despite the fact that none of them breaches the Constitution in any way.

I have already explained why I am not persuaded by the majority's reasons for rejecting these alternatives,

but I take this opportunity to reemphasize that under MCL 8.5 there are only two factors that this Court may properly consider in the process of severing that which is unconstitutional from that which is not: (a) "the manifest intent of the legislature" and (b) the operability of the post-severance legislation. Levels of litigation, the need to resolve legal uncertainties, and sundry burdens and procedures imposed on our judicial system simply do not render legislation "inoperable" any more than an automobile is rendered "inoperable" by a cracked window, a malfunctioning air conditioner, or a broken headlight.

I certainly accept that none of these alternatives is perfectly consistent with the Legislature's original intentions, or as coherent and effective in achieving the Legislature's purposes as its chosen system of sentencing. However, that system was struck down in *Lockridge*, and the question now is only which alternative is *next* best, not which is altogether equivalent. Since *Lockridge* has proclaimed that the Legislature's preferred system of sentencing is unconstitutional, some part of its chosen statutory scheme must necessarily be altered. Because the mandatory character of the scheme is, I believe, at the heart of the Legislature's intentions, I would alter that aspect as little as possible, whereas the majority jettisons it in its entirety. And in so doing so, the majority gives short shrift to proposed alternatives that might retain *some* prospect of accomplishing what the Legislature manifestly sought to achieve: the curtailment of excessive judicial sentencing discretion so that criminal sentencing disparities across the state, across courtrooms, and across judges, might be narrowed.

The majority thus places an almost insurmountable burden on the proposed alternatives to be perfect

remedies when they are incapable of being so precisely because the perfect remedy has already been struck down by the Court. Of course, the majority can find something deficient about each of the alternatives that renders it less ideal than what the Legislature began with, but that is merely in the nature of what occurs when the "ideal" has been removed from the discussion. In the end, what has been produced by the majority is a sentencing scheme that is 180 degrees removed from that enacted by the Legislature, a sentencing scheme that does little more than restore the *status quo ante* already rejected by that Legislature, a sentencing system in which there are no mandatory guidelines, no limits on excessive judicial discretion, no mechanism for fairly and equitably treating equally situated defendants sentenced at different times in different courtrooms by different judges. Thus, the Court rejects the imperfect in favor of the perfectly opposite. But when we are forced to engage in the instant process of severance under MCL 8.5, as we are here, we must remember that it is the *Legislature's* intentions, not our own, to which we are striving to give effect. These intentions could not have been any more clear in the instant case; the Legislature wanted mandatory guidelines so that criminal sentences would be more directly a function of a defendant's criminal conduct and criminal history and less a function of the individual judge who sentenced the defendant. Therefore, unlike the majority, I would maintain the guidelines as mandatory, at least to the *fullest extent possible*.

III. STARE DECISIS

The majority holds that "finality interests strongly support adherence to our holding in *Lockridge*," while

the concurrence concludes that "stare decisis" requires this Court to adhere to its holding in *Lockridge*.

First, contrary to the concurrence's contention, *Lockridge* did not hold with sufficient clarity that it was rendering the guidelines "fully advisory" or "advisory in all applications," hence the very need for an opinion in this case. See, e.g., *Lockridge*, 498 Mich at 373-374 ("[*T*]*o the extent that* OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment.") (emphasis added); *id*. at 364 ("To remedy the constitutional violation, we sever MCL 769.34(2) *to the extent that* it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory.") (emphasis added); *id*. at 365 ("[A] guidelines minimum sentence range *calculated in violation of Apprendi and Alleyne* is advisory only.") (emphasis added); *id*. at 391-392 ("*When* a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so.") (emphasis added). If *Lockridge* so clearly articulated that the guidelines are "fully advisory" or "advisory in all applications," as the concurrence asserts, (a) why did the prosecutor in this case argue otherwise? (b) why did defendant Steanhouse argue that it is "unclear from *Lockridge*" whether the guidelines are "advisory in all applications"? (c) why did this Court grant leave to appeal to address this issue? and

(d) why is this Court even bothering to write an opinion today purporting to resolve this very issue?[24]

Second, *Lockridge* addressed neither the separation-of-powers doctrine nor MCL 8.5 and thus can hardly be viewed as establishing binding authority for the instant dispute in which those principles are dominant.

Third, in *Lockridge*, 498 Mich at 393, the majority explicitly "[a]ssum[ed] arguendo" that judge-found facts had been "used to increase the defendant's mandatory minimum sentence, violating the Sixth Amendment . . . ." Accordingly, anything stated thereafter regarding the proper remedy in circumstances in which judge-found facts were *not* used to increase the defendant's mandatory minimum sentence presumably constituted dictum, which is "not binding under the principle of stare decisis." *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

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[24] The concurrence asserts that I "once understood the remedy adopted in *Lockridge* to be clear," quoting a statement from my dissent in *Lockridge* indicating that the majority was rendering the guidelines "advisory only." While indeed I stated this, I did so in the context of a lengthy opinion in which the focus was almost exclusively on whether the sentencing guidelines violated the Sixth Amendment. I concluded that the guidelines did *not* violate the Amendment and thus that it was unnecessary for me to assess the appropriate remedy for what I viewed as a nonexistent violation. More pertinently, however, my position simply did not prevail in *Lockridge*, and thus whatever I had to say about the remedy in my dissent is simply not controlling. Rather, it is the majority opinion that is both controlling and unclear. Moreover, the prosecutor and the defendant, acting in accord, have since convinced me that *Lockridge* did *not*, as the concurrence asserts, clearly hold that the guidelines are "fully advisory," in light of the specific language cited earlier in the paragraph above. Finally, the majority itself must have shared many of the same concerns as do the parties and myself given that the Court granted leave to appeal to address this issue and the present opinion has been written precisely to resolve it. I thus respectfully disagree with the concurrence that *Lockridge* left no room for dispute regarding the extent to which the majority rendered the guidelines advisory.

Fourth, even assuming that *Lockridge* had clearly held that it was rendering the guidelines "fully advisory," and that this constituted binding precedent, we have long recognized that "[w]hen questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent." *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014).[25] To the extent that *Lockridge* can be

[25] The concurrence asserts that the issue here is one of "statutory, not constitutional, construction." I respectfully disagree. As explained earlier in Part I(A), MCL 8.5 is essentially a codification of the "separation of powers" principle that this Court has the authority to strike down statutes only to the extent that they are unconstitutional. That is, even if MCL 8.5 did not exist, we would still be obligated to recognize that we have the authority to strike down statutes only to this same extent. This is because Const 1963, art 4, § 1, grants the "legislative power" to the Legislature; Const 1963, art 6, § 1, grants the "judicial power" to the judiciary; and Const 1963, art 3, § 2, provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." In sum, the Legislature has the authority to enact laws that do not violate the Constitution, and the judiciary has the authority to give reasonable meaning to legislative enactments and to exercise its power of "judicial review" to strike down legislative enactments to the extent that they violate the Constitution. Notably, then, MCL 8.5 *only* applies in those circumstances in which this Court has *first* exercised its power of "judicial review," as this Court did in *Lockridge*, to strike down legislation, which distinguishes that statutory provision from all other state laws and underscores its constitutional underpinnings. The precise question here is whether rendering the guidelines "fully advisory" violates constitutional strictures, i.e., whether this Court acts beyond its authority by striking down the guidelines in their entirety when they are only partially unconstitutional. Therefore, the issue is very much one of constitutional significance, requiring less deferential consideration of our precedents. While the concurrence is correct that the Legislature here is not "powerless to alter [this Court's] course," at least in the sense that it retains the power to adopt a constitutionally proper remedy, this does not absolve us of *our* obligation to ensure that *we* are acting within the scope of our most extraordinary authority—that of judicial review—by simply adhering to a precedent that failed to assess separation-of-powers implications. The Legislature "remains at liberty to correct us," as the concurrence asserts, *only* in the sense that it can

read as rendering the guidelines "fully advisory," as the concurrence asserts, it violated Michigan's separation-of-powers doctrine by invalidating a portion of the guidelines that the Court was not empowered to invalidate—because this portion had not been determined to violate the Sixth Amendment. Because *Lockridge* implicates the Constitution, this Court "has a duty to review the decision under *less* deferential standards of stare decisis in light of our role as the final judicial arbiter of this Constitution." *Id*. at 251 (emphasis added).[26] I do not believe that the majority's conclusory statement that "finality interests strongly support adherence to our holding in *Lockridge*" even minimally satisfies this duty of review.

Finally, *Lockridge* was decided a mere two years ago, and thus it has hardly "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*

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declare that we erred in our determination of the "legislative will" under MCL 8.5; however, the Legislature cannot correct us by declaring that we violated separation-of-powers principles by striking down a greater part of the guidelines than was necessary to remedy the Sixth Amendment violation because constitutional questions lie finally within the judiciary's authority.

[26] The high level of deference afforded to *Lockridge* by the concurrence is evidenced by the fact that it asserts several times that *Lockridge* has already clearly held that the guidelines are "fully advisory." Although, as noted, I disagree with this proposition, a fuller response would inquire whether the majority in *Lockridge* had acted within the scope of its constitutional authority in transforming mandatory guidelines into advisory guidelines. That is, if the majority in that case conceivably *had* impinged upon the Legislature's authority in adopting the remedy that the concurrence asserts it "clearly" did, the concurrence's response should be something more than "We already decided that." Instead, it should afford at least *some* consideration to rectifying the Court's error precisely because of its constitutional dimension. While the principle of deference to stare decisis is a venerable principle, it is not one by which the judiciary should be facilitated in its exercise of powers that do not belong to it.

v Detroit, 462 Mich 439, 466; 613 NW2d 307 (2000).[27] This is especially true given that all of the parties and all of the amici are now asking this Court to overrule *Lockridge* (at least with regard to what the majority today clearly establishes as its chosen remedy). The concurrence asserts that "[a]ny changes to the remedy adopted in *Lockridge* would require upending criminal sentencing in this state for a second time in two years and would set off another round of litigated questions, including whether and how to resentence the resentenced."[28] The concurrence then proceeds to inquire, "Against the prospect of this turbulence, we should ask: What is to be gained?"

To respond to the concurrence's inquiry, the following are among the things that might possibly be "gained" as a result of "any changes" in what the concurrence views as the "clear" *Lockridge* remedy:

- Separation-of-powers principles of the state constitution might be afforded greater consideration than in *Lockridge* and be more faithfully acted upon;
- Legislative intentions concerning the severance of constitutional, and unconstitutional, parts of laws struck down by this Court might be afforded greater

[27] Concerning the other stare decisis factors, *Lockridge* does not "def[y] practical workability," nor have there been any "changes in the law or facts [that] no longer justify the questioned decision." *Robinson*, 462 Mich at 464 (quotation marks and citation omitted). However, for the reasons cited throughout this section, I would hold that these stare decisis factors are not strong enough to counsel in favor of retaining it.

[28] The "turbulence" and "upending" feared by the concurrence will almost certainly be a lesser "turbulence" and "upending" than that occasioned by *Lockridge* itself, if only because what is at stake here is not whether our criminal sentencing process should be *restored* to what it was before *Lockridge* but merely whether it should be restored in *part*—specifically that part of the law as to which even *Lockridge* did not deem the sentencing guidelines to be unconstitutional.

consideration than in *Lockridge* and be more faithfully acted upon;

- The nature and breadth of the "judicial power" under the Michigan Constitution, the only power possessed by this Court, might be better assessed and exercised in the specific context of our state's criminal sentencing system;
- Some greater measure of self-government and popular control with regard to our state's criminal sentencing system might be restored;
- Legislative progress in reducing criminal sentencing disparities might again proceed, wherein criminal sentences are again determined, at least to a greater degree, by rules democratically enacted by the Legislature rather than by the decisions of hundreds of trial court judges throughout the state with widely divergent views and attitudes regarding criminal justice;
- Legislative progress in reducing criminal sentencing disparities might again proceed, wherein criminal sentences are again determined, at least to a greater degree, by a perpetrator's criminal conduct and criminal record rather than by the serendipitousness of whether the perpetrator is sentenced by Maximum Mike or Lenient Larry;
- The "ironic" outcomes arising out of *Lockridge* and identified in Part V of my dissent in that decision, such as defendants being incarcerated for lengthier periods than the Legislature intended as a direct result of *Lockridge*'s understanding of a defendant's Sixth Amendment right to a jury trial, might be forestalled or corrected to some degree. See *Lockridge*, 498 Mich at 458-462 (MARKMAN, J., dissenting); see also note 14 of this opinion.

IV. CONCLUSION

For the foregoing reasons, I believe that *each* of the five proposed alternative remedies is significantly more compatible with the Legislature's intentions in enacting mandatory sentencing guidelines than the majority's "fully advisory" remedy, and none of these is "inoperable." While undoubtedly none of these alternatives would likely be viewed as favorably by the Legislature as its own mandatory guidelines, the latter were deemed unconstitutional in *Lockridge*, and the only question today is whether the Legislature that enacted those guidelines would have preferred as an alternative the majority's "fully advisory" guidelines—effectively no guidelines at all—or an alternative that retains those parts of the guidelines that are indisputably constitutional and that limit excessive judicial sentencing discretion and unjustified sentencing disparities at least in *part* but not in *full*—at least in *part* rather than *never*. Therefore, I respectfully dissent.[29] In this position, I am notably in agreement with *all* of the parties and *all* of the amici.[30]

ZAHRA, J., concurred with MARKMAN, C.J.

WILDER, J., took no part in the decision of this case.

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[29] To the extent that this Court reaffirms its holding that a defendant receiving a sentence that represents an upward departure is not entitled to a *Crosby* remand and holds that "the proper inquiry when reviewing a [departure] sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990)," I concur.

[30] It should clearly be understood by our Legislature that, notwithstanding that aspects of its guidelines have been struck down by the Court, it retains the constitutional authority to restore such aspects to the law of this state that are not incompatible with *Lockridge*. See, e.g., *Booker*, 543 US at 265 ("Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.").

PEOPLE v WILSON

Docket No. 154039. Argued on application for leave to appeal April 13, 2017. Decided July 25, 2017.

Dwayne E. Wilson was convicted by a jury in the Macomb Circuit Court, James M. Biernat, Jr., J., of one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of unlawful imprisonment, MCL 750.349b. Because defendant had two prior felony-firearm convictions, defendant was sentenced to 10 years' imprisonment as a third-offense felony-firearm offender under MCL 750.227b(1), followed by concurrent terms of 100 to 180 months' imprisonment for the unlawful-imprisonment counts. Defendant objected at sentencing, arguing that his felony-firearm sentence was improper because his two prior convictions for felony-firearm arose from a single incident. Defendant cited *People v Stewart*, 441 Mich 89 (1992), which held that, in assessing whether a defendant is a third-offense felony-firearm offender under MCL 750.227b, prior felony-firearm convictions must arise out of separate criminal incidents. The circuit court held that *Stewart* was no longer good law because it relied on *People v Preuss*, 436 Mich 714 (1990), which had been overruled by *People v Gardner*, 482 Mich 41 (2008), and the court further held that nothing in the language of MCL 750.227b(1) requires the previous felony-firearm convictions to have arisen from separate incidents. Defendant appealed, and the Court of Appeals, MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ., reversed and remanded in an unpublished per curiam opinion, issued May 10, 2016 (Docket No. 324856), holding that defendant should have been sentenced as a second-offense felony-firearm offender rather than a third-offense felony-firearm offender because lower courts remain bound by *Stewart* unless and until the Supreme Court overrules it. The Court of Appeals further held that defendant was entitled to a remand under *People v Lockridge*, 498 Mich 358 (2015). The prosecution sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 500 Mich 889 (2016).

In a unanimous opinion by Justice LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under the plain language of MCL 750.227b(1), a defendant convicted of possession of a firearm during the commission of a felony (felony-firearm) who has two prior felony-firearm convictions is a third-offense felony-firearm offender subject to imprisonment for 10 years, regardless of whether the prior two convictions arose out of the same or separate criminal incidents. *People v Stewart*, 441 Mich 89 (1992), was overruled.

1. MCL 750.227b(1) provides that a person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of certain sections of the Michigan Penal Code, MCL 750.1 *et seq*., is guilty of a felony and shall be punished by imprisonment for 2 years; that upon a second conviction under MCL 750.227b(1), the person shall be punished by imprisonment for 5 years; and that upon a third or subsequent conviction under MCL 750.227b(1), the person shall be punished by imprisonment for 10 years. The Legislature excepted certain convictions from the statute: convictions for violations of MCL 750.223, MCL 750.227, MCL 750.227a, or MCL 750.230 are not to be counted. However, the text contains no similar exception for convictions arising out of the same criminal incident, and the presence of one limitation on the kinds of convictions that are to be counted strongly suggests the absence of others unstated. Furthermore, the text of the felony-firearm statute did not differ in any meaningful way from the habitual-offender statutes that the Supreme Court interpreted in *Gardner*; while the Court in *Gardner* emphasized that the language of the habitual-offender statutes "defies the importation of a same-incident test because it states that *any combination* of convictions must be counted," *Gardner*, 482 Mich at 51, the absence of the "any combination of" language in the felony-firearm statute did not create exceptions otherwise not present in the statute and therefore did not render the statute ambiguous. There is no separate-incidents requirement in either the habitual-offender or felony-firearm statutes, and the Supreme Court erred in *Stewart* by judicially engrafting a separate-incidents test onto the unambiguous statutory language of the felony-firearm statute. *Stewart* was wrongly decided.

2. If a case is wrongly decided, the Court has a duty to consider whether it should remain controlling law by determining whether there has been such reliance on the decision that overruling it would work an undue hardship, whether changes in the law or facts no longer justify the decision, and whether the decision defies practical workability. *Stewart* is overruled because

its reasoning was based entirely on cases that the Supreme Court has since overruled and because the other stare decisis factors were not strong enough to counsel in favor of retaining it. The Court's decision in *Gardner* undercut any reliance that defendant or others might reasonably have placed on the holding in *Stewart*. In *Gardner*, the Court, in construing the habitual-offender statutes, overruled the separate-incidents requirement that had been announced in *Preuss* and *People v Stoudemire*, 429 Mich 262 (1987). *Stewart* had merely imported the separate-incidents requirement from the habitual-offender context into the felony-firearm statute, and therefore *Gardner* left *Stewart* without foundation and defendant on notice that *Stewart* was on shaky ground. This change in caselaw diminished any reasonable reliance interest defendant or others may have had on *Stewart*, and the absence of that reliance interest weighed heavily in favor of overruling *Stewart*. Finally, while the *Stewart* rule did not defy practical workability, the absence of any reasonable reliance interest coupled with a significant intervening change in caselaw weighed heavily in favor of overruling *Stewart*.

Court of Appeals' judgment that defendant should have been sentenced as a second-offense felony-firearm offender reversed; case remanded to the trial court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*.

SENTENCES — POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY — PRIOR CONVICTIONS OF FELONY-FIREARM OFFENDERS — NO SEPARATE-INCIDENTS REQUIREMENT.

MCL 750.227b(1) sets forth the punishment for persons convicted of possession of a firearm during the commission of a felony (felony-firearm); under the plain language of MCL 750.227b(1), a defendant convicted of felony-firearm who has two prior felony-firearm convictions is a third-offense felony-firearm offender subject to imprisonment for 10 years, regardless of whether the prior two convictions arose out of the same or separate criminal incidents.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

LARSEN, J. Defendant, Dwayne Edmund Wilson, has two prior convictions for possession of a firearm during the commission of a felony (felony-firearm) arising from a single incident. He has once again been convicted of felony-firearm. May he now be properly sentenced as a third felony-firearm offender under MCL 750.227b(1)? Relying on binding precedent from this Court, see *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992), the Court of Appeals answered "no." We now overrule that precedent because nothing in the text of MCL 750.227b(1) requires that a repeat felony-firearm offender's prior felony-firearm convictions arise from separate criminal incidents, and the stare decisis factors do not counsel in favor of retaining the erroneous rule. Accordingly, we reverse, in part, the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Defendant was convicted by a jury of one count of felony-firearm, MCL 750.227b, and two counts of unlawful imprisonment, MCL 750.349b. He was sentenced to 10 years' imprisonment as a third felony-firearm offender under MCL 750.227b(1), followed by concurrent terms of 100 to 180 months' imprisonment for the unlawful-imprisonment counts. Defendant objected at sentencing, arguing that his felony-firearm sentence was improper because his previous convictions for felony-firearm arose from a single incident.[1] In support, defendant cited *Stewart*, which held that, in assessing whether a defendant is a third felony-firearm offender under MCL 750.227b(1), prior felony-

[1] It is undisputed that defendant's two prior felony-firearm convictions arose from the same criminal incident and that both preceded the criminal conduct that gave rise to defendant's latest felony-firearm conviction.

firearm convictions must arise out of separate criminal incidents. *Stewart*, 441 Mich at 95. The trial court agreed with the prosecution that *Stewart* was no longer good law because it relied on *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), which had been overruled by *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008). The trial court further agreed that nothing in the language of MCL 750.227b(1) requires the previous felony-firearm convictions to have arisen from separate incidents.

Defendant successfully sought relief in the Court of Appeals, which appropriately reasoned that all lower courts remain bound by *Stewart* unless and until this Court overrules it. *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2016 (Docket No. 324856), p 7, citing *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006); see also *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). The Court of Appeals, therefore, remanded the case to the trial court and ordered that defendant's felony-firearm sentence be reduced to five years' imprisonment. *Wilson*, unpub op at 8.

The prosecution seeks this Court's leave to appeal, arguing that *Stewart* does not comport with the plain language of MCL 750.227b(1) and should be overruled. We ordered oral argument on the application. *People v Wilson*, 500 Mich 889 (2016).

II. ANALYSIS

A.

Under the plain language of MCL 750.227b(1), a defendant convicted of felony-firearm who has two prior felony-firearm convictions is a third felony-

firearm offender subject to imprisonment for 10 years, regardless of whether the prior two convictions arose out of the same or separate criminal incidents. MCL 750.227b(1) provides:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230, is guilty of a felony and shall be punished by imprisonment for 2 years. Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be punished by imprisonment for 10 years.

The statute plainly directs courts to count convictions and apply enhanced punishments accordingly. See MCL 750.227b(1) ("Upon a second *conviction* under this subsection, the person shall be punished by imprisonment for 5 years" and "[u]pon a third or subsequent *conviction* under this subsection, the person shall be punished by imprisonment for 10 years.") (emphasis added). The Legislature did except certain convictions from the statute: convictions for violations of "section 223, 227, 227a, or 230" are not to be counted. *Id*. But the text contains no similar exception for convictions arising out of the same criminal incident. The presence of one limitation on the kinds of convictions that are to be counted strongly suggests the absence of others unstated. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003) (applying "the doctrine of expressio unius est exclusio alterius, the expression of one thing suggests the exclusion of all others").

The text of the felony-firearm statute does not differ in any meaningful way from the habitual-offender statutes this Court interpreted in *Gardner*. The habitual-offender statutes read: "If a person has been

convicted of any combination of [X] or more felonies or attempts to commit felonies, . . . the person shall be punished upon conviction of the subsequent felony . . . as follows: . . . ." MCL 769.11(1); MCL 769.12(1). In *Gardner*, we explained:

> The text clearly contemplates the *number* of times a person has been "convicted" of "felonies or attempts to commit felonies." Nothing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted. [*Gardner*, 482 Mich at 50-51.]

As with the habitual-offender statutes, the felony-firearm statute "clearly contemplates the *number* of times a person has been 'convicted' of" felony-firearm. *Id*.

Defendant argues, however, that our reasoning in *Gardner* rested on the Legislature's inclusion of the phrase "any combination of" in the habitual-offender statutes; and so, he argues, the absence of those or similar words in the felony-firearm statute leaves the Legislature's intent unclear. It is true, as defendant points out, that this Court in *Gardner* twice highlighted the "any combination of" language. See *id*. at 51, 66. The presence of that language in the habitual-offender statutes surely emphasized the fact that the Legislature had placed no restrictions on the kinds of convictions that should count. But it does not follow that the absence of such emphasizing language would have created exceptions otherwise not present. Stripped of the "any combination of" language, the text of the habitual-offender statutes at issue in *Gardner* would still contain no limitations on which convictions to count. See *id*. at 50-51. In the felony-firearm statute

at issue in this case, the only statutory exceptions pertain to underlying felonies. There is no mention in either the habitual-offender or felony-firearm statutes of a "separate incidents" requirement. Thus, the absence of the "any combination of" language in the felony-firearm statute does not render the statute ambiguous. "[W]hen statutory language is unambiguous, judicial construction is not required or permitted." *Id*. at 50.

A defendant with two prior felony-firearm convictions who is again convicted of felony-firearm is a third felony-firearm offender under MCL 750.227b(1), regardless of whether the two prior felony-firearm convictions arose out of the same criminal incident.[2] This Court erred in *Stewart* "by judicially engrafting [a separate-incidents test] onto the unambiguous statutory language" of the felony-firearm statute. *Id*. at 68. *Stewart* was wrongly decided.

B.

That *Stewart* was wrongly decided does not end our inquiry. We must still ask whether we should overrule it. "The application of stare decisis is generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014) (citation and quotation marks omitted). But "stare decisis is a 'principle of policy' rather than 'an inexorable command,' " *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000)

[2] This case does not present the issue of how to sentence a defendant who is convicted of multiple felony-firearm counts within one case, and so we decline to comment on the issue.

(citation omitted), and so, if a case is wrongly decided, "we have a duty to reconsider whether it should remain controlling law," *Gardner*, 482 Mich at 61. Our stare decisis principles direct us to consider whether there has been such reliance on the decision that overruling it would work an undue hardship, whether changes in the law or facts no longer justify the decision, and whether the decision defies practical workability. *Robinson*, 462 Mich at 464.

Most significantly, any reliance that defendant, or others, might reasonably have placed on this Court's prior holding in *Stewart* was undercut by our decision in *Gardner*.[3] *Stewart* drew its "separate incidents" rule entirely from our prior decision in *Preuss*, which, along

[3] Relying on *Gardner*, the prosecution stated at oral argument that criminal defendants could not have relied on *Stewart*'s rule "because, simply put, by committing the crime they are already outside societal norms in that situation." Although there is language in *Gardner* that might be read to support this argument, see *Gardner*, 482 Mich at 62 ("The nature of a criminal act defies any argument that offenders attempt to conform their crimes—which by definition violate societal and statutory norms—to a legal test established by *Stoudemire* and *Preuss*."), *Gardner* should not be read to imply that criminal defendants can never assert legitimate reliance interests in statutes or caselaw. The very foundations of the state and federal constitutional prohibitions on ex post facto legislation are built on the idea of such reliance, not only by the law-abiding, who have a right to expect that their lawful acts will not be made retroactively criminal, but also by the law-breaking, who have a right to expect that the punishment for their crimes will not retroactively increase. See, e.g., *Collins v Youngblood*, 497 US 37, 43; 110 S Ct 2715; 111 L Ed 2d 30 (1990) ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."); *People v Stevenson*, 416 Mich 383, 397; 331 NW2d 143 (1982) ("Increasing the authorized penalty after the fact does not deny the defendant fair notice of what conduct is criminal, yet it still violates the rule against *ex post facto* criminal laws."); see also *Marks v United States*, 430 US 188, 191-192; 97 S Ct 990; 51 L Ed 2d 260 (1977) (describing rare cases in which the Supreme Court reversed convictions on due-process grounds when "they rested on an unexpected" or "unforeseeable judicial construction of the statute").

with *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), had announced the rule in the course of construing the habitual-offender statutes.[4] In *Stewart*, this Court imported the *Stoudemire-Preuss* separate-incidents requirement from the habitual-offender context into the felony-firearm statute. *Stewart*, 441 Mich at 94-95, citing *Preuss*, 436 Mich at 717. But the Court overruled both *Stoudemire* and *Preuss* in *Gardner*,[5] 482 Mich at 61, leaving *Stewart* without foundation and defendant on notice that *Stewart* was on shaky ground. This change in our caselaw left *Stewart* an anomaly and diminished any reasonable reliance interest defendant and others may have had on it. Cf. *Robinson*, 462 Mich at 466 (holding that a 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"). While the *Stewart* rule does not "def[y] 'practical workability,' " *id*. at 464, the absence of any reasonable reliance interest, coupled with a significant intervening change in our caselaw, weighs heavily in

[4] We also stated in *Stewart* that *People v Sawyer*, 410 Mich 531; 302 NW2d 534 (1981), "should be understood to mean that a defendant may not be convicted as a repeat offender unless the prior conviction(s) precede the offense for which the defendant faces enhanced punishment." *Stewart*, 441 Mich at 94-95. In this case, both of defendant's prior convictions for felony-firearm precede the date of his third offense, and so the continuing viability of *Sawyer* is not before us in this case.

[5] The Court in *Gardner* criticized the earlier decisions for "explicitly ignor[ing] the text, turning instead to legislative history and the Court's own views regarding" legislative intent. *Gardner*, 482 Mich at 51. *Stoudemire* had not even kept its review of legislative history at home but instead, noting that the Michigan act was modeled on New York's, had relied on a floor statement by the authoring New York legislator to reveal the intent of Michigan's Legislature. *Id*. at 51-52. After determining that the stare decisis factors did not counsel against it, the *Gardner* opinion overruled *Stoudemire* and *Preuss*. *Id*. at 61-62.

favor of overruling *Stewart*.[6] See *id*. at 465 (concluding that a prior case had "fallen victim to a subsequent change in the law" because of an intervening change in our caselaw).

Defendant has suggested many reasons why the Legislature might have wanted to limit the increased penalties of MCL 750.227b(1) to convictions that arise out of separate incidents. Whatever the merit of those arguments, there is nothing in the text of the statute to suggest the Legislature's agreement with them. *Stewart*, therefore, was wrongly decided. Moreover, its reasoning is based entirely on cases that we have since overruled, and the other stare decisis factors are not strong enough to counsel in favor of retaining it. We, therefore, overrule *Stewart*. We hold that a defendant's prior felony-firearm convictions count as convictions under MCL 750.227b(1) even if they did not arise out of separate criminal incidents.

III. CONCLUSION

Defendant has two prior felony-firearm convictions. It is irrelevant under MCL 750.227b(1) that defendant's prior convictions arose out of the same criminal

[6] In a slight twist on his stare decisis argument, defendant argues that we should read a separate-incidents requirement into the felony-firearm statute because, in the years since *Stewart*, the Legislature has not amended the felony-firearm statute to specifically *omit* a separate-incidents requirement. This Court, however, has long taken the view that "legislative acquiescence is an exceedingly poor indicator of legislative intent." *Donajkowski v Alpena Power Co*, 460 Mich 243, 258; 596 NW2d 574 (1999); see also *McCahan v Brennan*, 492 Mich 730, 749-750; 822 NW2d 747 (2012); *Paige*, 476 Mich at 516; *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003). We have also rejected any notion that cases involving statutory interpretation are to be afforded any greater stare decisis weight than other cases. See *Robinson*, 462 Mich at 467; *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 181; 615 NW2d 702 (2000).

incident, and so defendant may properly be sentenced as a third felony-firearm offender. Accordingly, we reverse the Court of Appeals insofar as it held that defendant should have been sentenced as a second felony-firearm offender.

We note that we have already denied defendant's cross-application for leave to appeal. *People v Wilson*, 500 Mich 890 (2016). We further note that the prosecution's application for leave to appeal did not raise any challenge to the Court of Appeals' holding that defendant was entitled to a remand under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). Therefore, in accordance with the Court of Appeals' decision, this case is remanded to the trial court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with LARSEN, J.

In re SIMPSON

Docket No. 150404. Argued October 6, 2016 (Calendar No. 1). Decided July 25, 2017.

The Judicial Tenure Commission (JTC) filed a formal complaint against 14A District Court Judge J. Cedric Simpson, alleging three counts of judicial misconduct arising from an incident that occurred in Pittsfield Township on September 8, 2013. Around 4:22 a.m. on that date, Crystal M. Vargas, one of respondent's interns, was involved in a motor vehicle accident near respondent's home. Vargas immediately called respondent, and he arrived at the scene approximately 10 minutes after the accident had occurred. As the investigating officer was administering a field sobriety test, respondent identified himself to the officer as a judge, had a conversation with Vargas without the officer's permission, and asked the officer whether Vargas needed a ride. The investigating officer administered a preliminary breath test (PBT) to Vargas, which indicated that Vargas had a breath-alcohol content (BAC) over the legal limit, and she was placed under arrest. Later breathalyzer tests also indicated that Vargas's BAC was over the legal limit but showed a lower BAC than did the PBT. Respondent contacted the township attorney who would be handling Vargas's case, said that Vargas was his intern, and noted that Vargas would likely be involved in one of the attorney's upcoming mediation cases. Respondent also observed the discrepancy between the PBT and the breathalyzer results and requested a copy of the police report. Respondent later contacted the attorney to discuss defense attorneys Vargas might retain. After an investigation into respondent's conduct, the JTC filed its formal complaint alleging that respondent had interfered with the police investigation into the accident, interfered with Vargas's prosecution, and made misrepresentations to the JTC. The Honorable Peter Houk, the master appointed to the case, found by a preponderance of the evidence that respondent's actions constituted judicial misconduct on all three counts. The JTC agreed with these findings and concluded that respondent's conduct violated the Michigan Code of Judicial Conduct and also constituted misconduct in office and conduct clearly prejudicial to the administration of justice under Const 1963, art 6, § 30(2). The

JTC recommended that respondent be removed from office and that costs of $7,565.54 be imposed on him. Respondent petitioned the Supreme Court, requesting that it reject or modify the JTC's decision and recommendation. Respondent also moved for a remand to the JTC to consider some allegedly exculpatory information he had not received but that had been disclosed to the JTC examiner. The Supreme Court remanded the case to the JTC, the JTC remanded the case to the master, and the master decided that his previous findings were unaffected by the new evidence. The JTC also decided that the evidence did not affect its decision and recommendation. Respondent's petition to reject or modify the JTC's decision and recommendation remained before the Court.

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court *held*:

The JTC correctly found that respondent committed judicial misconduct, but it erred by concluding that removal from office was warranted. A suspension of nine months without pay was proportional to the misconduct. Respondent was properly ordered to pay costs of $7,565.54 because he engaged in conduct involving "intentional misrepresentations" or "misleading statements" under MCR 9.205(B).

1. The JTC properly concluded that the first two allegations of judicial misconduct against respondent—interference with the police investigation and interference with the prosecution—were proved by a preponderance of the evidence. With respect to the first allegation, the facts showed that respondent approached Vargas and the investigating officer as sobriety tests were being performed and interrupted the sobriety-testing process. Given that respondent was certainly aware that the officer was investigating whether Vargas was under the influence of alcohol or a controlled substance, when respondent introduced himself to the officer as "Judge Simpson," he either failed to prudently guard against influencing the investigation or used his judicial office in an effort to interfere with it. Next, respondent spoke to Vargas during the investigation without the officer's permission. Finally, respondent's question regarding whether Vargas simply needed a ride was a transparent suggestion to the officer to end his investigation and allow respondent to drive Vargas away from the scene. Respondent's behavior at the accident scene constituted judicial misconduct because he used his position as a judge in an effort to scuttle a criminal investigation of his intern. With respect to the second allegation, the evidence indicated that respondent interfered with the prosecution by improperly acting

as Vargas's legal advocate. Respondent succeeded in delaying the issuance of charges against Vargas when he convinced the township attorney to hold off on the case. Respondent consulted the township attorney about the best defense attorney to represent Vargas, raised a question about the discrepancy between the results of the PBT and the breathalyzer, and requested a copy of the police report.

2. With respect to the third allegation—misrepresentations to the JTC—the JTC's finding that respondent made an intentional misrepresentation or a misleading statement when he testified under oath that he had not had contact with Vargas between midnight and 4:00 a.m. on the morning of the accident was not proved by a preponderance of the evidence. Although respondent's testimony about contacts during that time frame was inaccurate, his testimony suggested that he was uncertain about the contact, not that he intentionally misrepresented whether he and Vargas had contact. However, the JTC's finding that respondent made an intentional misrepresentation or a misleading statement with regard to the purpose of the thousands of text messages and phone calls he and Vargas exchanged from August 2013 through November 2013 was proved by a preponderance of the evidence. Respondent admitted to the voluminous contacts between himself and Vargas but indicated that the majority of the contacts concerned a complex case Vargas was working on for respondent, but the record indicated that respondent and Vargas had already engaged in an excessive amount of communication before respondent received the evidence in the complex case. Accordingly, the JTC's finding that respondent had made an intentional misrepresentation or a misleading statement was proved by a preponderance of the evidence. Although the JTC's findings were not based on facts alleged in the complaint, because respondent did not challenge the JTC's findings on that basis, it was unnecessary to decide whether the JTC's consideration of facts not alleged in the complaint was improper.

3. Respondent's interference with the police investigation and prosecution of his intern along with the intentional misrepresentation or misleading statement he made in his answer to the complaint in explaining the nature of the extensive communications between him and Vargas warranted a nine-month suspension without pay and the imposition of costs. The JTC was generally correct in concluding that four of the seven factors set forth in *In re Brown*, 461 Mich 1291 (2000), weighed in favor of a more severe sanction. However, the Court's overriding duty in deciding the appropriate sanction to impose in judicial disciplin-

ary proceedings is to treat equivalent cases of misconduct in an equivalent manner and unequivalent cases in a proportionate manner. The Supreme Court has consistently imposed the most severe sanction of removal on judges who testified falsely under oath. In this case, respondent's false statement regarding the nature of his extensive communications with Vargas was given in the answer to the complaint. The JTC did not prove that respondent's answer was verified as required by MCR 9.209(B)(1), and so it could not establish that the answer was given under oath. Accordingly, the most severe sanction of removal was not warranted in this case. Respondent's case was most akin to *In re Lawrence*, 417 Mich 248 (1983), because, in both cases, the respondent's misconduct included misuse of the judicial office to benefit another and a nontestimonial misrepresentation. Because the respondent in *Lawrence* was suspended without pay for nine months for similarly serious misconduct, an unpaid suspension of nine months was warranted in this case and was sufficient to protect the public from this type of judicial misconduct in the future. Under MCR 9.205(B), in addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the JTC in prosecuting the complaint if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation or if the judge made misleading statements to the JTC, the JTC's investigators, the master, or the Supreme Court. Because respondent engaged in conduct involving "intentional misrepresentation" or "misleading statements" under MCR 9.205(B), the JTC properly requested imposition of the costs, fees, and expenses it incurred in prosecuting the complaint.

4. Contrary to the suggestion of the partial dissent, there are many reasons not to address allegations of misconduct that were not found and recommended to the Court by the JTC. In particular, *In re Mikesell*, 396 Mich 517 (1976), held that to do so would violate our state's Constitution. It would also violate the court rules, which suggest that the Court has the authority only to accept or reject the recommendations of the JTC unless they relate to the sanction. Further, a respondent judge is entitled to notice of the charges and a reasonable opportunity to respond to them. Without such notice, it is not clear how a respondent judge would know which charges are at issue and, therefore, which ones he or she should substantively address when a case proceeds to the Michigan Supreme Court. Whatever could be said about such a regime, it would not provide a full panoply of procedural guarantees for adjudicating allegations of judicial misconduct.

Nine-month suspension without pay and costs of $7,565.54 imposed.

Chief Justice MARKMAN, joined by Justice ZAHRA, concurring in part and dissenting in part, would have considered an additional two occasions on which respondent lied under oath—without regard to the fact that the two lies were not reflected in the complaint's allegations or the JTC's recommendation—and weighed them accordingly to determine respondent's proper sanction. Respondent falsely responded, under oath, to a question before the master about his purpose in going to the accident scene, and he also gave a false explanation in his sworn testimony before the master to explain his purpose for calling the township attorney. The majority's rationale for not taking the two sworn lies into consideration is apparently that neither instance of misconduct was specifically alleged in the JTC's recommendation. These additional lies are further examples of the misconduct with which respondent is charged and, if taken into consideration, would increase the sanction imposed on respondent. Nothing in past caselaw supports the majority's implicit reasoning for its failure to consider the two additional lies. Misconduct discernible from the record does, under Michigan law, constitute a basis on which this Court may impose judicial discipline, even if that misconduct is not specifically identified in the JTC's recommendation. Morever, respondent in the instant case would suffer no prejudice or any miscarriage of justice were this Court to hold him accountable for his lies offered while under oath. Respondents are aware of their obligation to tell the truth in disciplinary proceedings and that they could be disciplined for false testimony. A respondent should also not be given a lesser sanction for a false statement in answer to the complaint's allegations simply because the JTC has failed to prove that the respondent's answers were verified. Any untrue statement by a respondent frustrates this Court's constitutional obligation to uphold the integrity and reputation of the judiciary. An appropriate sanction in this case should take into account all of respondent's lies.

Justice WILDER took no part in the decision of this case.

1. JUDICIAL MISCONDUCT — FALSE STATEMENTS — UNVERIFIED ANSWER TO A COMPLAINT — NOT GIVEN UNDER OATH.

The Court's overriding duty in deciding the appropriate sanction to impose in judicial disciplinary proceedings is to treat equivalent cases of misconduct in an equivalent manner and unequivalent cases in a proportionate manner; the Supreme Court has consistently imposed the most severe sanction of removal on

judges who testified falsely under oath; a false statement in a document that has not been verified as required by MCR 9.209(B)(1) cannot be used to establish that a false statement was given under oath.

2. JUDICIAL MISCONDUCT — AUTHORITY TO SANCTION MISCONDUCT — ALLEGATIONS OF MISCONDUCT NOT ADDRESSED IN THE FORMAL COMPLAINT.

The Supreme Court may not address allegations of misconduct that were not found and recommended to the Supreme Court by the Judicial Tenure Commission (Const 1963, art 6, § 30; MCR 9.225).

Paul J. Fischer, *Margaret N. S. Rynier*, and *Glenn J. Page* for the Judicial Tenure Commission.

Mogill, Posner & Cohen (by *Kenneth M. Mogill* and *Erica N. Lemanski*) for respondent.

Amici Curiae:

Erane C. Washington for the Vanzetti M. Hamilton Bar Association.

Mark P. Fancher for the Michigan Chapter of the National Conference of Black Lawyers.

VIVIANO, J. This case is before this Court on the recommendation of the Judicial Tenure Commission (JTC) that respondent, 14A District Court Judge J. Cedric Simpson, be removed from office and ordered to pay $7,565.54 in costs. Respondent has filed a petition requesting that this Court reject or modify the recommendation. After reviewing the record and considering the parties' arguments, we agree with the JTC that respondent committed judicial misconduct and that the imposition of costs is warranted. However, we disagree with the JTC that removal from office is warranted. Instead, we conclude that a nine-month suspension without pay is the appropriate sanction.

I. FACTS

Respondent is a judge of the 14A District Court and therefore subject to the Michigan Code of Judicial Conduct. He has no history of misconduct. At the time relevant to this case, he was an adjunct professor at the Ann Arbor campus of Western Michigan University Cooley Law School. During the 2013 summer term, Crystal Vargas was a student in respondent's Pretrial Skills class. In June 2013, Ms. Vargas sought an internship with respondent in the 14A District Court. Respondent accepted Ms. Vargas, and she started her internship on July 10, 2013. Within days, respondent and Ms. Vargas began communicating with each other by telephone call and text message on a frequent basis. Cellular records indicate that several thousand communications were exchanged between respondent and Ms. Vargas from July 23, 2013, to November 30, 2013. Those communications were exchanged at all times of the day and night and on weekends as well.

On September 7, 2013, respondent and Ms. Vargas exchanged seven phone calls and numerous text messages. This was consistent with their pattern of communication during that summer and fall. On September 8, 2013, respondent and Ms. Vargas exchanged six text messages between 1:25 a.m. and 2:29 a.m., and they exchanged an additional six text messages between 4:20 a.m. and 4:23 a.m. At about the time the latter group of text messages was exchanged, Ms. Vargas was involved in a motor vehicle accident at the intersection of Platt Road and Michigan Avenue, less than two miles from respondent's home. Ms. Vargas called respondent at 4:24 a.m., shortly after the accident.

Within a few minutes, while Ms. Vargas was still on the phone with respondent, Pittsfield Township Police

Officer Robert Cole arrived at the scene and began investigating whether Ms. Vargas was under the influence of alcohol. At about 4:30 a.m., as Officer Cole was administering field sobriety tests to Ms. Vargas, respondent arrived at the scene. Respondent approached Officer Cole and identified himself as "Judge Simpson." Officer Cole recognized respondent as a judge, stopped the tests, walked toward respondent, and proceeded to briefly explain that Ms. Vargas had been involved in an accident.[1] Respondent then approached Ms. Vargas without Officer Cole's permission and had a brief conversation with her. Officer Cole informed respondent that Ms. Vargas was okay and that he wanted to determine whether she was fit to drive. Respondent asked, "Well, does she just need a ride or something?" Respondent moved away from the immediate vicinity, and Officer Cole continued with the sobriety tests. Based on the results of the tests, Officer Cole administered a preliminary breath test (PBT) to Ms. Vargas. The PBT indicated that Ms. Vargas had a breath-alcohol content (BAC) of 0.137%, and Officer Cole placed her under arrest.

Afterward, respondent left the scene, and Ms. Vargas was transported to the Pittsfield Township Police Department. Because Officer Cole had never had a judge appear at an investigation scene, he promptly informed his supervisor, Sergeant Henry Fusik, about respondent's appearance. Sergeant Fusik, in turn, informed the Director of Public Safety, Chief Matthew

[1] Officer Cole later testified during the JTC proceedings that when a family member or friend arrives at the scene of such an investigation, he is trained to "tell them that I'll be back with them in ten or fifteen minutes, whenever I'm done figuring out if they've been drinking or not, and then go back and make contact with them." However, Officer Cole did not do so in this case "[b]ecause he's not just a family member. He's Judge Simpson, so I'm going to talk with him."

Harshberger, about the situation. Sergeant Fusik instructed Officer Cole to process Ms. Vargas's case as he would any other case. Officer Cole subsequently administered two breathalyzer tests to Ms. Vargas, both of which indicated a BAC of 0.10%.

On September 10, 2013, the day before the police department issued a warrant request to Pittsfield Township Attorney Victor Lillich, Mr. Lillich received a telephone call from respondent. According to Mr. Lillich, respondent told him during the telephone conversation that Ms. Vargas was his intern and a "good kid" who was in a "pretty bad relationship." Respondent also told Mr. Lillich that Ms. Vargas "would be the one who would probably be doing some of the work" on an upcoming mediation case with which Mr. Lillich was involved. In addition, respondent observed that there was a discrepancy between the PBT and the breathalyzer results. Mr. Lillich responded that the discrepancy "would not be a big concern" in his decision to issue charges. Respondent requested, and Mr. Lillich agreed to provide him with, a copy of the police report.

On September 15, 2013, Mr. Lillich e-mailed the police report to respondent. In the e-mail, Mr. Lillich advised respondent that the case presented "nothing out of the ordinary" beyond the discrepancy between the PBT and the breathalyzer results, and Mr. Lillich stated that he "would be authorizing an OWI 1st" charge against Ms. Vargas.[2]

On September 17, 2013, respondent again called Mr. Lillich. According to Mr. Lillich, the "conversation was primarily about" criminal defense attorneys. In particular, Mr. Lillich explained that he and respondent discussed the names of "good defense attorneys" that Ms.

[2] That is, Mr. Lillich indicated that he would authorize a charge of operating while intoxicated (OWI), first offense, under MCL 257.625(1).

Vargas could retain. Additionally, Mr. Lillich agreed to "sit" on the case until Ms. Vargas retained an attorney.

In October 2013, Chief Harshberger sent an e-mail to Mr. Lillich inquiring about the status of the Vargas case. Mr. Lillich replied that he was "sitting on" the case "out of respect and defference [sic] to Judge Simpson." A few days later, however, Mr. Lillich returned the case to the Pittsfield Township Police Department as "denied," with a notation to refer the case to the county prosecutor. The return document indicated that Mr. Lillich disqualified himself from the case "to avoid any inference of impropriety" because respondent had contacted him regarding "his intern, Crystal Vargas."[3]

The JTC investigated respondent for his conduct related to the Vargas case. On November 12, 2014, the JTC filed a formal complaint against respondent, alleging that he had committed the following three counts of misconduct: (1) interfering with a police investigation, (2) interfering with a prosecution, and (3) making misrepresentations to the JTC. On December 17, 2014, this Court appointed the Honorable Peter Houk to serve as master. The master conducted a three-day hearing and then issued his report on April 28, 2015, finding that each of the three counts of misconduct was proved by a preponderance of the evidence.

On September 1, 2015, the JTC issued its decision and recommendation for discipline. The JTC found by a preponderance of the evidence that respondent inter-

[3] On October 28, 2013, the Pittsfield Township Police Department resubmitted the Vargas warrant request to the Washtenaw County Prosecutor's Office, and within a week, Ms. Vargas was charged with OWI, first offense. Following the disqualification of the entire 14A District Court bench, a visiting judge from the 53d District Court was assigned to the case. On January 8, 2014, Ms. Vargas pleaded guilty as charged.

fered with a police investigation, interfered with a prosecution, and made intentional misrepresentations or misleading statements to the JTC. Further, the JTC concluded that the misconduct constituted "misconduct in office" and "conduct . . . clearly prejudicial to the administration of justice," Const 1963, art 6, § 30(2),[4] and that respondent violated the Michigan Code of Judicial Conduct Canons 1,[5] 2(A),[6] and 2(B),[7] as well as MCR 9.104(1), (2), (3), and

[4] Const 1963, art 6, § 30(2), states as follows:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

[5] Canon 1 states, in relevant part, as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary.

[6] Canon 2(A) states as follows:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

[7] Canon 2(B) states, in relevant part, as follows:

> A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

(4).[8] In determining the appropriate recommended sanction, the JTC assessed the factors set forth in *In re Brown*[9] and concluded that the misconduct implicated four of the seven *Brown* factors and thus "a more severe sanction" was warranted. The JTC then concluded "that removal from office [was] an appropriate and proportional sanction for Respondent's misconduct." In addition, the JTC requested the imposition of costs in the amount of $7,565.54 because "Respondent made intentional misrepresentations or misleading statements to the [JTC] in his answer to the formal complaint, and during his testimony at the public hearing."[10]

Thereafter, respondent filed a petition in this Court to reject or modify the JTC's decision and recommendation. In addition, respondent filed a motion to remand to the JTC for further proceedings based on allegedly exculpatory information that was disclosed as a result of a Freedom of Information Act (FOIA)

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[8] MCR 9.104 states, in relevant part, as follows:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
>
> (3) conduct that is contrary to justice, ethics, honesty, or good morals;
>
> (4) conduct that violates the standards or rules of professional conduct adopted by the Supreme Court[.]

[9] *In re Brown*, 461 Mich 1291, 1291-1293; 625 NW2d 744 (2000).

[10] According to the JTC, the $7,565.54 amount represented "the costs, fees, and expenses incurred by the [JTC] in prosecuting the complaint. See MCR 9.205(B)."

request to the Pittsfield Township Department of Public Safety. Respondent claimed that the FOIA request revealed significant exculpatory evidence concerning the first two counts of the complaint that had been disclosed to the JTC examiner but not to respondent.[11] We remanded the case to the JTC. The JTC, in turn, remanded the case to the master for a determination of whether the evidence would alter his findings, how the nondisclosure occurred, and the reasons for the nondisclosure. After conducting a two-day hearing, the master concluded that the evidence did not alter his previous findings. In addition, the JTC concluded that the evidence did not affect its decision and recommendation.[12] Respondent's petition to modify or reject the JTC's decision and recommendation is now before this Court.

II. STANDARD OF REVIEW

"Judicial tenure cases come to this Court on recommendation of the JTC, but the authority to discipline judicial officers rests solely in the Michigan Supreme Court."[13] This Court reviews de novo the JTC's findings of fact, conclusions of law, and recommendations for discipline.[14] "The Court may accept or reject the recommendations of the JTC or modify them by imposing greater, lesser, or entirely different sanctions."[15] The

[11] For instance, the alleged exculpatory evidence included a September 8, 2013 e-mail from Chief Harshberger to Sergeant Fusik stating that Officer Cole had "handled everything by the numbers."

[12] Although we agree with the master and the JTC that this evidence was improperly withheld, we also agree that it does not materially exculpate respondent.

[13] *In re Morrow*, 496 Mich 291, 298; 854 NW2d 89 (2014).

[14] *Id*.

[15] *In re James*, 492 Mich 553, 559-560; 821 NW2d 144 (2012).

examiner has the burden to prove each allegation of judicial misconduct by a preponderance of the evidence.[16] " '[I]t is the JTC's, not the master's conclusions and recommendations that are ultimately subject to review by this Court.' "[17]

III. ANALYSIS

A. FINDINGS OF FACT

1. COUNT 1: INTERFERENCE WITH THE POLICE INVESTIGATION

The JTC concurred with the master's finding with respect to Count 1, stating that "a preponderance of the evidence showed that Respondent used his judicial office to interfere, or to attempt to interfere, with the police investigation." We agree.

The facts show that respondent exited his vehicle and approached Ms. Vargas and Officer Cole as sobriety tests were being performed. Indeed, respondent *interrupted* the sobriety-testing process. Respondent, who had prosecuted numerous drunk-driving cases on behalf of Superior Township before he became a judge, was certainly aware that Officer Cole was investigating whether Ms. Vargas was under the influence of alcohol or a controlled substance. Given these circumstances, when respondent began his interaction with Officer Cole by introducing himself as "Judge Simpson," he appears at best to have failed to prudently guard against influencing the investigation and at worst to have used his judicial office in a not-so-subtle effort to interfere with the investigation. Indeed, but

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[16] *In re Morrow*, 496 Mich at 298.

[17] *In re Adams*, 494 Mich 162, 170 n 8; 833 NW2d 897 (2013), quoting *In re Chrzanowski*, 465 Mich 468, 481; 636 NW2d 758 (2001) (alteration in original).

for respondent's status as a judge, Officer Cole would not have spoken to respondent until Officer Cole completed his investigation. Next, respondent spoke to Ms. Vargas during the investigation without Officer Cole's permission—another action an ordinary citizen would not have been permitted to take. Finally, respondent's question—"Well, does she just need a ride or something?"—was a transparent suggestion to Officer Cole to end his investigation and allow respondent to drive Ms. Vargas away from the scene.[18]

We believe that respondent's behavior at the accident scene constitutes judicial misconduct. Respondent used his position as a judge in an effort to scuttle a criminal investigation of his intern. Count 1 was proved by a preponderance of the evidence.

2. COUNT 2: INTERFERENCE WITH THE CRIMINAL PROSECUTION

The JTC concurred with the master's finding with respect to Count 2, stating that "a preponderance of the evidence showed that Respondent interfered, or attempted to interfere, with the prosecution of the criminal case against Ms. Vargas." We agree.

The facts show that before Mr. Lillich, the township prosecutor, had even received a warrant request, respondent contacted him to discuss his intern's arrest.[19] Respondent described Ms. Vargas as a "good kid" who was in a "pretty bad relationship." In addition, respondent reminded Mr. Lillich that he had met Ms. Vargas in the past and would be working with her in the future. Finally, respondent raised an evidentiary

[18] As stated by the master, "Respondent's question clearly implies that he [was] available to short circuit the process."

[19] Because Mr. Lillich appeared in respondent's court, he was obviously aware of respondent's status as a judge.

issue—the discrepancy between the PBT and breathalyzer results. We believe respondent's purpose in making these statements was to advocate on behalf of Ms. Vargas and to persuade Mr. Lillich to deny the impending warrant request.

After receiving a copy of the police report, respondent again contacted Mr. Lillich. During this conversation, as found by the master and the JTC, respondent discussed with Mr. Lillich potential defense attorneys to represent Ms. Vargas. In addition, the conversation resulted in Mr. Lillich's agreeing to "sit" on the case until Ms. Vargas retained an attorney who could discuss any potential "problems" with the case. Several weeks later, when Chief Harshberger inquired about the status of the case, Mr. Lillich acknowledged respondent's involvement in the matter and stated that he was "sitting on" the case out of respect and deference to respondent. Indeed, respondent's involvement in the case was cited as the reason that Mr. Lillich denied authorization of the warrant and disqualified himself.

We believe that each of these actions—individually and taken together—constitutes judicial misconduct. Respondent improperly acted as a legal advocate for Ms. Vargas and used his position as a judge to thwart the township's criminal prosecution of his intern. And he succeeded for a time in delaying the issuance of the charges. Count 2 was proved by a preponderance of the evidence.

3. COUNT 3: MISREPRESENTATIONS

With respect to Count 3, we are confronted with an unusual circumstance: None of the JTC's findings is traceable to the allegations of misconduct in the com-

plaint.[20] The JTC's allegations concerning respondent's alleged misrepresentations are contained in ¶¶ 64-85 of the complaint. Although the master found that certain of these allegations were proved by a preponderance of the evidence and that others were not,[21] the

[20] Indeed, both of the remaining allegations relate to facts occurring after the complaint was filed—the evidence on which the JTC relies is the answer to the complaint and a small portion of respondent's testimony under oath at the public hearing. It is clear that the JTC can proceed on additional charges arising after the complaint is filed, see, e.g., MCR 9.209(B)(2) ("Wilful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint."). But MCR 9.213 provides the proper procedure for giving a respondent notice of the JTC's intention to amend the complaint. If the complaint is amended, the respondent must be given an opportunity to defend against the charges. MCR 9.213 provides:

> The master, before the conclusion of the hearing, or the commission, before its determination, may allow or require amendments of the complaint or the answer. The complaint may be amended to conform to the proofs or to set forth additional facts, whether occurring before or after the commencement of the hearing. If an amendment is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment.

Like the JTC, we have declined to address charges that are not formally charged in the complaint. See *In re Hocking*, 451 Mich 1, 4-5; 546 NW2d 234 (1996) ("The commission also found a 'strong indication of a pattern of gender bias,' but refused to make a formal finding in this regard because gender bias was not an allegation formally charged in the complaint."); *id*. at 24 ("Thus, because the complaint did not charge, and the evidence does not establish, gender bias, we agree that such a conclusion is inappropriate."). See also *In re Hague*, 412 Mich 532, 563 n 11; 315 NW2d 524 (1982) ("The supplemental complaint to Formal Complaint No. 23 is the sole basis for the Court's [findings of misconduct] in this case.").

In this case, no amended complaint was filed. However, because respondent has not challenged the JTC's findings on this basis, we need not decide whether the JTC improperly considered facts not alleged in the complaint.

[21] The master made no findings of misconduct regarding the misrepresentations alleged in ¶¶ 64-67 of the complaint (regarding respondent's

JTC did not adopt any of these findings. Instead, the JTC made two additional findings not based on the allegations in the complaint, only one of which was addressed by the master.

In particular, the JTC found that respondent made "an intentional misrepresentation or misleading statement when he testified under oath at the public hearing that he had no contact with Ms. Vargas between midnight and 4:00 a.m. on September 8, 2013." The JTC also found that respondent made "an intentional misrepresentation or a misleading statement" in his answer to ¶ 65 of the complaint regarding the purpose of the large volume of telephone calls and text messages he exchanged with Ms. Vargas between August 1, 2013, and November 30, 2013. Because we have long held that our focus in judicial disciplinary proceedings

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statements to the JTC about his contacts and relationship with Ms. Vargas), instead focusing, like the JTC did in its findings, on respondent's answer to ¶ 65, which is discussed in more detail later in this opinion. The master found that the allegations in ¶¶ 68-69 of the complaint (regarding respondent's reason for appearing at the accident scene) were proved by a preponderance of the evidence. The master did not address the allegations in ¶¶ 70-71 (regarding whether respondent spoke with Officer Cole while Officer Cole was administering sobriety tests to Ms. Vargas). The master found that the allegations in ¶¶ 72-75 (regarding whether respondent was truthful in his correspondence with the JTC concerning whether his actions at the scene intruded on Officer Cole's investigation and whether he asked for, suggested, or implied that he wanted special treatment for Ms. Vargas), were proved by a preponderance of the evidence. The master found that the allegations in ¶¶ 76-79 (regarding whether respondent was truthful in his correspondence with the JTC concerning whether Ms. Vargas showed up at his home unexpectedly after her release from jail, and whether he only had "snippets" of conversations with Ms. Vargas after the date of the accident) were not proved. Finally, with respect to the allegations in ¶¶ 80-85 (regarding whether respondent was truthful in his correspondence with the JTC concerning the purpose of his interactions with the township attorney), the master concluded that respondent "was not truthful in his answers" for the reasons expressed elsewhere in the master's report.

is on the JTC's findings,[22] it is to those findings that we now turn.

The JTC first found that "[r]espondent made an intentional misrepresentation or misleading statement when he testified under oath at the public hearing that he had no contact with Ms. Vargas between midnight and 4:00 a.m. on September 8, 2013." In particular, the JTC found that the following exchange constituted a misrepresentation or misleading statement under oath:

> *Examiner*: Did you have any contact with Ms. Vargas between midnight and 3:30 that morning?
>
> *Respondent*: Which morning?
>
> *Examiner*: I'm sorry. On the day that she was -- on the morning she was arrested, did you have any contact with her between midnight and 3:30 or 4:00 that morning?
>
> *Respondent*: No.
>
> *Examiner*: And when you say no, that's not by text messages or anything else; correct?

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[22] See *In re Mikesell*, 396 Mich 517, 524-526; 243 NW2d 86 (1976). In *In re Mikesell*, we explained that "[u]nder Const 1963, art 6, § 30(2), this Court may take action against a judge '[o]n the recommendation of the judicial tenure commission.' " *Id*. at 524 (second alteration in original). Applying the rule in that case, the Court explained:

> Thus, while the original complaint filed against the respondent contained 14 paragraphs of which 12 were allegations of misconduct, this Court concerns itself only with paragraphs 9-14 of the complaint. The Commission adopted and confirmed the report of the Master in all respects. The Master found that the allegations of paragraphs 3-8 of the complaint were not proven. *They are not part of the recommendation of the Commission and will not be considered by this Court*. [*Id*. (emphasis added).]

See also *In re Chrzanowski*, 465 Mich at 481 ("[P]ursuant to [Const 1963, art 6, § 30(2)], it is the JTC's, not the master's conclusions and recommendations that are ultimately subject to review by this Court.").

> *Respondent*: I don't believe there were any text messages. I don't believe that there was any contact.

In fact, telephone records indicated that respondent and Ms. Vargas exchanged six text messages between 1:25 a.m. and 2:29 a.m. on September 8, 2013. Thus, respondent did not provide accurate information when he testified that he did not have any contact with Ms. Vargas during that time frame.

Nonetheless, it is not clear that respondent made an intentional misrepresentation to the JTC through this testimony. After answering "no" to the examiner's question about whether he had any contact with Ms. Vargas between midnight and 3:30 or 4:00 on the morning at issue, respondent equivocated by adding that he did not "believe" that there was any communication.[23] Moreover, respondent acknowledged during the hearing that he communicated with Ms. Vargas "into the evening" of September 7, 2013. And the JTC found that respondent did not testify falsely about his contacts with Ms. Vargas after 4:00 a.m. on September 8, 2013, i.e., the period during which the accident occurred. Therefore, considering this context, it appears that respondent simply may not have recalled the precise timing of a few of the many communications he had with Ms. Vargas—communications that were not central to the allegations of misconduct in this case.

We find that respondent's testimony on this point was careless and that he provided inaccurate informa-

[23] And, perhaps as a result, the JTC equivocated as well, finding that "[r]espondent made an intentional misrepresentation or *misleading statement*." (Emphasis added.) That is, the JTC did not specifically find that respondent made "an intentional misrepresentation." If the JTC intended to communicate a finding that respondent made an "intentional misrepresentation," it should not have expressed its finding in the alternative.

tion. However, we do not believe that the JTC has sustained its burden of proving by a preponderance of the evidence that respondent made an intentional misrepresentation or misleading statement regarding his contacts with Ms. Vargas before 4:00 a.m. on September 8, 2013. Consequently, we reject the JTC's conclusion that this alleged act constituted misconduct.

Second, the JTC found that "[r]espondent made an intentional misrepresentation or a misleading statement regarding the purpose for the thousands of texts [sic] messages he exchanged with Ms. Vargas between August 1, 2013, and November 30, 2013." This particular finding refers to respondent's answer to ¶ 65 of the formal complaint, in which, after admitting the factual allegation, respondent stated that "the vast bulk of the communications related to a complex, sensitive project Ms. Vargas was working on for Judge Simpson in the case of *People v Nader Nassif*, #CRW 13-1244-FH." Under MCR 9.209(B)(1), the answer to the complaint must be "verified by the respondent." Although the answer was signed by respondent, the JTC has not shown that it was verified. There is no indication in the record that respondent verified the answer by oath or affirmation, MCR 2.114(B)(2)(a), or by a signed and dated declaration, MCR 2.114(B)(2)(b). Nevertheless, any misrepresentations or misleading statements in respondent's unverified answer may still be grounds for a finding of misconduct. See MCR 9.209(B)(2) ("Wilful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.").

With regard to this finding of misconduct, we agree with the JTC that respondent made "an intentional misrepresentation or a misleading statement." The

sheer number of communications—which were frequently exchanged during the night and on weekends—is inconsistent with respondent's explanation that the communications related to court business, including an in camera review of evidence in the *Nassif* case. Moreover, respondent testified that he learned that the *Nassif* case was assigned to him on August 11 or 12, and that his court did not receive the evidence for the in camera review until September 12. Yet respondent and Ms. Vargas had already exchanged a surfeit of communications by then. In addition, this explanation was inconsistent with another explanation advanced by respondent—that the communications were attributable to the "problems" that Ms. Vargas was having with her former boyfriend, who allegedly had been violent toward her.[24]

On the basis of the foregoing evidence, we affirm the JTC's finding that respondent made "an intentional misrepresentation or a misleading statement" when he attributed the "vast bulk" of his communications with Ms. Vargas to the *Nassif* case.[25] We believe the JTC's finding has been proved by a preponderance of the evidence.

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[24] While a judge may certainly defend against the charges within the bounds of the law, he or she cannot make knowingly false statements in the course of a JTC investigation. See generally *In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (YOUNG, J., concurring) ("[W]here a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater.").

[25] Although there is no direct evidence of the precise nature of the relationship between respondent and Ms. Vargas, it is evident based on the multitudinous communications between them that the relationship far exceeded the professional boundaries we would expect in any workplace, especially in a judge's chambers. However, the JTC did not make any charges against respondent for having an inappropriate relationship with his intern. Instead, the formal complaint alleged only that he made false statements to the JTC concerning the nature and extent of his

B. CONCLUSIONS OF LAW

As stated above, the JTC concluded that respondent's misconduct constituted misconduct in office, Const 1963, art 6, § 30(2), and MCR 9.205; conduct clearly prejudicial to the administration of justice, Const 1963, art 6, § 30(2), and MCR 9.205; a 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 Canon 1; irresponsible or improper conduct that erodes public confidence in the judiciary, contrary to Canon 2(A); conduct involving impropriety and the appearance of impropriety, contrary to Canon 2(A); a failure to respect and observe the law and to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to Canon 2(B); conduct that is prejudicial to the proper administration of justice, contrary to MCR 9.104(1); conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2); conduct that is contrary to justice, ethics, honesty, or good morals, contrary to MCR 9.104(3); and conduct that violates the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4).[26]

We agree with the JTC in most respects, but we decline to decide whether respondent committed mis-

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relationship, personal contacts, and communications with Ms. Vargas—allegations that were not resolved by either the master or the JTC in their respective findings.

[26] We note that it is unclear whether MCR 9.104 even applies in this context because that rule, and the entire subchapter in which it appears, governs professional disciplinary proceedings before the Attorney Discipline Board—not disciplinary proceedings before the JTC; however, because respondent has not challenged the JTC's conclusions on this basis, we do not address the issue.

conduct in office, contrary to Const 1963, art 6, § 30(2), and MCR 9.205, because it is not necessary for us to reach that question.[27]

C. SANCTION

The JTC recommends that this Court remove respondent from office as "an appropriate and proportional sanction for Respondent's misconduct" because respondent "intentionally used his status as a judge in an attempt to influence the investigation and prosecution of [a] criminal case for the benefit of his intern" and "made intentional misrepresentations or misleading statements, under oath, at the public hearing and in his answer to the formal complaint." The JTC arrived at this recommendation after assessing the *Brown* factors and concluding that "a more severe sanction" was warranted.

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[27] Respondent argues that he cannot be found liable for "misconduct in office" because his conduct did not constitute the common-law offense of misconduct in office. See *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), quoting Perkins & Boyce, Criminal Law (3d ed), p 543 ("At common law, misconduct in office constituted 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' "). Although this Court has not yet addressed whether "misconduct in office," under Const 1963, art 6, § 30(2), and MCR 9.205(B), is limited to the common-law offense, we have repeatedly suggested that it is not so limited. See, e.g., *In re Probert*, 411 Mich 210, 234-235; 308 NW2d 773 (1981) (in which the respondent, among other acts of misconduct, "procured an employment test for his friend, and assisted her in preparing answers in advance of the test," and this Court agreed with the JTC that the respondent was liable for misconduct in office and conduct clearly prejudicial to the administration of justice because those acts were "within the purview of Const 1963, art 6, § 30, and GCR 1963, 932.4") (quotation marks omitted). We need not address whether respondent may be found liable for "misconduct in office," however, given our conclusion that respondent engaged in "conduct that is clearly prejudicial to the administration of justice" under the same constitutional provision and therefore may be sanctioned by this Court.

The seven *Brown* factors are as follows:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
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> (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.[28]

The JTC stated that four of the seven *Brown* factors weighed in favor of a more serious sanction; only the first and seventh factors did not. The JTC's discussion of the second factor did not specifically address whether the second factor weighed in favor of a more serious sanction. We generally agree with the JTC's assessment. With regard to the first factor, we agree with the JTC that the factor does not weigh in favor of a more serious sanction because "[t]here was no evidence . . . that Respondent repeated similar misconduct in other cases." Indeed, we find it noteworthy that

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[28] *In re Brown*, 461 Mich at 1292-1293.

there is no evidence that respondent committed *any* misconduct in other cases, which we bear in mind when determining the appropriate sanction. With regard to the second factor, the JTC properly noted that respondent's misconduct did not occur on the bench but nonetheless involved his position as a judge. The third and fourth factors counsel a graver sanction because, as the JTC discussed, respondent interfered in a criminal investigation and prosecution, then misrepresented certain facts during the JTC investigation. The fifth factor weighs in favor of a more severe sanction because respondent's repeated efforts to prematurely end Ms. Vargas's criminal matter, as well as his lack of candor in the JTC proceedings, evidence a premeditated endeavor to commit misconduct. Regarding the sixth factor, we agree with the JTC that it justifies a greater sanction, albeit on different grounds. As noted above, we disagree with the JTC's conclusion that respondent made intentional misrepresentations or misleading statements at the public hearing. However, we conclude that respondent's misconduct in interfering with the police investigation and criminal prosecution undermined the ability of the justice system to discover the truth of what occurred in the legal controversy involving Ms. Vargas. As for the seventh factor, the JTC appropriately observed that respondent's misconduct did not relate to any protected classes.

"This Court gives considerable deference to the JTC's recommendations for sanctions, but our deference is not 'a matter of blind faith[.]' "[29] "Instead, it 'is a function of the JTC adequately articulating the bases for its findings and demonstrating that there is a reasonable relationship between such findings and the

[29] *In re Morrow*, 496 Mich at 302, quoting *In re Brown*, 461 Mich at 1292 (alteration in original).

recommended discipline.' "[30] "This Court's overriding duty in the area of judicial discipline proceedings is to treat 'equivalent cases in an equivalent manner and . . . unequivalent cases in a proportionate manner.' "[31] We decline to adopt the JTC's recommended sanction of removal from office.

In this case, as explained previously, respondent attempted to and did interfere with a police investigation and the prosecution of his intern. Moreover, respondent made an intentional misrepresentation or misleading statement in his answer to the complaint when he claimed that the "vast bulk" of communications between him and Ms. Vargas concerned the *Nassif* case. The public has a right to expect more of its judges. "As the cornerstone of our tripartite system of government, the judiciary has a public trust to both uphold and represent the rule of law."[32] Our judicial system depends on public confidence in the integrity and impartiality of the judiciary.[33] Because the people " 'are entitled to a judiciary of the highest integrity, in both appearance and in fact,' " this Court " 'bears the obligation under the constitution adopted by "we the people" to maintain and enforce standards of judicial fitness.' "[34]

We have previously sanctioned judges for attempting to interfere in the legal process on behalf of themselves or others. In *In re Brown*, the respondent was involved in an automobile accident, he knew one of the respond-

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[30] *In re Morrow*, 496 Mich at 302, quoting *In re Brown*, 461 Mich at 1292.

[31] *In re Morrow*, 496 Mich at 302, quoting *In re Brown*, 461 Mich at 1292.

[32] *In re Hocking*, 451 Mich at 6.

[33] *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998).

[34] *In re McCree*, 495 Mich 51, 83 n 39; 845 NW2d 458 (2014), quoting *In re James*, 492 Mich 553, 574; 821 NW2d 144 (2012) (MARKMAN, J., concurring in part and dissenting in part).

ing police officers, he informed the officers that the other driver was speeding, and he requested that they issue her a ticket.[35] The JTC found that the respondent was " 'attempting to use the prestige of [his] office to gain a personal advantage.' "[36] This Court adopted the JTC recommendation of a 15-day suspension without pay.[37] In *In re Mazur*, the respondent attempted to assist a former neighbor whose daughter had been arrested by contacting the judge assigned to the case and asking the judge to release her on a personal recognizance bond.[38] Pursuant to the settlement agreement between the JTC and the respondent, this Court imposed a public censure and a 30-day suspension without pay.[39] And in *In re Lawrence*, the respondent committed five acts of misconduct, one of which was the improper use of his judicial office to influence a licensing agency for the benefit of an acquaintance.[40] In particular, the respondent "clearly stated that [the respondent's acquaintance], the applicant for a gun permit, was a probation officer and was required to go into the inner city of Detroit at all hours during the course of his probation duties."[41] This Court stated that "[s]uch information was not true and was clearly a misrepresentation"[42] and imposed, for that and other misconduct, a nine-month suspension without pay.[43]

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[35] *In re Brown (After Remand)*, 464 Mich 135, 136-137; 626 NW2d 403 (2001).

[36] *Id*. at 137 (alteration in original).

[37] *Id*. at 141.

[38] *In re Mazur*, 498 Mich 923, 925 (2015).

[39] *Id*. at 926.

[40] *In re Lawrence*, 417 Mich 248, 261; 335 NW2d 456 (1983).

[41] *Id*.

[42] *Id*.

[43] *Id*. at 267.

We have also previously sanctioned judges for making misrepresentations while not under oath. In *In re Lawrence*, as noted previously, the respondent made a misrepresentation in a letter to a licensing agency.[44] In *In re Binkowski*, the respondent modified a letter that was sent to him by the JTC "to convey to his colleagues the erroneous impression that the outcome of the commission's inquiry into the grievances which had been filed [against him] was a straightforward and unencumbered dismissal of those grievances."[45] This Court imposed a public censure against the respondent.[46] In *In re Milhouse*, the respondent filed a judgment of sentence falsely indicating that the criminal defendant had waived his right to counsel and pleaded guilty to the charged offense.[47] During the JTC investigation, the respondent "submitted a written reply to the grievance. In that reply, [he] did not make a full and fair disclosure and knowingly made false and misleading statements that he had mistakenly entered the judgments and closed the files and that it was not his intent to falsify documents or deprive [the criminal defendant] of his right to due process."[48] In addition, in his answer to the 28-day letter,[49] the respondent "did not make a full and fair disclosure and knowingly made false and misleading statements that he had mistakenly closed the files and he had not intended to knowingly and purposely deprive [the criminal defendant] of his due process rights."[50] In accordance with

[44] *Id*. at 261.

[45] *In re Binkowski*, 420 Mich 97, 105-106; 359 NW2d 519 (1984).

[46] *Id*. at 107.

[47] *In re Milhouse*, 461 Mich 1279, 1280 (2000).

[48] *Id*. at 1281.

[49] A 28-day letter is a letter of inquiry from the JTC to the judge under investigation. See *In re Ferrara*, 458 Mich at 355 n 6.

[50] *Id*.

the JTC's recommendation and the respondent's consent, this Court imposed a public censure and a 10-day suspension without pay, with credit given for a 10-day suspension already imposed by the district court.[51] Finally, in *In re Radzibon*, the respondent committed acts of misconduct that included filing "a false and incomplete inventory of estate assets" when acting as an attorney in a probate court.[52] This Court, with the respondent's consent, adopted the JTC recommendation of a 90-day suspension without pay and restitution of $1,000 for the respondent's acts of misconduct.[53]

We acknowledge that "[t]his Court has consistently imposed the most severe sanction by removing judges for testifying falsely under oath."[54] However, in each case in which this Court has removed a judge for testifying falsely under oath, the judge testified falsely at the JTC hearing itself or another court hearing.[55]

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[51] *Id*. at 1279.

[52] *In re Radzibon*, 457 Mich 1201, 1204 (1998).

[53] *Id*. at 1205.

[54] *In re Adams*, 494 Mich 162, 186; 833 NW2d 897 (2013).

[55] See *In re Ryman*, 394 Mich 637, 643; 232 NW2d 178 (1975) ("The master further found that the respondent gave false testimony in a number of instances in testifying before the master as to the facts related to his practice of law after ascending [to] the bench."); *In re Ferrara*, 458 Mich at 362-363 ("Respondent displayed a similar disregard for the truth, as well as a lack of candor with the tribunal, when she answered questions before the master and this Court regarding whether she uttered the ugly words disseminated to the public by, and attributed to her in, the press."); *In re Noecker*, 472 Mich at 9; ("[The JTC] found that [respondent] failed to offer credible testimony when under oath in the public hearing."); *In re Nettles-Nickerson*, 481 Mich 321, 337; 750 NW2d 560 (2008) ("Respondent's act of perjury in her divorce case undermined the ability of the justice system to discover the truth of her ex-husband's residency, which if known at the time of Respondent's misrepresentations would have prompted the Kent County Circuit Court to conclude that it lacked jurisdiction over the proceeding."); *In re James*, 492 Mich at 556 ("[Respondent] made

That is, in each of those cases, the judge apparently gave one or more false answers after swearing to testify truthfully. Here, in contrast, the false statement concerning the *Nassif* case was given in the answer to the complaint, which the JTC has not proved was verified as required by MCR 9.209(B)(1). Absent such proof, we cannot conclude that the false statement in the answer was given under oath.[56] Therefore, we do not believe that the most severe sanction of removal is warranted in this case. Instead, as *In re Milhouse* illustrates, when a judge engages in misconduct by making an intentional misrepresentation or a misleading statement while not under oath in the course of a JTC investigation, a lesser, though still serious, sanction may be warranted.

We find that this case is most akin to *In re Lawrence* because in both cases, the respondent's misconduct included misuse of the respondent's judicial office to benefit another and a nontestimonial misrepresentation. In *In re Lawrence*, there were additional unrelated allegations of misconduct, including allegations that the judge had assigned cases to attorneys with

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numerous misrepresentations of fact under oath during the investigation and hearing of this matter."); *In re Justin*, 490 Mich 394, 396; 809 NW2d 126 (2012) ("Instances of respondent's judicial misconduct include . . . making false statements under oath during the JTC hearing."); *In re Adams*, 494 Mich at 171 ("The master and the JTC both found that respondent made false statements under oath in Judge Brennan's courtroom. We agree."); *In re McCree*, 495 Mich at 66-67 ("[T]he JTC found that 'Respondent engaged in a pervasive pattern of dishonesty that included lying under oath to the Commission and to the Master.' For example, respondent testified that it did not 'dawn' on him to recuse himself from the *King* case and that his failure to recuse himself was a mere 'oversight.' ").

[56] We do not address whether removal would be justified if a judge makes an intentional misrepresentation or misleading statement in an answer that is properly verified because that question is not presently before us.

whom he had financial ties,[57] that the judge had an interest in a liquor license in direct contravention of a statute,[58] and that the judge had improperly retained campaign funds.[59] However, we believe that the allegations in this case—although fewer in number—are of equivalent seriousness. Respondent used his position as a judge to repeatedly attempt to thwart the criminal investigation and prosecution of his intern. This was not a one-time occurrence—rather, from the time respondent arrived at the accident scene until the time Ms. Vargas was charged by a substitute prosecutor, respondent made a sustained effort to scuttle the charges. And respondent was not forthcoming in his answer to the formal complaint about the reason for his interactions with Ms. Vargas. Because the respondent in *In re Lawrence* was suspended without pay for nine months for similarly serious misconduct, we believe that an unpaid suspension of nine months is warranted here.

In our judgment, bearing in mind that respondent has no other history of misconduct, a nine-month unpaid suspension is a proportionate sanction. That sanction is greater than the sanctions imposed in *In re Brown* and *In re Mazur* for misusing the judicial office to benefit the judge or another person. It is also greater than the sanctions imposed against each respondent in *In re Binkowski*, *In re Milhouse*, and *In re Radzibon* for nontestimonial misrepresentations. We believe our sanction here must be greater than those sanctions because respondent engaged in a *sustained* campaign to prevent Ms. Vargas from facing legal consequences for her actions by interfering with a police investiga-

[57] *In re Lawrence*, 417 Mich at 253.

[58] *Id*. at 256-257.

[59] *Id*. at 262.

tion and the subsequent prosecution, in addition to providing false information in his answer to the formal complaint.[60] We conclude that a nine-month suspension without pay is consistent with our caselaw and will protect the public from this type of judicial misconduct.[61]

IV. RESPONSE TO THE PARTIAL DISSENT

The partial dissent accuses us of "misreading . . . the law" because we do not address allegations of misconduct that were not found and recommended to us by the JTC. There are many reasons not to address such allegations—for one thing, it would violate our state's Constitution, as we held in *In re Mikesell* over 40 years ago.[62] It would also violate our court rules, which

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[60] To assert, as the partial dissent does, that we have not held respondent accountable for his lack of candor in his answer to ¶ 65 of the formal complaint is a misreading of our opinion. What we presume the partial dissent means is that we did not accord this misconduct sufficient weight and therefore failed to impose some unspecified greater sanction that the partial dissent believes would be appropriate. Left unanswered is the critical question of *precisely what additional weight* the partial dissent would accord this misconduct—the partial dissent has not told us whether it believes that its reweighing of the evidence justifies increasing the sanction by an additional day, week, month, or year, or whether it agrees with the JTC that removal from office is the appropriate sanction in this case.

[61] See *In re Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991) ("The purpose of [judicial disciplinary] proceedings is not to impose punishment on the respondent judge, or to exact any civil recovery, but to protect the people from corruption and abuse on the part of those who wield judicial power.").

[62] See note 22 of this opinion. The partial dissent's attempt to narrow *In re Mikesell*—by urging that this Court may consider allegations "not reflected in the JTC's findings"—is unpersuasive. See note 2 of the partial dissent. Allegations of misconduct left unaddressed by the JTC are, by definition, not recommended to us by the JTC. The issue of the scope of our review in JTC cases was squarely presented and decided in *In re Mikesell*, where we held that our Constitution requires us to focus

suggest that we have the authority only to "accept or

on the findings and recommendations of the JTC, not on the findings of the master. See *In re Mikesell*, 396 Mich at 524-526; see also *In re Chrzanowski*, 465 Mich at 481 (reiterating the same point, albeit without citing *In re Mikesell*). That holding has never been overturned, or even criticized; it remains good law. See *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990) ("Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed."). The partial dissent accuses us of "self-impos[ing]" the limitation on our scope of review in JTC matters; however, the limitation was actually imposed by the people of our state when they voted to amend our Constitution in 1968. See Const 1963, art 6, § 30. The question whether their judgment was sound (i.e., whether, in the partial dissent's words, it was "dubious public policy") is not for us to decide. See *Durant v Michigan*, 456 Mich 175, 220; 566 NW2d 272 (1997) ("The people having spoken through their constitution, the policy debate is no longer open.").

More troubling still is the partial dissent's suggestion that *In re Mikesell* may have been overruled by implication, i.e., that an inconsistent application of the law is sufficient to overrule an express holding of this Court. Allowing a case to "slip[] down a memory hole," *People v Ream*, 481 Mich 223, 232 n 7; 750 NW2d 536 (2008), is a poor substitute for "deliberately examin[ing] and decid[ing]" a principle of law. *Jamieson*, 436 Mich at 79. Unlike *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981), the case we said was implicitly overruled in *Ream*, our holding in *In re Mikesell* has never been called into question or criticized. And, contrary to the partial dissent's suggestion, *In re Mikesell* and *In re Chrzanowski* are not the only cases in which this Court has applied the principle of limiting its review to the particular allegations of misconduct found proved by the JTC. See, e.g., *In re Bennett*, 403 Mich 178, 184; 267 NW2d 914 (1978) ("We have reviewed the entire record *de novo* and conclude that the conduct charged to Judge Bennett and found by the Commission is established by the record. The issues for our consideration, then, are whether *that conduct* is of a nature warranting discipline and, if so, whether removal, as recommended by the Commission majority, or some other form of discipline should be imposed.") (emphasis added); *In re Laster*, 404 Mich 449, 455; 274 NW2d 742 (1979) ("We have reviewed the entire record *de novo* and conclude that the conduct attributed to Judge Laster, and found by the Commission, is established."); *In re Lawrence*, 417 Mich at 266 (1983) ("Upon *de novo* review of the record in this case, we find that the allegations of misconduct found by the commission are supported by the evidence."); *In re Callanan*, 419 Mich 376, 383; 355 NW2d 69 (1984)

reject the recommendations of the [JTC]" unless they relate to the sanction, in which case we may "modify the recommendations by imposing a greater, lesser, or entirely different sanction."[63]

The partial dissent argues that three cases, postdating *In re Mikesell*, are inconsistent with it and therefore may have overruled *In re Mikesell*'s holding *sub silentio*: *In re Ferrara*, *In re Adams*, and *In re McCree*. We disagree. A close review of each of those cases

("Respondent admitted that the facts as alleged in the indictment gave rise to discipline, but not that the facts alleged were true. As a result, we consider *only those facts found by the commission* which have been admitted, that respondent was indicted and has been three times convicted, and the legal conclusions that can be drawn from them.") (emphasis added); *In re Jenkins*, 437 Mich 15, 18 n 1; 465 NW2d 317 (1991) ("The master permitted amendment of the original complaint to include charges that respondent failed to respond timely to the original complaint, and that respondent harassed nine witnesses by filing defamation lawsuits against them. *Neither the master nor the commission stated any findings or made any recommendations with regard to these charges, and we therefore do not address them*.") (emphasis added); *In re Seitz*, 441 Mich 590, 594; 495 NW2d 559 (1993) ("It becomes our task, by reviewing de novo the record of this case, to conclude whether 'the conduct charged to Judge [Seitz] and found by the Commission is established by the record. The issues for our consideration, then, are whether that conduct is of a nature warranting discipline and, if so, whether removal, as recommended by the Commission majority[,] or some other form of discipline should be imposed.' "), quoting *In re Bennett*, 403 Mich at 184; *In re Moore*, 464 Mich 98, 122; 626 NW2d 374 (2001) ("In reviewing the record de novo, *we consider whether the conduct charged and found by the commission is established by the record*, whether the conduct is of a nature warranting discipline, and whether the discipline recommended by the commission or some other form of discipline should be imposed.") (emphasis added). See also *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971) (limiting the Court's de novo review to the three particular findings of misconduct made by the JTC and alleged in the complaint).

[63] MCR 9.225. See also *In re Hathaway*, 464 Mich 672, 685; 630 NW2d 850 (2001) ("The court rule states our authority to modify a recommendation of the commission, and the meaning of the word 'modify' encompasses authority to alter the recommended discipline.").

indicates that this Court would have imposed the same sanction recommended by the JTC—removal from office—regardless of the additional determinations of misconduct.[64] Even conceding, arguendo, that the ap-

[64] See Garner et al, The Law of Judicial Precedent (2016), p 300 ("If at all possible, the opinions [perceived as conflicting] should be harmonized."). In *In re McCree*, this Court expressly qualified its additional determinations of misconduct by explaining that those determinations did not affect the ultimate sanction. *In re McCree*, 495 Mich at 71 ("Although we believe that the sanctions recommended by the JTC, and adopted by this Court today, would be warranted even without considering these additional findings of fact, we believe that these additional findings provide relevant background and context and demonstrate more fully the nature and magnitude of respondent's misconduct."). In *In re Adams*, this Court adopted the JTC's determination that the respondent made false statements under oath during her divorce case. *In re Adams*, 494 Mich at 171 ("The master and the JTC both found that respondent made false statements under oath in Judge Brennan's courtroom. We agree."). Then, after identifying additional instances "of varying significance" of the respondent's having testified falsely under oath, instances that were not identified by the JTC, *id*. at 177, this Court ordered that the respondent be removed from office because the respondent "testif[ied] falsely under oath." *Id*. at 178. We explained that we could "discern no compelling reason to treat this case any differently" from previous cases in which this Court had removed a judge for testifying falsely under oath. *Id*. at 186. The Court gave no indication that it would have deviated from those previous cases but for the additional instances in which the respondent had lied under oath. Finally, in *In re Ferrara*, although one of the grounds of misconduct included inappropriate, untruthful, and evasive statements made to the press, to the public, to the master, to the JTC, and to this Court (when the respondent judge apparently addressed the Court on her own behalf during oral argument), and the opinion does discuss the statements made to this Court in some detail, see *In re Ferrara*, 458 Mich at 363-365, the statements made to this Court were simply a continuation (and perhaps a more vivid illustration) of the improper statements made by the respondent in the other venues (which were included in the JTC's recommendation). In light of the nature and severity of the charges of misconduct that were sustained by both the master and the JTC—including that the respondent obstructed justice by fabricating evidence and twice attempting to introduce that evidence during the hearing before the master, *id*. at 365-369—we do not believe the Court's decision to remove the respondent judge hinged on her statements to this Court during oral argument.

plications in the cases relied on by the partial dissent could be read as inconsistent with *In re Mikesell*, those cases never cited the *In re Mikesell* holding applied here, and the issue of this Court's authority to look beyond the ambit of JTC proceedings was not deliberately examined or decided in those cases. These cases did not implicitly overrule *In re Mikesell*; if anything, they erroneously failed to follow its rule. We, therefore, disagree with the partial dissent that *In re McCree*, *In re Adams*, and *In re Ferrara* stand for the proposition that this Court possesses the constitutional authority to impose a sanction on the basis of misconduct beyond the JTC's findings of misconduct.

Another compelling reason to limit our review in JTC proceedings to allegations of misconduct found and recommended to us by the JTC is that a respondent judge is entitled to notice of the charges and a reasonable opportunity to respond to them.[65] Without such notice, it is not clear to us how a respondent judge would know which charges are at issue and, therefore, which ones he or she should substantively address when a case proceeds to our Court. Is our review limited to the charges in the formal complaint or an

[65] See MCR 9.213 ("If an amendment [of the complaint] is made, the respondent must be given reasonable time to answer the amendment and to prepare and present a defense against the matters charged in the amendment."). See generally *In re Del Rio*, 400 Mich 665, 683; 256 NW2d 727 (1977) ("In respondent's case, the order for interim suspension was not entered until the respondent was given adequate notice and a reasonable opportunity to respond to both the complaint and the petition for interim suspension."); *In re Mikesell*, 396 Mich at 529, quoting *In re Kelly*, 238 So 2d 565, 569 (Fla, 1970) ("Under the provisions of the [Florida] Constitution this Court may exclude from the judiciary those persons whose unfitness or unsuitability bears a rational relationship to his qualifications for a judgeship, so long as the adjudication of unfitness rests on constitutionally permissible standards and emerges from a proceeding which conforms to the minimum standards of due process.").

amended version of it?[66] Or the findings of the master? Or the findings and recommendations of the JTC? Should a respondent and his or her attorney be put in the untenable position of having to argue against possible findings of misconduct that were not charged in the complaint or made by either the master or the JTC but might be discerned by a member of this Court? Whatever could be said about such a regime, we would no longer say that it "provides a full panoply of procedural guarantees for adjudicating allegations of judicial misconduct."[67]

One need look no further than this case to see the deficiencies in the partial dissent's proposed regime. In assessing the two new allegations of misconduct "identified" by the partial dissent that do not appear in the complaint or the JTC's decision, we have no input from respondent or from the JTC on whether they agree with the partial dissent's assertion that "the master specifically concluded that respondent had lied under oath" when he denied that he interfered with the police investigation and criminal prosecution of Ms. Vargas. For our part, we are not convinced.

At the outset, we could locate no finding in the master's report that respondent "lied under oath" as

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[66] The partial dissent asserts that there is no need to amend the formal complaint to add charges based on conduct arising in the course of the JTC proceedings in light of MCR 9.209(B)(2), which provides that "[w]ilful concealment [or] misrepresentation . . . are additional grounds for disciplinary action under the complaint." See note 2 of the partial dissent. As noted above, we do not reach this issue because it is not before us. See note 20 of this opinion. However, recognizing that JTC proceedings "are concerned not with punishing criminality but with maintaining standards of judicial fitness," *In re Mikesell*, 396 Mich at 527, we note that the partial dissent's position is a little like saying that a criminal defendant need not be charged in an information or indictment with perjury for lying at his trial for larceny because a statute on the books makes perjury a crime.

[67] *In re Del Rio*, 400 Mich at 683.

the partial dissent suggests.[68] Instead, the penultimate sentence of the master's report provides that "Respondent made misleading statements to the Commission's investigators and to the Master when he testified to the nature of the text messages and denied interfering with the police investigation and the prosecution of Ms. Vargas." But it is far from clear that a "misleading statement" is equivalent to a "lie under oath." We have not yet addressed, for example, whether materiality or an intention to deceive are necessary to prove that a judge testified falsely under oath. Before being removed from office, a respondent judge is certainly entitled to an opportunity to provide input on these critical questions (as well as whether the specific elements are proved in a given case, if we decide they are necessary).[69] Maybe these deficiencies caused the JTC not to make findings on or recommend those charges to us. But, absent further briefing or argument, we will never know, because the part of the proceedings where the parties are able to give input has long passed.[70]

For all these reasons, we decline the partial dissent's

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[68] The master did conclude, however, that respondent was untruthful in his correspondence with the JTC regarding his interactions with Officer Cole and the township attorney. See note 21 of this opinion. However, as noted above, the JTC did not adopt these findings.

[69] To the extent that the partial dissent believes that respondent should receive a more serious sanction simply because he denied the allegations of misconduct set forth in Counts 1 and 2 of the complaint, we reject such a rule because it would create immense pressure on judges to stipulate to the charges or risk removal for fighting them.

[70] We dismiss as unserious the partial dissent's extraordinary suggestion that the JTC can inoculate itself from a claim of legal error by reciting a boilerplate phrase and citing an inapplicable court rule. See note 9 of the partial dissent. It is difficult to see what value the partial dissent sees in planting this seed, which in our view can only serve as a suggestion that the JTC travel a road seemingly no justice would accept as sustainable.

invitation to "identify" misconduct in the record that was not charged in the complaint or found and recommended to us by the JTC.

V. CONCLUSION

Respondent's judicial misconduct warrants a serious sanction to restore the public's faith and confidence in the judiciary. However, for the reasons explained above, we conclude that the recommended sanction of removal from office is disproportionate to the misconduct. We therefore modify the JTC's recommendation and order that the Honorable J. Cedric Simpson, judge of the 14A District Court, be suspended without pay from the performance of his judicial duties for a period of nine months. In addition, because respondent engaged in conduct involving "intentional misrepresentation" or "misleading statements" under MCR 9.205(B), we order him to pay costs in the amount of $7,565.54. Finally, pursuant to MCR 7.315(C)(3), the Clerk is directed to issue the order forthwith.

MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

MARKMAN, C.J. (*concurring in part and dissenting in part*). Respondent lied under oath on at least two occasions. I respectfully believe that the majority errs by failing to give weight to this misconduct, largely because the recommendation of the Judicial Tenure Commission (JTC) to this Court did not specifically refer to the lies that nonetheless appear clearly in the record. The majority's implicit conclusion—that this Court is constrained from holding a judge accountable in disciplinary proceedings for misconduct appearing in the record but not specifically identified in the JTC's

recommendation—is inconsistent with our caselaw. Such an understanding of the relationship between this Court and the JTC will inevitably weaken our ability to monitor, and to sanction when necessary, the professional behavior of Michigan judges. Although I agree with the majority that respondent *did* commit misconduct and therefore concur with its decision to impose *some* sanction—indeed a considerable sanction—I would consider additional aspects of respondent's misconduct in setting the sanction.

The irony of this dissent is that I disagree with little that is actually within the majority opinion. The majority evaluates four different allegations made against respondent spread over three counts. I agree with most or all of the majority's factual findings regarding those allegations. First, I agree with the majority that Count 1 of the JTC complaint—alleging that respondent interfered with Police Officer Robert Cole's investigation of respondent's intern's car accident—has been proved. Second, I agree that Count 2—alleging that respondent interfered with Pittsfield Township Attorney Victor Lillich's prosecution of respondent's intern—has been proved. Third, I agree that an allegation under Count 3 of the JTC complaint—that respondent lied about having been in contact with his intern in the early morning hours of September 8, 2013—has not been proved and that respondent's denial was not a lie. Fourth, I agree that a separate allegation under Count 3—that in his answer to the complaint, respondent misrepresented the reason for the thousands of text messages and phone calls he exchanged with his intern—has been proved. Moreover, at least for the sake of argument, I also agree that the JTC has failed to prove that respondent verified his answer to the complaint, meaning that it has not been proved that his false statement in the answer was offered under oath.

Rather than what is *included* in the opinion, it is what is *excluded* that most concerns me. The majority does not recognize two additional instances of misconduct that, in my judgment, should fall within Count 3. First, the majority does not recognize that respondent's sworn explanation before Master Peter Houk for respondent's presence at his intern's car accident scene was that he wanted "to make sure that [his intern] was okay," and that he responded affirmatively when asked whether he "arrived at this location because [he was] concerned for [his intern's] well-being from her ex-boyfriend[.]" This explanation was false; respondent's interaction with Officer Cole was not merely an inquiry into his intern's well-being but was instead, as the majority acknowledges, "an effort to scuttle a criminal investigation of his intern." Second, the majority does not recognize that respondent's sworn explanation before the master for calling Lillich was that he

> wanted to check [his intern's] story because it didn't make much sense to [him] and that [he] thought that [his intern] had not told [him] the truth regarding [his intern's] consumption of alcohol or alcohol usage . . . that [his intern] was underestimating something to [respondent].

This explanation again was false; respondent's interaction with Lillich was, as the majority also acknowledges, an effort "to thwart the township's criminal prosecution of his intern."

In his report to the JTC, the master specifically concluded that respondent had lied under oath in offering an innocent explanation for each of these actions. According to the master, respondent's rationale for being at the accident scene was disconsonant with evidence indicating that respondent "was there to inject himself into the investigation in support of [his intern]." Therefore, the master concluded, "The allega-

tion regarding misrepresenting the reason for [r]espondent's appearance at the accident scene has been proven by a preponderance of the evidence."[1] And concerning respondent's rationale for contacting the township attorney, the master concluded that "[r]espondent was not truthful in his answers." To characterize a statement as a "misrepresentation" or as "not truthful" is tantamount to stating that it is a lie, and these particular lies were offered under oath. In recent cases, this Court has made it reasonably clear that a judicial officer who lies during the course of disciplinary proceedings is not competent to sit as a judge, and we have consequently removed such judges from office. See *In re Justin*, 490 Mich 394, 424; 809 NW2d 126 (2012) (noting that "some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege" and that accordingly, lying under oath makes a judge unfit to continue holding judicial office) (quotation marks, citation, and emphasis omitted); see also *In re Adams*, 494 Mich 162, 186; 833 NW2d 897 (2013) ("This Court has consistently imposed the most severe sanction by removing judges for testifying falsely under oath."); *In re McCree*, 495 Mich 51, 81; 845 NW2d 458 (2014) ("Just last term, this Court held [in *Adams*] that lying under oath ' "is

[1] There can be little doubt that the master found respondent to have lied concerning his intentions for appearing at the accident scene. The master's report notes that "[p]aragraphs 68-69 of the Formal Complaint allege that the Respondent lied about his reason for appearing at the arrest scene." In the process of assessing these allegations, the master observed that respondent's stated reason for appearing at the scene was that he "was worried that the incident . . . might be related to her ex-boyfriend[.]" But, as found by the master, respondent made no inquiry at all concerning the ex-boyfriend when he injected himself at the scene.

entirely incompatible with judicial office and warrants removal." ' ") (citations omitted).

However, what is more troubling than the lack of consideration of these two instances of misconduct is the majority's legal *rationale* for doing so. Why are the master's allegations of false testimony given under oath going unaddressed? While the majority never directly explains this, its position appears to be predicated on the fact that these two instances of misconduct are not specifically discussed in the JTC's recommendation to this Court. Rather, the JTC's recommendation as to Count 3 only pertains to the two allegations of lying or misrepresentation that the opinion does discuss—the allegation that respondent lied about being in contact with his intern in the early morning hours of September 8, 2013, and the allegation that he lied in his answer to the complaint. The JTC's recommendation does not address the master's finding that respondent lied under oath when he denied that he was interfering with either Cole's investigation or Lillich's prosecution; it simply does not discuss these allegations at all.

The majority never squarely asserts that this Court cannot hold a respondent responsible for misconduct contained in the record but not specifically identified as a basis for discipline in the JTC's recommendation. Instead, it strongly implies this by failing to acknowledge these instances of sworn lying identified by the master; it would be one thing after review to reject these instances of misconduct as a basis for sanctions, but it is a considerably different thing to fail entirely to even consider these instances of misconduct. The only support offered for this lack of acknowledgment in the majority's analysis is the assertion that "we have long held that our focus in judicial disciplinary proceedings

is on the JTC's findings," with a footnote discussing *In re Mikesell*, 396 Mich 517; 243 NW2d 86 (1976), and *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001).[2] The apparent upshot is that misconduct set forth in the *record* but not specifically identified as misconduct in the JTC's *recommendation* cannot constitute a basis for this Court to impose judicial discipline.

This reading of our authority in judicial disciplinary proceedings is a misreading of the law. Our court rules specifically provide that "[w]ilful concealment [or] mis-

[2] Moreover, the majority reads *Mikesell* significantly more broadly than is warranted. In *Mikesell*, 396 Mich at 524-526, the original complaint contained 12 allegations of misconduct, 6 of which were rejected by both the master and the JTC and were not considered by this Court. Here, by contrast, we are debating instances of misconduct that *were*, in fact, recognized by the master, some of which were adopted by the JTC (including respondent's stated purpose for thousands of text messages with his intern from August to November of 2013), and others of which were *not* recognized by the master and only consist of further *examples* of the misconduct that respondent *is* charged with by the JTC in Count 3. The only question is whether this Court can *bolster* its conclusions in regard to one or more lies found by the JTC with *additional* lies not reflected in the JTC's findings, which we have clearly and regularly done since *Mikesell*. Application of *Mikesell* to misrepresentations made during JTC proceedings is particularly inappropriate because willful concealment and misrepresentation during JTC proceedings *always* constitute an additional basis for disciplinary action once a complaint has been filed without the need for an amended complaint to set forth any additional allegations about misrepresentations during the pendency of JTC proceedings. See MCR 9.209(B)(2). The majority also errs by giving meaning to the Court's remark in *Chrzanowski*, 465 Mich at 481, that "it is the JTC's, not the master's conclusions and recommendations[,] that are ultimately subject to review by this Court." That statement was made in response to the respondent's argument that the JTC had not sufficiently *deferred* to the master's findings. *Id*. at 480. It does not stand for the proposition that this Court may not review de novo the record and identify additional instances of misconduct, if any, beyond those set forth in the JTC's recommendation. See *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971) (recognizing that this Court conducts a review de novo of the record in judicial disciplinary proceedings).

representation . . . are additional grounds for disciplinary action under the complaint" in a JTC matter. MCR 9.209(B)(2). Respondents are consequently on notice that telling the truth in JTC proceedings is *always* imperative and that this Court "review[s] the record *de novo* in this type of action." *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971). Moreover, after reviewing de novo the record of JTC proceedings, this Court has repeatedly imposed discipline on the basis of misconduct beyond that set forth in the JTC's recommendation. Thus, in *In re Ferrara*, 458 Mich 350, 363-364 & n 13; 582 NW2d 817 (1998), we pointed to the respondent's evasive and dishonest remarks made to this Court during oral argument as part of a pattern of "unsupportable denials and inconsistent statements to the media, the public, the commission, and this Court," indicating her "refus[al] to accept responsibility for her [racist] comments" and constituting "clear evidence of her inability to be forthright, to avoid appearances of impropriety, and to fulfill the ethical obligations of a judicial officer." Obviously, remarks made by the respondent during oral argument *before this Court* could never constitute a part of the recommendation made by the JTC *to* this Court, which prompted our consideration of the matter in the first place. Similarly, in *Adams*, 494 Mich at 177, "we f[ound] that respondent also testified falsely about several other matters," a finding we made "[i]n addition to the factual misrepresentations identified by the JTC." Again, in *McCree*, 495 Mich at 70, we did the same when we discerned several lies "[i]n addition to the factual findings that we adopt[ed] from the JTC . . . ." It is clear from *Ferrara*, *Adams*, and *McCree* that there is no requirement that this Court avert its gaze from on-the-record judicial misconduct even if the JTC has not connected

the dots for us, or has lacked the opportunity to connect the dots, in the exacting manner required by the majority.[3] The appropriate sanction, as well as the fitness of a respondent to sit as a judge, are unaffected by whether a respondent's misconduct has been iden-

[3] See also *In re Morrow*, 496 Mich 291; 854 NW2d 89 (2014); *In re Hathaway*, 464 Mich 672; 630 NW2d 850 (2001). In *Morrow*, 496 Mich at 297, "the master concluded that the facts constituted judicial misconduct in only two counts," while "[a] majority of the JTC disagreed in large part . . . ." However, "[t]he JTC made no mention of two of the alleged instances of misconduct, . . . evidently agreeing [with the master] that these counts did not establish judicial misconduct." *Id*. at 297 n 3. We stated that "[o]ur review of the record . . . le[d] us to the same conclusion," *id*., suggesting that we had independently reviewed the master's report in reaching our own conclusion regarding whether the JTC's recommendation identified all the misconduct that it should have identified. In *Hathaway*, 464 Mich at 682, the JTC recommended to this Court that we suspend the respondent for 30 days on the basis of the misconduct the JTC identified. We modified that suspension under MCR 9.225 to a six-month suspension. *Id*. at 692. The majority opinion argues that *Ferrara*, *Adams*, and *McCree* "erroneously failed to follow [*Mikesell*'s] rule." But it is noteworthy that this Court specifically cited *Mikesell* in both *McCree* and *Adams*, obviously discerning no apparent conflict between *Mikesell* and the decision made in both *McCree* and *Adams* to recognize misconduct contained in the record even when it was not included in the JTC's recommendation. Moreover, the only instances in which *Mikesell* has been affirmatively cited for the proposition asserted by the majority were in *dissents*. Thus, we reached our conclusion in *Hathaway* over a dissent that expressly argued that under *Mikesell* "matters beyond the JTC's recommendation are not to be considered by th[is] Court." *Id*. at 701 (CAVANAGH, J., dissenting). See also *In re Brown (After Remand)*, 464 Mich 135, 144; 626 NW2d 403 (2001) (CORRIGAN, J., dissenting) (relying on *Mikesell* to distinguish between conduct that was included in the complaint but not contained in the JTC's recommendation and conduct that was included in the complaint *and* in the JTC's recommendation). Whether the majority misreads *Mikesell*—as I believe it does—or *Mikesell* has been overruled by implication, see *People v Ream*, 481 Mich 223, 232; 750 NW2d 536 (2008), one thing seems certain—our law *today* is clearly reflected in *Ferrara*, *Adams*, and *McCree*. See also Garner et al, The Law of Judicial Precedent (2016), p 300 ("A court of last resort generally follows its decision in the most recent case, which must have tacitly overruled any truly inconsistent holding.").

tified by the JTC[4] or discerned from the record by this Court.

The majority's understanding would significantly cabin this Court's ability to identify misconduct on the part of Michigan judges and is neither good law nor good disciplinary policy. "[*T*]*he purpose of judicial discipline is not to punish but to maintain the integrity of the judicial process*." *In re Moore*, 464 Mich 98, 118; 626 NW2d 374 (2001) (emphasis added). The ultimate responsibility to uphold the integrity and the professional standards of the Michigan judiciary rests with this Court under our Constitution:

> On recommendation of the judicial tenure commission,[5] the supreme court may censure, suspend with or

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[4] The majority asserts that it is in accord with the JTC in that the first *Brown* factor—"misconduct that is part of a pattern or practice"—is not satisfied because in the words of the JTC, "[t]here was no evidence . . . that [r]espondent repeated similar misconduct in other cases." However, we have already held in *Adams*, 494 Mich at 180-181, that repeated instances of lying *within* the course of a single JTC proceeding are fully sufficient to support an enhanced sanction under that factor. This is but one good illustration of why this Court has not viewed itself as bound by the JTC's recommendations.

[5] In *Hathaway*, 464 Mich at 695, we held that "the phrase 'on recommendation' is an expression [of] how the judicial discipline process is *initiated*." This phrase—which was also what the Court relied on in *Mikesell*—means, as set forth in *Hathaway*, only that this Court cannot take action sua sponte against a judge; disciplinary action must invariably be commenced by the JTC. However, "[o]nce the JTC makes a recommendation of discipline, this Court may accept or reject that recommendation." *Id*. "Inherent in our authority to reject a JTC recommendation is the option to decide the appropriate discipline to impose, whether it be an affirmance, a reduction, or an increase in the recommendation of the JTC." *Id*. The same reasoning applies to our ability to identify misconduct beyond that set forth in the JTC's recommendation, reasoning that is incompatible with the majority's assertion that *its* interpretation of *Mikesell* "was actually imposed by the people of our state when they voted to" create the JTC in 1968. Once the judicial disciplinary process has been *initiated*, this Court reviews the record de

> without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. [Const 1963, art 6, § 30(2).]

Judicial discipline cases are therefore unique. Ordinarily, we sit as an appellate court, reviewing how lower courts have disposed of parties' disputes. Even when our original jurisdiction is invoked, we are generally adjudicating a dispute between parties. Judicial discipline cases, by contrast, reflect an exercise of this Court's *affirmative duty* to maintain the integrity of the judiciary. "[T]his Court, and this Court alone, decides what, if any, disciplinary action shall be taken against any elected member of the state judiciary[.]" *In re Del Rio*, 400 Mich 665, 689; 256 NW2d 727 (1977). It is inconsistent with our precedent—and it is dubious public policy—to constrain this Court's ability to discipline misbehaving judges. I would not self-impose such a limitation on our ability "to protect the people from corruption and abuse on the part of those who wield judicial power" in this fashion. *In re Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991).

Indeed, the fact that this Court is charged with the affirmative obligation to guard against judicial misconduct also leaves me indifferent to whether respondent's answer in this matter was or was not "verified." The

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novo in accordance with *Somers*, and we possess inherent authority to identify misconduct contained in the record and to impose an appropriate sanction. As for the several cases cited by the majority in note 62 as additional support for its reading of *Mikesell* and *Chrzanowski*, I read these as being fully consistent with *Hathaway*—JTC disciplinary recommendations must precede the imposition of sanctions by this Court. However, the JTC's recommendations do not detract from our prerogative, set forth in *Ferrara*, *Hathaway*, *Adams*, and *McCree*, to go *beyond* such recommendations once the process has been initiated.

majority concludes that respondent's "false statement . . . was given in the answer to the complaint" but that "the JTC has not proved [the answer] was verified . . . ." As a result, the majority holds that because it "cannot conclude that the false statement in the answer was given under oath," the most severe sanction of removal is not warranted. But given that the majority concedes that respondent made a "false statement" in his answer, I do not see why we should be concerned about whether the false answer was proved to be sworn. The JTC is the constitutional agency by which this Court investigates judicial misconduct, and I do not understand why a respondent who intentionally frustrates our efforts at discovering the truth of misbehavior should face lesser consequences for lying to the JTC if his response to our inquiries was not sworn. Once again, these misstatements were made to this Court's investigative arm *in the course of* its investigation of respondent's alleged misconduct.[6] The distinction resting upon whether a person's responses were sworn is critical to determining whether that person is *criminally* liable for his or her lies, but the distinction is not critical with regard to judicial disciplinary proceedings.

The majority treats JTC proceedings as tantamount to ordinary adversarial litigation. For example, it ap-

[6] The examples offered by the majority justifying a lesser sanction for lies not under oath are easily distinguishable. In *In re Lawrence*, 417 Mich 248; 335 NW2d 456 (1983), the misrepresentation was contained in a letter sent some years earlier to a county concealed weapon licensing board, not to the JTC. In *In re Binkowski*, 420 Mich 97; 359 NW2d 519 (1984), the judge lied to his *colleagues* about a JTC investigation that he faced. And in *In re Milhouse*, 461 Mich 1279 (2000), and *In re Radzibon*, 457 Mich 1201 (1998), the respondent judges ultimately *admitted* to their lies, unlike respondent here. None of these cases comports with the facts in this case—in this case, the respondent has persisted in a lie made to this Court's investigative arm.

pears to fault the JTC examiner for failing to file an amended complaint to include allegations of misconduct occurring during the proceedings before the master, although the majority ultimately avoids reliance on this issue, "because respondent has not challenged the JTC's findings on this basis . . . ." Perhaps, however, respondent has not undertaken such a challenge because it is not relevant in light of MCR 9.209(B)(2), which makes clear that lies and misrepresentations always provide an additional basis for discipline beyond what is alleged in the complaint itself.[7] "Judicial disciplinary proceedings . . . are fundamentally distinct from all other legal proceedings, whether civil or criminal." *Jenkins*, 437 Mich at 28. In ordinary civil or criminal proceedings, some compromise of the truth-seeking function of the judicial process is necessarily tolerated in exchange for furthering other important constitutional and societal values. Those concerns are of significantly lesser weight in the context of judicial disciplinary proceedings because it is the "integrity" of the judicial process that is paramount, and that integrity is maintained by appropriately disciplining judges

[7] The majority states that reliance on this court rule is "like saying that a criminal defendant need not be charged in an information or indictment with perjury for lying at his trial for larceny because a statute on the books makes perjury a crime." First, this reflects the majority's misplaced analogy to criminal proceedings. Second, it essentially renders this portion of MCR 9.209(B)(2) nugatory. The rule requires that a respondent file an answer including "a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent," and it places the respondent on notice that lies in that answer constitute an additional basis for discipline beyond the contents of the complaint. Unlike a statute establishing a substantive criminal offense such as perjury, MCR 9.209(B)(2) does not propound that lying is a disciplinable offense—a proposition effected by MRPC 3.3(a)(1) and MCR 9.205(B)(2)—but rather places a respondent on notice that lies contained in his or her answer, but not charged in the complaint, constitute a potential basis for additional discipline.

who lie or misrepresent the facts. We have, for example, signaled that the "exclusionary rule" may not apply in judicial disciplinary proceedings. See *id*. ("[T]he unique character and purpose of judicial disciplinary proceedings might incline us not to apply the exclusionary rule . . . ."); see also *In re Servaas*, 484 Mich 634, 677; 774 NW2d 46 (2009) (MARKMAN, J., dissenting) ("This Court cannot, as a function of the examiner's behavior, avoid its responsibility to address respondent's misconduct."). We have also identified as an aggravating factor in judicial disciplinary proceedings "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy . . . ." *In re Brown*, 461 Mich 1291, 1293 (2000). In the end, the paramount concern in a judicial disciplinary proceeding pertains to whether and when an individual is fit to hold judicial office and to exercise the judicial power.

Further, our court rules themselves support the notion that judicial discipline is not on par with ordinary adversarial criminal litigation. MCR 9.203(D) provides that "[a]n investigation or proceeding under this subchapter may not be held invalid by reason of a non-prejudicial irregularity or for an error not resulting in a miscarriage of justice." In failing to accord consideration to respondent's false statements in his answer to the complaint, the majority essentially renders that portion of the disciplinary proceedings invalid by reason of a procedural error. The majority identifies no prejudice that respondent would suffer if he were to be held accountable for the false statements he provided in the answer to the complaint, whether or not the JTC has shown that his answer was verified. Holding respondent accountable for his false statements would hardly seem to result in any articulable "miscarriage of justice." Indeed, such a miscarriage

results, in my judgment, only from *failing* to hold respondent responsible for false statements made in the course of a JTC investigation. The majority fails to show how verification is related in any way to the ends served by the judicial disciplinary process, in particular, the preservation of the integrity and reputation of our state's judiciary.

The majority similarly has not shown that prejudice or any miscarriage of justice would result if this Court were to recognize misconduct committed by the respondent that was identified by the master but neither specifically adopted nor rejected by the JTC.[8] Respondent knew that he was obliged to tell the truth in these proceedings, and he knew on the strength of *Ferrara*, *Adams*, and *McCree* that if we did not give credence to his explanation for his behavior, he could be disciplined for his false explanations. Therefore, respondent would not be unfairly surprised if we were to conclude that the record contained a preponderance of evidence that he had lied under oath. It is entirely "practicable and fair" to hold respondent accountable for his lies. MCR 9.200. I do not see how it is inconsistent with "the rights of the judges who are governed by these rules," *id*., to take notice of respondent's on-the-record lies when he was well aware that it is this Court's longstanding practice to do so. The majority inadvertently erects a new and unnecessary obstacle to "preserv[ing]

[8] If the concern of the majority is with the respondent's being afforded "an opportunity to provide input" regarding areas of concern that appear to trouble the majority based on its handling of the JTC recommendation, why does the majority not simply remand to the JTC under MCR 9.225 so that the JTC might specifically evaluate each of the master's findings, as we did on strikingly similar facts in *In re Logan*, 779 NW2d 249 (Mich, 2010)? See also *In re Brown*, 461 Mich 1209 (1999); *In re Brown*, 461 Mich 1291 (2000); *In re Hathaway*, 461 Mich 1296 (2000); *In re Chmura*, 461 Mich 517; 608 NW2d 31 (2000).

the integrity of the judicial system," "enhanc[ing] public confidence in that system," and "protect[ing] the public [and] the courts . . . ." *Id*. Nor do I share the majority's concern about "creat[ing] immense pressure on judges to stipulate to the charges," because all that a respondent need do is tell the truth as a continuing condition of being "entrusted with [the] judicial privilege," *Justin*, 490 Mich at 424 (quotation marks and citation omitted).[9]

In sum, I have two areas of disagreement with the majority, both of which concern this Court's role in the judicial disciplinary process. First, I disagree with the majority's implication that this Court cannot consider evidence of misconduct derived from the record but not specifically alleged as misconduct in the JTC's recommendation to this Court.[10] Second, I disagree with the majority's assertion that when a respondent has indis-

[9] While I would hardly urge such a course of action, if the majority's paramount concern is merely to ensure that allegations of misconduct are formally contained in the JTC's recommendation to this Court, what would stop the JTC from effectively insulating its recommendations from claims of error by simply incorporating by reference the record developed by the master, any alternative findings and conclusions on which the master relied, or both? On what basis would a simple statement to that effect fail to satisfy the majority? That something this peremptory and insubstantial could insulate the JTC's recommendations from being faulted under the majority's analysis only illustrates how fundamentally harmless the JTC's purported "defects" are in the instant case and consequently how markedly the majority misapprehends MCR 9.203(D). It is difficult to understand how the JTC's omission of something this insubstantial could constitute a "miscarriage of justice" under the court rule.

[10] I also note that MCR 9.205(B) enables this Court to order a respondent "to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court." Limiting our ability to take notice of lies and other misrepresentations also unneces-

putably lied in his or her answer to a complaint, the JTC's failure to prove that the respondent's answer was verified justifies a lesser sanction than if the answer had been verified. As applied to the instant case, I would first recognize and assess respondent's on-the-record lies in his sworn testimony before the master when he denied intending to interfere with the police investigation or subsequent prosecution of his intern. I would then treat the lie in respondent's answer—a lie that this Court unanimously recognizes—without regard to whether it was verified. Regardless of this, respondent's lie constituted an effort at frustrating this Court in carrying out its constitutional duty to uphold the integrity and reputation of the judiciary. I would impose a sanction that takes all of respondent's lies into account in determining an appropriate sanction. Accordingly, I respectfully dissent.

ZAHRA, J., concurred with MARKMAN, C.J.

WILDER, J., took no part in the decision of this case.

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sarily circumscribes our ability to recoup costs where costs would otherwise constitute part of an appropriate remedy.

In re GORCYCA

Docket No. 152831. Argued March 8, 2017 (Calendar No. 1). Decided July 28, 2017.

The Judicial Tenure Commission (JTC) filed a formal complaint against Sixth Circuit Judge Lisa O. Gorcyca alleging two counts of judicial misconduct arising from a hearing at which she found three children in contempt of court. The contempt hearing arose in the context of a protracted and acrimonious divorce and custody case. The two younger children, 10-year-old RT and 9-year-old NT, were ordered to participate in parenting time in respondent's jury room with their father on June 24, 2015. LT, who was 13 years old, was not scheduled for parenting time with his father on that day, but he came to the court with his siblings. After the children refused to communicate with their father, respondent held a show-cause hearing to determine why all three children should not be held in contempt. Respondent first appointed separate attorneys for all three children and allowed them 30 minutes to consult with the children. At the hearing, respondent first addressed LT—the child not under any order for parenting time that day—who expressed confusion about what he had done wrong but indicated that he would not talk to his father. Among other things, respondent told LT that he was defiant, contemptuous, and "mentally messed up." She held him in direct contempt of court and ordered LT to be confined at Oakland County Children's Village. Respondent then addressed RT and NT. Both children were initially apologetic and indicated that they would try to comply with the court's order but later stated that they would prefer to go with LT to Children's Village. Respondent held RT and NT in direct contempt. All three children were handcuffed and removed from the courtroom. Respondent indicated that the children's father could seek review of their placement if he determined that the children had developed a healthy relationship with him. After an investigation into respondent's conduct, the JTC issued its formal complaint alleging that respondent had engaged in judicial misconduct when she held the three children in contempt and that respondent had not been truthful in her answer to the JTC's 28-day letter. The Honorable Daniel Ryan, the master appointed to the case, concluded that

respondent's actions in the courtroom during the contempt hearing constituted judicial misconduct and that she misrepresented to the JTC the meaning behind a gesture she made during the contempt hearing while she was addressing LT. Specifically, the master found that respondent committed misconduct by (1) finding LT in contempt of a nonexistent parenting-time order, (2) giving the children's father the keys to the jailhouse, thereby depriving the children of the opportunity to purge their contempt, (3) making a gesture indicating that LT was crazy and making disparaging remarks about the children, and (4) misrepresenting to the JTC that the gesture was intended to communicate LT's moving forward with therapy. The JTC adopted the master's findings with one exception—the JTC disagreed with the master that respondent misrepresented the meaning of the gesture and concluded that her answer was merely misleading. The JTC recommended that the appropriate discipline for respondent's misconduct was a 30-day suspension without pay and costs of $12,553.73. Respondent petitioned the Supreme Court, requesting that the Court reject or modify the JTC's recommendation.

In an opinion by Justice ZAHRA, joined by Chief Justice MARKMAN and Justices MCCORMACK, VIVIANO, LARSEN, and WILDER, the Supreme Court *held*:

The JTC correctly found that respondent committed judicial misconduct during the contempt hearing when she directed demeaning and disparaging comments to the children, but it erred by concluding that respondent committed misconduct when she exercised her contempt power to hold the oldest child in contempt of an order that did not apply to him and delegated the authority to decide when the three children had purged their contempt. Those decisions constituted mere legal errors made in good faith and with due diligence, and the errors could have been remedied on appeal. Public censure was proportionate to respondent's misconduct.

1. The JTC properly concluded that respondent committed misconduct when she failed to exhibit appropriate judicial temperament during the contempt hearing. The facts showed that respondent's conduct during the hearing violated four canons of the Code of Judicial Conduct. Respondent violated Canon 1 (preserving the integrity and independence of the judiciary by observing high standards of conduct), Canon 2(A) (avoiding irresponsible or improper conduct so as not to erode public confidence in the judiciary), Canon 2(B) (treating every person fairly, courteously, and respectfully), and Canon 3(A)(3) (being patient, dignified, and courteous to litigants in his or her official

capacity). Respondent's conduct violated these canons when she mocked and threatened the children, called them "mentally messed up" and "brainwashed," expressed general hostility toward the children and their mother, and exaggerated or lied about the conditions at Children's Village.

2. The JTC incorrectly concluded that respondent committed judicial misconduct with respect to the contempt orders. To the extent respondent held LT in contempt without sufficient evidence that he had disobeyed any lawful order, decree, or process of the court as stated in MCL 600.1701(g), her decision was legal error. Respondent also made a legal error when she improperly delegated to the father the authority to determine when the children had purged themselves of contempt. But those errors were made in good faith and with due diligence and, under MCR 9.203(B), did not constitute judicial misconduct. There was no evidence that respondent deliberately failed to observe the law governing contempt proceedings. In addition, it is significant that not one of the many attorneys and other professionals present in the courtroom during the contempt hearing objected to respondent's actions during the hearing. Their failure to alert respondent to actions that may have been contrary to the law supported the conclusion that respondent acted in good faith, that is, that she did not willfully fail to observe the law. Further, respondent acted with due diligence even though she made the identified legal errors. Respondent treated the children's behavior as constituting direct contempt for which no hearing was required, but respondent not only held a hearing, she appointed separate counsel for each child and allowed them 30 minutes to confer with the children before beginning the hearing. Respondent's preparation for the contempt hearing showed that she exercised due diligence, even though her decisions ultimately constituted legal error.

3. Respondent's judicial misconduct amounted to her sarcastic and disparaging comments to the children during the contempt hearing. This misconduct warranted a public censure; it did not warrant a 30-day suspension without pay. The Supreme Court's overriding duty in deciding the appropriate sanction to impose in judicial disciplinary proceedings is to treat equivalent cases of misconduct in an equivalent manner and unequivalent cases in a proportionate manner. In considering the appropriate sanction, the JTC correctly analyzed most of the factors set forth in *In re Brown*, 461 Mich 1291 (2000), but application of two of the factors required clarification. Because respondent's misconduct was an isolated occurrence in an otherwise exemplary career,

Factor 1 did not weigh in favor of a more severe sanction. The JTC's concern that respondent might repeat the misconduct was not a reason to impose a more severe sanction. Should the misconduct occur again, the JTC can file a new complaint and, when recommending a sanction for that misconduct, may consider the incidents as a pattern of misconduct. Moreover, consideration of Factor 7 did not call for a more severe sanction. Even though respondent's misconduct involved children, it did not involve the unequal application of justice on the basis of a class of citizenship, which is the harm addressed by Factor 7. Simply put, respondent's conduct—though inappropriate—did not demonstrate an animus toward children, and there was no evidence that respondent treated children differently than she did other persons who had previously defied court orders. Respondent's case was most analogous to *In re Hocking*, 451 Mich 1 (1996), in which the respondent instigated a confrontation with an attorney, personally attacked the attorney, and made caustic comments in an abusive tone to the attorney. Even though the respondent in *Hocking* demonstrated a total lack of self-control and an antagonistic mindset, he was found not to have abused the contempt power; rather, his behavior was found to have prejudiced the administration of justice, and he received a three-day suspension. Several mitigating factors, in addition to the conclusion that Factors 1 and 7 did not weigh in favor of a more severe sanction, also compelled a lesser sanction in this case. First, respondent's display of inappropriate judicial temperament occurred during extremely contentious and protracted proceedings and represented respondent's single recorded lapse of good temperament. Second, respondent's frustration was understandable given the children's deliberately defiant behavior over a five-year period. And last, there was no indication that respondent sought to personally benefit from her misconduct.

4. The JTC properly found that respondent did not intentionally misrepresent or make a false statement about the gesture she made when she circled her temple with her finger during her discussion with LT at the contempt hearing, but the JTC incorrectly determined that respondent's answer to the 28-day letter's allegation of misconduct concerning the gesture was misleading enough to justify the imposition of costs totaling $12,553.73. The JTC found it significant that respondent's answer to the 28-day letter denied making the gesture to imply that LT was crazy but that respondent testified before the master that she did not recall making the gesture and could only guess at what she meant by it. The JTC concluded that respondent's lack of memory precluded it from speculating about respondent's motives and intentions and

from determining that the statement was an actionable falsehood. However, although the JTC found that a preponderance of the evidence did not prove that respondent's statement was an intentional misrepresentation or a misleading statement, it concluded that respondent's answer to the 28-day letter was misleading enough to justify the imposition of costs totaling $12,553.73. Under MCR 9.205(B), the Court is authorized to impose costs, fees, and expenses incurred by the JTC if a respondent made a misrepresentation or a misleading statement to the JTC, its investigators, the master, or the Supreme Court. A misrepresentation or misleading statement generally involves an intent to deceive, and there was no evidence that respondent had a wrongful intent when she speculated about what she meant by the gesture.

5. Contrary to the conclusion reached in the partial dissent, respondent did act in good faith and with due diligence when she conducted the contempt hearing. MCL 722.23(j) requires family court judges to evaluate the willingness and ability of divorced parents to facilitate and encourage a close relationship between the children and the other parent, and respondent acted in furtherance of that ideal, making progressive attempts over the course of five years to get the children to adhere to court directives and engage with their father. The record shows that respondent exercised poor judgment and lacked proper judicial temperament on the day in question, but respondent had an otherwise exemplary record. Given these facts, public censure was a sufficient disciplinary outcome.

Public censure imposed; no costs.

Justice VIVIANO, joined by Justice MCCORMACK, concurring, agreed with the sanction of public censure imposed on respondent and agreed that the circumstances did not justify imposing costs, fees, and expenses on respondent but wrote separately to assert that in JTC cases the Court should address all the legal bases for the findings of misconduct recommended by the JTC. The majority sustained the JTC's findings as to Canon 1, the first sentence of Canon 2(A), Canon 2(B), and Canon 3(A)(3); Justice VIVIANO agreed with the majority's reasoning and conclusions with respect to those findings. Justice VIVIANO interpreted the majority's silence regarding the other findings of the JTC as a rejection of those other findings. With the exception of the JTC's finding under MCR 9.104(2), Justice VIVIANO agreed that no additional findings should have been sustained. However, the Court should, as a matter of course, examine all the JTC findings, describe its reasoning for resolving each of the JTC's findings, or explain its decision not to address certain JTC findings in a specific case.

Justice BERNSTEIN, concurring in part and dissenting in part, would have adopted the findings and recommendation of the JTC to publicly censure respondent and suspend her from office for 30 days without pay, but agreed with the majority that the imposition of costs was not appropriate. Respondent's language and demeanor during the contempt hearing constituted judicial misconduct, and respondent's exercise of the contempt power also constituted judicial misconduct. Altogether, this misconduct warranted a sanction more severe than public censure. Respondent held LT in contempt of court for violating a parenting-time order that did not apply to him. Respondent also committed judicial misconduct when she delegated to the father the discretion to determine when the children had purged themselves of contempt. Under these circumstances, the majority wrongly concluded that respondent's exercise of her contempt power was legal error executed in good faith and with due diligence. The majority asserted that this legal error could have been remedied on appeal and was made with the parties' knowledge and without objection. However, that none of the attorneys or other professionals present in the courtroom objected to the proceedings did not insulate respondent's error from review for misconduct. Only the attorneys representing the children had any duty to object, and they were unprepared to do so because of the limited time they had to confer with their clients and the breakneck speed at which the hearing was conducted. Respondent admitted that she had been contemplating holding the children in contempt for nearly a year before she did so. Thus, respondent had endless opportunities to research the law of contempt and fulfill her duties under MCR 9.205(A), the rule that places personal responsibility on a judge for his or her own behavior and the conduct and administration of the judge's courtroom. Because respondent failed to fully consider her course of action and because she entered patently inappropriate contempt orders, respondent's legal errors were not made in good faith or with due diligence. Finally, although the majority correctly concluded that *Brown* Factors 1 and 7 did not weigh in favor of a more severe sanction, the bulk of the factors favored the more severe sanction recommended by the JTC. Respondent's conduct occurred on the bench, was prejudicial to both the actual administration of justice and the appearance of propriety, and impeded respondent's ability to determine the children's best interests and the best resolution of the underlying custody case. Respondent's inability to recognize the problematic nature of her conduct and the fact that she attempted to shift responsibility for her conduct to the children and their attorneys further indicated the need for a more severe sanction.

1. JUDICIAL MISCONDUCT — CONDUCT SUBJECT TO DISCIPLINE — LEGAL ERRORS MADE IN GOOD FAITH AND WITH DUE DILIGENCE.

A legal error made in good faith and with due diligence does not, under MCR 9.203(B), rise to the level of judicial misconduct and is therefore not subject to discipline.

2. JUDICIAL MISCONDUCT — *BROWN* FACTORS — DETERMINING SEVERITY OF SANCTION — FACTOR 1.

In *In re Brown*, 461 Mich 1291 (2000), the Court set forth seven factors to consider when determining the seriousness of judicial misconduct; Factor 1 states that misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct; fear of future misconduct by a judge whose misconduct was isolated does not weigh in favor of a more severe sanction under Factor 1.

3. JUDICIAL MISCONDUCT — *BROWN* FACTORS — DETERMINING SEVERITY OF SANCTION — FACTOR 7.

In *In re Brown*, 461 Mich 1291 (2000), the Court set forth seven factors to consider when determining the seriousness of judicial misconduct; Factor 7 addresses the unequal application of justice on the basis of a person's class of citizenship; Factor 7 does not weigh in favor of a more severe sanction when a judge's misconduct is directed at children so long as the judge's misconduct does not display a particular animus toward children and there is no evidence that children are treated differently than other persons under the same circumstances.

Paul J. Fischer, *Margaret N. S. Rynier*, *Glenn J. Page*, and *Lynn A. Helland* for the Judicial Tenure Commission.

Vandeveer Garzia, PC (by *Christian E. Hildebrandt*), and *Miller Canfield PC* (by *Thomas W. Cranmer*) for respondent.

Amici Curiae:

David S. Mendelson, *Mark A. Bank*, *David C. Anderson*, and *James J. Parks* for the Michigan Chapter of The American Academy of Matrimonial Lawyers and the Oakland County Bar Association.

ZAHRA, J. This case comes to the Court after the Judicial Tenure Commission (the Commission) recommended that respondent, Sixth Circuit Court Judge Lisa O. Gorcyca, be publicly censured and suspended from office without pay for a period of 30 days. The Commission also imposed costs, fees, and expenses in the amount of $12,553.73 against respondent under MCR 9.205(B) for providing a misleading response to the Commission during its investigation. Respondent has filed a petition requesting that this Court reject or modify the Commission's recommendation.

After review of the entire record and careful consideration of the parties' arguments, we agree in part with the Commission's conclusion that respondent committed judicial misconduct, but we are not persuaded that the recommended sanction is appropriate. Instead, we hold that public censure is proportionate to the judicial misconduct established by the record. We also reject the Commission's recommendation to impose costs, fees, and expenses against respondent under MCR 9.205(B).

I. FACTS AND PROCEEDINGS

A. UNDERLYING DIVORCE AND CUSTODY CASE

The alleged misconduct in this judicial-discipline case arose in the context of a protracted and highly contentious divorce and custody case that was filed in 2009. Three children were born during the marriage: the oldest son (LT) was born in July 2001, the middle son (RT) was born in August 2004, and the only daughter (NT) was born in December 2005.

The register of actions related to the underlying divorce and custody proceedings reflects that more than 100 pleadings were filed and that more than 40

hearings were held. Well before the judgment of divorce was entered on August 8, 2011, the children's refusal to participate in parenting time with their father took center stage. The record reflects that the first notable instance arose shortly after an August 25, 2010 hearing at which the father was granted unsupervised parenting time. At that time, the legal guardian ad litem (LGAL), attorney William Lansat,[1] scheduled parenting time for the father and his children on each day from August 25 through August 30. Apparently, at some point on August 27 while the children were with their father, the children called their mother and alleged that their father had made threats against them. When the mother appeared at the park where the father and the children were located, the father allegedly began "pushing her around." With their mother's encouragement, the children called 911, and the police responded. The responding police officers saw no visible injuries to the mother and concluded that there was no probable cause to arrest the father. The police informed the LGAL of the incident, and the LGAL directed the parties to terminate the visitation for the day. The matter was referred to the Department of Human Services (DHS).[2] During an interview with DHS, the two older children alleged that they were threatened. The youngest child declined to talk about the incident. The matter was apparently closed.[3] The

[1] In highly contentious cases, trial courts often rely on the observations and recommendations of an LGAL appointed to advocate the interests of the children.

[2] The Department of Human Services is now known as the Department of Health and Human Services. See Executive Order No. 2015-4.

[3] As discussed in more detail in note 66 of this opinion, RT later complained to the court that his father had abused him, but respondent found insufficient proof of the allegations after a full evidentiary hearing held on March 23, 2015.

rest of the August visitations were largely unsuccessful. Thereafter, respondent ordered that the father's future parenting time be supervised.

The children became exceedingly resistant to respondent's efforts to facilitate the children's relationship with their father. On September 15, 2010, the court ordered psychological evaluations of the parents and children and therapy for the children. The court granted the father supervised parenting time, and the mother was afforded the choice of an individual to supervise that parenting time. The visits did not go well; the supervisor reported that she was unsuccessful in separating the children from their mother. The children refused to respond to their father and even avoided eye contact with him. The oldest child would pull the other children away from their father, and the children would hide behind their mother. The supervisor believed that the younger children were following the oldest child's cues and directions. The children behaved similarly during visits on November 1, 4, and 6, 2010.[4]

The August 8, 2011 judgment of divorce awarded the parties joint legal custody of the children, while awarding physical custody to the mother and parenting time to the father. Although the father planned to return to Israel, he expected to be in Michigan every three to four months for about three weeks each time.

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[4] On November 4, 2010, the father filed a motion that alleged parental alienation orchestrated by the mother. Parental alienation is seemingly contrary to MCL 722.23(j), a factor to be considered in determining the best interests of a child. MCL 722.23(j) requires evaluation of "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." It is unclear how this motion was resolved, except that additional efforts were made to promote a meaningful relationship with the father.

Between 2011 and 2015, there were at least 13 motions to show cause filed by the father and the LGAL against the mother, all similarly related to the children's alleged refusal to comply with the court's parenting-time orders. During that period, at least 78 orders were entered—30 of which related to the children. Seven different therapists were involved with the children in the context of the parenting-time situation. During a therapy session in April 2011, a therapist reported that all three children "huddled" in a mass, whispering to each other with no other verbal contact. Yet, the LGAL reported that the mother did not believe that therapy was warranted and that she believed there was nothing wrong with the children. In November 2011, a family court judge filling in for respondent warned the parties that the children do "not run the show" and that a change in custody would be considered if the situation did not improve.

By February 2012, the children's refusal to engage in parenting time with the father had become routine anytime the father was supposed to meet with the children.[5] Respondent interceded by ordering that parenting time with the father and the children be held at the home of the mother's friend. But again, the children largely ignored their father and the parenting-time supervisor. In a July 24, 2013 order, respondent informed the parties that if either of them failed to comply with the court's orders, they would be subject to contempt of court and "20 days for the first violation and 40 days for a subsequent violation."

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[5] For instance, around that time, the father was to pick up the children from school and then participate in family therapy with a counselor. But shortly after the father arrived at the school, the LGAL received a call from the school reporting that the children were "hysterical" and refused to go with their father. The school expressed that it could ill afford a repeat of this incident, and the children never again left school with their father.

On August 20, 2014, the parties stipulated to parenting time in respondent's jury room on the following two days—August 21 and 22. The children arrived at court but sat in chairs in the hallway and refused to participate, linking their arms together and refusing to look at or speak to anyone. Efforts by sheriff's deputies, LGAL Lansat, a friend of the court (FOC) counselor, and an assistant prosecuting attorney were fruitless. Respondent herself then went out in the hallway to try to persuade the children to participate in parenting time, explaining to them that they and their mother could be held in contempt of court if they continued to refuse to enter the jury room for parenting time. Eventually, the children went into the room on both dates, but, according to the LGAL and the FOC counselor, "[l]ittle progress" was made.[6] According to the

[6] The LGAL's November 3, 2014 report described the attempts to provide the father with visitation with his children in August 2014. The LGAL's report included an analogy to the notorious cult leader Charles Manson:

> I advised Mother that unless she gets these kids off the bench, there will be grave consequences—such as placement in the [C]hildren's [V]illage. Mother told the kids to listen; but to no avail. Mother believed the kids were traumatized because, according to Mother, [their therapist] was threatening them with being detained, if they didn't shape up.
>
> The children would not answer any adult; they huddled together as if they were sending messages/vibes to each other in some sort of Manson-like behavior.
>
> . . . At one point the deputy pulled Mother aside and told her she runs the risk these kids will go to the Village. This charade took place for about an hour. It was only after the Judge HERSELF, accompanied by all these people, went outside her courtroom to the hall and finally was able [to] bring these kids into the jury room escorted by armed deputies.

The LGAL explained that he was using "this Manson-like phenomenon to describe the kids as the girls that were associated with Manson

LGAL's report, it was at that time that respondent came to believe that the children "were in 'contempt' of her order and unless they complied, she would have had to appoint Attorneys for them."

The LGAL's report noted that "every conceivable machination of parenting time" had been tried over the past four years, but that the children resorted "to the usual 'shut-down' mode[.]" The LGAL then stated that

> the Court needs to consider, if there is to be any progress, a draconian approach. There has been no progress of any meaningful degree regarding Father's parenting time/relationship with his children since August of 2010. In fact, the situation is, quite frankly, worst [sic]. . . .
>
> What message would we be sending to these kids if we allow their behaviors to go unchecked—essentially condoning th[ese] bizarre, cult like actions?

The LGAL made specific recommendations regarding future parenting-time visits with the father, which would be monitored and would involve exchanges at the courthouse parking lot with a sheriff's deputy present. The LGAL stated that he knew of "no other option" because everything had been tried unsuccessfully for four years and because "[c]ontinuation of the status quo is untenable and is contrary to the children's best interest, the statutes and philosophy of the various statutes on custody and parenting time."

The time between August 2014 and June 2015 was replete with court hearings, stipulated orders, and more show-cause motions alleging violations of parenting time. On February 23, 2015, after moving back to Michigan from Israel, the father filed a motion to show

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indicated how he would be 'telegraphing' his 'vibes' to them. In fact, [the FOC counselor] indicated to [him] that she saw the children tapping their feet under the table in the jury room as if they were sending Morse codes to each other."

cause, alleging that the mother continued to disregard the court's parenting-time orders and continued to alienate the children from him. By order of March 4, 2015, respondent implemented the parties' agreed-upon parenting schedule. She also ordered that the children were to lose access to electronics, visits with friends, and television until they began communicating with their father and that there was to be no replacement meal if the children refused to eat dinner with their father. Respondent indicated that she would be inclined to entertain the father's motion for a change in custody if things did not improve over the next 30 days. Thirty days came and passed without improvement. In fact, during that time the mother voluntarily went to jail and worked at an animal shelter for two days because she violated the parenting-time agreement. She also agreed to pay the father's attorney fees. In exchange, the father agreed not to pursue the motion to change custody. The parties agreed to have parenting time in the jury room during spring break.

B. PARENTING-TIME ORDER

On June 23, 2015, the parties appeared before respondent for a review hearing. The father's attorney and the parenting-time monitor, Art Gallagher, reported to respondent that while the children were appearing for the visits, they participated minimally. Respondent ordered that the father would have supervised parenting time with the two younger children the next day in respondent's jury room. The order provided that the father's visitation with the oldest child would occur on July 14, 2015, after the father returned from a business trip.

The next day, the two younger children appeared in respondent's jury room for individual parenting time with their father. The oldest child came along with his mother and siblings but was not scheduled for parenting time. Respondent's judicial assistant informed respondent that things were not going well, so respondent and FOC family counselor, Tracey Stieb, entered the jury room where they saw RT sitting in a chair, with his legs over a second chair and his head tucked between his legs. Respondent questioned him and reminded him of the court's admonition in the hallway in August 2014 regarding the consequences of his refusal to comply, including "potentially being sent to Children's Village." Acting on the child's statement that he listened to his mother, respondent, with the consent of the mother's attorney, drafted a script for the mother to read to the children in the jury room. Later, respondent was informed that, despite the mother's speech, the children had persisted in their refusal to communicate with their father and to participate in parenting time with him. At that point, respondent indicated that she was appointing attorneys for all three children and that, if necessary, she would be proceeding with an immediate contempt hearing regarding the children. Respondent called for an extra sheriff's deputy, appointed attorneys for each child, and allowed 30 minutes for the attorneys to confer with the children. The three attorneys were provided with a brief "on the fly" verbal recitation of the situation from LGAL Lansat and did not ask to review any pleadings or court orders.

C. CONTEMPT HEARING

Respondent then held a contempt hearing that ultimately addressed the behavior of all three children, despite the fact that LT was not scheduled to have

parenting time with his father that day. LT expressed confusion as to what he had done wrong, but nonetheless apologized to respondent for not understanding the rules. He admitted that he did not want to talk to his father, telling respondent that he believed that his father was violent and that he had observed his father hit his mother. Respondent's direct response to that testimony was: "All right. Well, the court finds you in direct contempt. I ordered you to have a healthy relationship with your father." LT stated, "I didn't do anything wrong . . . ." LT said that his father was the one who had done something wrong, and that he "thought there was like rules when -- rules for like not, you know, not hitting someone[.]" He asked respondent why he was the one going away. Respondent interjected, and despite having already held LT in contempt, she expressed her disapproval of LT with the following notable statements:

- "You are a defiant, contemptuous young man and I'm ordering you to spend the rest of the Summer -- and we'll review it -- we'll review it when school starts, and you may be going to school there. So you're going to be -- I'm ordering you to Children's Village."
- "[Y]ou're supposed to have a high IQ, which I'm doubting right now because of the way you act, you're very defiant, you have no manners . . . ."
- Respondent told LT that he needed "to do a research program on Charlie Manson and the cult that he has. Your behavior in the hall with me months ago, your behavior in this courtroom, your behavior back there, is unlike any I've ever seen in any 46,000 cases. You, young man, are the worst one. So you have bought yourself living in Children's Village, going to the bathroom in public, and maybe Summer school, I don't know . . . ."

- "You had very simple choices and you're clearly -- clearly very messed up."
- "So, I'm sentencing you to Children's Village . . . pending you following the court's direct order. When you can follow the court's direct order and have a normal, healthy relationship with your father I would review this."
- "[Y]ou are so mentally messed up right now and it's not because of your father."
- Addressing the father, respondent said, "Dad, if you ever think that he has changed and therapy has helped him and he's no longer like Charlie Manson's cult, then you let us know and we can do it." As respondent said that, she was making a circular gesture with her finger near her temple.

At the end of that portion of the hearing, LT was handcuffed and led out of the courtroom by sheriff's deputies. Respondent set a review date of September 8, 2015.

Respondent then turned her attention to the two younger children, who had been subject to the parenting-time order for that day. Reading from a written note that he had prepared with his counsel, RT apologized to respondent and to his father.

> [*RT*]: Judge, I'm sorry for my behavior, and dad, I'm sorry for my behavior[.]
>
> [*Counsel*]: Look in his eyes I told you, remember to look --
>
> [*RT*]: Dad, the Judge wanted me to talk to you so here is something about myself. I enjoy soccer and I hope to be on the soccer team -- (undecipherable).
>
> [*Counsel*]: And what do you hope -- do you mind, your Honor? What do you -- what is the thing that you're --
>
> [*Respondent*]: Oh, it's impressive.

[*Counsel*]: -- we talked about, what do you -- you're going to tell the Judge that you're going to be doing from this point forward when you get together with your dad, what was the "C" word we talked about?

[*RT*]: Communicate.

[*Counsel*]: Communicate. That means dialogue, back and forth. Remember I told you not to be just a stick in the mud, your dad asks you a question, you respond. That's how one develops a relationship, starting through communication. Are you in agreement with starting to communicate with your father so that you can build a relationship?

[*RT*]: Yes.

[*Counsel*]: Look at your father's eyes and say that.

[*RT*]: Yes.

[*Counsel*]: Look at the Judge's eyes and say that.

[*RT*]: Yes.

Respondent then addressed the youngest child, 9-year-old NT:

[*Respondent*]: . . . [N]o, [NT], don't read what your brother wrote. You're your own person. Do you know what? I know you're kind of religious. God gave you a brain. He expects you to use it. You have a brain, you are not your brother. You are not your big, defiant brother who's living in jail. Do you want to live in jail? Just tell me this right now.

[*Counsel*]: Do you want to go to jail?

[*Respondent*]: Mom, you must step away.

[*Deputy One*]: Go ahead and step over here, Ma'am.

[*Deputy Two*]: Step away.

[*Deputy One*]: Step towards the back. Thank you.

[*Deputy Two*]: Step up. There you go.

[*Counsel*]: Okay, I'm urging you to apologize and say you will go and try to work with your father at visits. Can you do that?

[*NT*]: I'm sorry, I'll try to work with my father at visits.

[*Respondent*]: Well, you're going to stay here all day and it's going to be up to your dad. I'm going to see how you

two act. Maybe the three of you should go to lunch in the cafeteria? If you have any hesitation at all you're living in Children's Village. You're living in Children's Village.

You know what that would do to your mother, going home, riding down the elevator without you? Can you guys think about someone besides yourself? You should be thinking about your father and what your father has gone through unnecessarily because of I don't why? . . . [I]t's despicable to me what your father has gone through when he loves you and he loves you, and he wants to be in your life. He wants you to be in his life. I'm so upset with you, I'm so upset with you, I'm even more upset with your brother, and I won't say what I think about your mother. I think your mom did something nice in the jury room for once. And I like your dad. And I -- you have me as your Judge for five and a half years.

How old will you be, [NT]? Let's see, you're going to be a teenager. You want to have your -- you want to have your birthdays in Children's Village? Do you like going to the bathroom in front of people?

[*Counsel*]: She said no, thank you.

[*Respondent*]: Is your bed soft and comfortable at home?

* * *

[*Respondent*]: I'll tell you this, you two don't have a nice lunch with your dad and make this up to your dad you're going to come back here at 1:30 and I'm going to have the deputies take you to Children's Village.

Respondent explained to the children that she had "wanted to do this to you all many times," but that their father had said "no." Respondent told the children:

Your mom didn't want me to either, but the ball is in your dad's court. Your dad is in charge. Unless you want to live in Children's Village. It's up to you. I have put other children in Children's Village. You guys can all hang out together.

After some discussion about where the children would have lunch with their father, respondent cautioned: "Everything's recorded [in the courthouse] and I'm going to watch. You walk -- the minute you pull into this courtroom -- courthouse, you're video'd. Outside, they can get you walking in, they can get you everywhere except in the bathroom."

[*Counsel*, to *RT*]: What do you have to say?

[*RT*]: I'll go with my brother then.

[*Respondent*]: Pardon?

[*RT*]: I'll go with my brother.

[*Respondent*]: What does that mean?

[*RT*]: Children's Village.

[*Respondent*]: So you don't want to have parenting time with your father?

[*Mother's Attorney*]: Do they realize that they would not be seeing their siblings?

[*Respondent*]: You're not even going to be with your brother. That's cool. You won't be in the same cell. I'll put in there "Stay away from your brother."

All right, so you're admitting you won't have parenting time with your dad?

[*RT*]: (No audible response).

[*Respondent*]: Okay. Is that a yes?

[*RT*]: Mm-hmm.

* * *

[*Counsel*, to *NT*]: You want to go to lunch with your dad?

[*NT*]: No.

* * *

[*Counsel*]: Now she's refusing because her brother is.

[*NT*]: I'm not refusing because my brother is.

* * *

I'm refusing because I want to refuse.

[*Respondent*]: That's ridiculous, I have to say.

* * *

I've never seen anything like this. One day you can watch this video and realize that you two have been brainwashed. Your dad is a good man. . . . And wipe that smirk off your face, [RT].

[*RT*]: It's not a smirk.

[*Respondent*]: I don't know what that is. I've never seen anything like it. You're a defiant, contemptuous young man and the court finds both of you in direct contempt. You both are going to live in Children's Village. Your mother is not allowed to visit, no one on your mom's side is allowed to visit. Only your father and therapist and Mr. Lansat. When you are ready to have lunch with your dad, to have dinner with your dad, to be normal human beings, I will review this when your dad tells me you are ready. Otherwise, you are living in Children's Village [un]til you graduate from high school. That's the order of the court. Good bye.

Sheriff's deputies then placed both children in handcuffs and took them away.

D. AFTERMATH

More than two weeks later, on July 10, 2015, following numerous media reports about the case, respondent held an emergency hearing, after which she vacated the June 24 orders, sent the children to summer camp by stipulation of the parties, and ordered intensive reunification therapy for the family. The emergency hearing that day was held at the request of the LGAL, not the

father, who was in Israel at the time.[7]

On August 12, 2015, respondent adopted the LGAL's recommendation for parental-alienation counseling in the form of an intensive intervention program. The order also permitted the father to make any and all decisions regarding the children during the intervention program and ordered that the children would stay with the father until further order of the court. The mother appealed, and the Court of Appeals reversed the trial court, agreeing that the August 12, 2015 order was entered in error because it effectively changed the children's custody from their mother to their father without a prior determination regarding whether that change would alter the children's established custodial environment.[8]

E. JUDICIAL TENURE COMMISSION PROCEEDINGS

The Commission issued a 28-day letter[9] to respondent on September 1, 2015, outlining many of the facts

[7] The father participated by telephone.

[8] *Eibschitz-Tsimhoni v Tsimhoni*, unpublished per curiam opinion of the Court of Appeals, issued April 14, 2016 (Docket No. 329406). The Court remanded the case for further proceedings, stating:

> While we reverse the trial court's procedurally defective orders, we note that nothing that this Court can do will change the reality of the children's situation. On remand, the trial court shall conduct an evidentiary hearing on the children's custody as soon as possible to determine whether, considering the myriad disruptions in this case, the children have an established custodial environment. The trial court shall then use the appropriate standard to determine what custody arrangement is in the children's best interests. [*Id*. at 3.]

Respondent recused herself from all further proceedings in the divorce and custody case in December 2015.

[9] MCR 9.207(A) provides that "[a] request for investigation of a judge must be made in writing and verified on oath of the complainant. The commission also is authorized to act on its own initiative or at the

discussed in this opinion. Respondent replied on October 23, 2015. On December 14, 2015, the Commission's examiner (the Examiner) filed a formal complaint against respondent that (1) alleged that respondent committed misconduct on June 24, 2015, when she held three children in contempt, and (2) asserted that respondent was not truthful in her October 23, 2015 answers to the Commission's 28-day letter. In particular, respondent had acknowledged that during the contempt hearing, she had circled her temple with her finger while comparing LT to Charles Manson and his cult. Respondent had claimed that she was not indicating that LT was crazy but was referring to the "forward movement he would make in therapy." The Examiner rejected this explanation as untrue. The Examiner also alleged that respondent, in her October 23, 2015 answers to the Commission's 28-day letter, had misrepresented the facts when she claimed that she did not find the children in contempt for their refusal to talk to or have lunch with their father.

This Court appointed retired Third Circuit Court Judge Daniel Ryan as master (the Master) to hear the Commission's complaint. After holding hearings, the Master first concluded that respondent committed misconduct by holding LT in contempt for refusing to participate in parenting time on June 24, 2015, when no parenting-time order for LT existed. Second, the Master concluded that respondent engaged in miscon-

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request of the Supreme Court, the state court administrator, or the Attorney Grievance Commission." If the Commission chooses to act, MCR 9.207(D)(1) provides that "[b]efore filing a complaint or taking action . . . , the commission must give written notice to the judge who is the subject of a request for investigation. The purpose of the notice is to afford the judge an opportunity to apprise the commission, in writing within 28 days, of such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant issues."

duct by inappropriately giving the "keys to the jailhouse" to the father, who had informed respondent through counsel on June 23 that he would be leaving for Israel shortly after the June 24 parenting-time session, which would deprive the three children of the opportunity to purge themselves of contempt. Third, the Master agreed with the Examiner that respondent engaged in inappropriate behavior by gesturing that LT was crazy like Charles Manson and his cult and by failing to act in a patient, dignified, and judicial manner as illustrated by her disparaging comments to the children about themselves, their siblings, and their mother during the contempt hearing, which crossed the bounds of "stern language." Last, the Master concluded that respondent misrepresented to the Commission that the gesture meant "moving forward" with therapy. The Master rejected as semantics the Examiner's claim that respondent misrepresented the facts when she claimed that she did not find the children in contempt for the simple reason that they refused to talk to or have lunch with their father.

The Commission adopted the Master's findings and conclusions with one notable exception. That is, the Commission concluded that respondent had not made a misrepresentation to the Commission when stating only that she "believed" the gesture meant "moving forward" with therapy. Nonetheless, the Commission determined that respondent's representation was misleading, and it imposed costs incurred by the Commission in the amount of $12,553.73. After applying the factors set forth in *In re Brown*,[10] the Commission determined that a public censure and 30-day suspension without pay was an appropriate sanction.

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[10] *In re Brown*, 461 Mich 1291, 1292-1293 (2000).

Respondent petitioned this Court to reject the Commission's conclusion that she committed misconduct and to reverse the assessment of costs against her. The Examiner filed a reply brief in support of the Commission's decision and recommendation.

II. ANALYSIS

Section 30(2) of Article 6 of the 1963 Michigan Constitution establishes the Commission's authority:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

Similarly, MCR 9.205(B) provides in part:

> Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. . . .
>
> (1) Misconduct in office includes, but is not limited to:
>
> (a) persistent incompetence in the performance of judicial duties;
>
> (b) persistent neglect in the timely performance of judicial duties;
>
> (c) persistent failure to treat persons fairly and courteously;

> (d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;
>
> (e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and
>
> (f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge.
>
> (2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge . . . .

The Examiner has the burden of proving the allegations of judicial misconduct by a preponderance of evidence.[11]

A. STANDARD OF REVIEW

Judicial tenure cases come to this Court on recommendation of the Commission, but the authority to discipline judicial officers rests solely with the Michigan Supreme Court.[12] Accordingly, this Court reviews recommendations made by the Commission and its findings of fact de novo.[13]

B. JUDICIAL MISCONDUCT

The Commission concluded that the following actions of respondent on June 24, 2015, constituted judicial misconduct:

- Respondent held LT in contempt on June 24, 2015, for refusing to participate in parenting time with his father on that date when the only order applying to him called for him to visit with his father on July 14, 2015.

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[11] *In re Morrow*, 496 Mich 291, 298; 854 NW2d 89 (2014); MCR 9.211(A).

[12] See Const 1963, art 6, § 30(2).

[13] *In re Chrzanowski*, 465 Mich 468, 478-479; 636 NW2d 758 (2001).

- Having ordered the three children in this case to be confined to Children's Village for contempt of court, respondent delegated to a third party the discretion to determine when they had purged themselves of contempt.
- Respondent failed to act in a patient, dignified, and judicial manner during the contempt proceedings against the three children, aged 9, 10, and 13, directing to them insulting, demeaning, and humiliating comments and gestures far exceeding the proper bounds of stern language permitted to a judge.

1. APPARENT AND ACTUAL ABSENCE OF APPROPRIATE JUDICIAL TEMPERAMENT

We agree with the Commission's third conclusion that respondent's actions and demeanor during the June 24, 2015 contempt hearing violated certain canons of the Code of Judicial Conduct.[14] Canon 1 provides, in part, that "[a] judge should . . . observe[] high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2(A) provides that "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges." Canon 2(B) adds that "a judge should treat every person fairly, with courtesy and respect." And Canon 3(A)(3) provides that "[a] judge should be patient, dignified, and courteous to litigants . . . and others with whom the judge deals in an official capacity . . . ."

[14] The unfortunate facts of this case would challenge the temperament and objectivity of any judge committed to his or her statutory and constitutional duties. Such circumstances do not, however, provide a judge with a free pass to breach the high standards of conduct imposed on the judiciary of Michigan. They may, however, mitigate the penalty imposed for an isolated breach of conduct by a judge with no other recorded instances of judicial misconduct.

Respondent's conduct toward the children on June 24, 2015, violated these canons. Respondent did not observe high standards of conduct and did not preserve the integrity of the judiciary when she mocked the children, threatened them, called them "crazy" and "brainwashed," exaggerated or lied about the conditions at Children's Village, and generally expressed hostility to the children and their mother.

The Commission also correctly concluded that respondent's behavior eroded public confidence in the judiciary. Respondent was keenly aware that her conduct would be captured by a videorecording of the proceedings. She even reminded the children of the constant surveillance to which they were subject in all areas of the court premises. And yet, fully aware that her actions were being captured on video, respondent directed demeaning, threatening, and sarcastic statements to the children.

The record of the June 24, 2015 hearing also cannot be said to "promote public confidence in the integrity and impartiality of the judiciary."[15] To the contrary, respondent's actions reflected neither integrity nor impartiality. She certainly did not treat the children "with courtesy and respect."[16] Respondent had every right to insist that the children, like all persons before the court, respect the rule of law and the orders of the court. But respondent could have contrasted her expectations with the defiant actions of the children. Similarly, she could have calmly yet sternly explained the consequences associated with defiance of a court order, and she could have clearly articulated her disappointment in the actions of the children. Instead, she referred to the children in a demeaning, disrespectful, and inappropriate way and allowed her understand

[15] Canon 2(B).

[16] Canon 3(A)(3).

able frustrations to impede her management of the proceedings. Respondent's behavior and demeanor toward the children completely lacked any semblance of patience, dignity, or courtesy. We agree with the Commissioner that respondent violated the aforementioned canons of the Code of Judicial Conduct.

2. ABUSE OF CONTEMPT POWER

While we agree with the Commission to the extent that it concluded that respondent's actions and demeanor violated certain canons of the Code of Judicial Conduct, we disagree with the Commission that respondent committed judicial misconduct with respect to the contempt orders. In her petition to this Court, respondent maintains, ostensibly in regard to the Commission's first two conclusions, that the Commission inappropriately decided alleged legal errors beyond its jurisdiction as provided in MCR 9.203(B). Although we disagree with any suggestion that "the existence of appellate review to remedy a judge's conduct divests the Commission of its jurisdiction to review that same conduct for the existence of judicial misconduct,"[17] we must likewise acknowledge that legal errors, standing alone, generally do not suggest the existence of judicial misconduct. This understanding is rooted in MCR 9.203(B), which provides:

> The commission may not function as an appellate court to review the decision of a court or to exercise superintending control or administrative control of a court, but may examine decisions incident to a complaint of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.207. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.

[17] *In re Laster*, 404 Mich 449, 461-462; 274 NW2d 742 (1979).

Distinguishing judicial misconduct from legal error is not a simple endeavor. We are guided by our recent decision in *In re Morrow*, a case in which we were presented with several instances of judicial misconduct, all of which the respondent argued "should be immune from action by the [Commission] because he acted 'in good faith and with due diligence[.]' "[18] This Court ultimately rejected the respondent's argument, stating that "[a]cting in disregard of the law and the established limits of the judicial role to pursue a perceived notion of the higher good, as respondent did in this case, is not 'good faith.' "[19] Crucial to our determination that the respondent had committed misconduct rather than legal error was the fact that he had *willfully* failed to follow the law even after the applicable law was brought to his attention.[20] Good faith, in this legal context, is defined as "[a] state of mind consisting in (1) honesty in belief or purpose, [or] (2) faithfulness to one's duty or obligation"[21] A decision to willfully ignore the law is the antithesis of a decision made in "good faith." That is, a legal decision that is not made in "good faith" reasonably implies that a judge has knowledge of the law but refuses to acknowledge his or her duty or obligation to apply that law. This refusal cannot be considered faithful to the law. Stated in terms of MCR 9.203(B), a "willful failure to observe the law" is not merely "incident" to a complaint of judicial misconduct but is in fact judicial misconduct because it cannot be characterized as a decision made in "good faith." Accordingly, a "willful failure to observe the law" directly implicates the Commission's duty "to

[18] *Morrow*, 496 Mich at 300 (second alteration in original).

[19] *Id*.

[20] *Id*. at 305.

[21] *Black's Law Dictionary* (10th ed).

prevent potential prejudice to future litigants and the judiciary in general,"[22] and is squarely within the Commission's jurisdiction.

Against this backdrop, we turn to the matter at hand. MCL 600.1701 states:

> The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> (g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.

On June 23, 2015, respondent entered a written order reflecting that the father would have supervised parenting time with RT and NT the next day in respondent's jury room. The order provided that the father's visitation with LT would occur on July 14, 2015, after the father returned from a business trip. Yet, respondent held LT in contempt on June 24 because he refused to participate in parenting time with his father. The Commission concluded that respondent abused the power of contempt by holding LT in contempt without any legal basis. Respondent maintains that her actions were less egregious because she "did not act in the absence of any order whatsoever . . . ." While respondent's argument arguably admits that she did not have clear authority to hold LT in contempt, there is some merit to respondent's argument given that LT appeared to be engaging in his persistent behavior of thwarting the parenting time between the younger children and their father. Re-

[22] *Laster*, 404 Mich at 462.

spondent understood that the parenting-time supervisor had identified early on that the younger children were following LT's cues and directions. And respondent herself had witnessed this behavior at the August 14, 2014 parenting-time session at which she personally intervened to prevent, in the words of the LGAL, the children from "huddl[ing] together as if they were sending messages/vibes to each other in some sort of Manson-like behavior."[23] This same scenario appeared to be reoccurring on June 24, 2015, and respondent may have been justified in holding LT in contempt on this basis.[24]

But respondent did not clearly articulate this point at the contempt hearing. For the purposes of this appeal, we assume, therefore, that she did not hold LT in contempt for thwarting parenting time between the father and the younger children. And we agree with the Commission that it would unquestionably be legal error to have held LT in contempt without sufficient evidence that he had defied a "lawful order, decree, or process of the court."[25] We also agree with the Commission that respondent committed a legal error by unlawfully delegating to the father the discretion to determine when any of the children had purged themselves

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[23] Indeed, during the public hearing, respondent acknowledged that she "would not have informed . . . the middle child that his older brother had picked Children's Village" because in her view, "once I did that, [the middle child] went, oh, like he always did and blindly followed [his older brother]."

[24] To the extent that LT's behavior occurred outside respondent's presence, such behavior was not punishable as direct contempt; only the behavior that occurred "during [the court's] sitting, in its immediate view and presence," MCL 600.1701(a), could be punished as direct contempt. See *In re Scott*, 342 Mich 614, 619; 71 NW2d 71 (1955) ("[P]ersonal judicial knowledge of the operative facts is necessary in a summary conviction . . . .").

[25] MCL 600.1701(g).

of contempt.[26] Respondent's contempt orders as to all three children violated the general rule that the contemnor must be given the "keys to the jailhouse."[27] The father planned to leave for Israel shortly after the children were held in contempt. Yet, in regard to RT and NT, respondent ordered that

> [y]our mother is not allowed to visit, no one on your mom's side is allowed to visit. Only your father and therapist and Mr. Lansat [LGAL]. When you are ready to have lunch with your dad, to have dinner with your dad, to be normal human beings, I will review this when your dad tells me you are ready.

While the record does suggest that the children could have purged themselves of contempt by informing Lansat that they would be amenable to meeting with their father, this was not made entirely clear at the hearing, and the order of contempt left the impression that only the father had the "keys to the jailhouse."

In this case, as will be further discussed, respondent's decision to hold the children in contempt was an isolated instance of legal error. But we find it more significant that the errors—holding LT in contempt and giving the father the keys to the jailhouse—could have been remedied on appeal, that the errors were made with the parties' knowledge, and that the parties failed to object to the orders. Further, in this tense court hearing, the children each had a lawyer present as well as the LGAL. The record also reflects that an FOC counselor was in the courtroom as well as an

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[26] MCL 600.1715(2) states that "[i]f the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty . . . ."

[27] See *In re Moroun*, 295 Mich App 312, 318; 814 NW2d 319 (2012) (opinion by K. F. KELLY, J.).

assistant prosecuting attorney. None of the lawyers or trained professionals in the courtroom suggested that respondent's actions crossed the line, nor did they offer alternative actions for the court's consideration. For these reasons, we cannot conclude that respondent's decisions are fairly characterized as "willful failure[s] to observe the law."[28] Respondent had the statutory authority to hold any contemptuous person in contempt of court, and it certainly appears that at least RT and NT blatantly defied the court's order.[29] As previously discussed, respondent may even have had authority to hold LT in contempt for encouraging his younger siblings' contemptuous behavior, but we need not decide that question because even if that was not the basis of respondent's contempt order, it is clear that respondent did not act in willful disregard of the law. In distinguishing between judicial misconduct and a merely erroneous legal decision, we find our decision in *In re Post*[30] instructive. In that case, the respondent held an attorney in contempt for attempting to assert his client's Fifth Amendment right against self-incrimination.[31] The client had appeared for an arraignment on the charge of being a minor in possession of alcohol.[32] He pleaded not guilty, and the respondent inquired whether the client could pass a drug test that day.[33] The attorney stated that his client would stand mute to the question on the basis of his Fifth Amend-

[28] See *Morrow*, 496 Mich at 299.

[29] In addition, the parties do not dispute that if respondent had the authority to hold the children in contempt, sending them to Children's Village was an appropriate sanction.

[30] *In re Post*, 493 Mich 974 (2013).

[31] *Id*. at 982-994.

[32] *Id*. at 980.

[33] *Id*. at 981, 983.

ment right.[34] The respondent nonetheless elicited an admission from the client and continued to press the client for details about his recent substance abuse.[35] The attorney repeatedly objected, but the court simply ignored him or belittled his representation.[36] When the attorney persisted in asserting that the court was violating his client's Fifth Amendment right, the respondent held the attorney in contempt of court.[37] Although the respondent maintained that "his actions did not violate [the client]'s Fifth Amendment right in the United States Constitution or Article [1], Section 17 [of] the Michigan State Constitution,"[38] the Commission disagreed and concluded that "attached transcripts show by a preponderance of the evidence, that [r]espondent breached the standards of judicial conduct . . . ."[39] Among the numerous violations of the standards of judicial conduct found by the Commission, the Commission specifically noted that the respondent's "[c]onduct . . . violates MCL 600.1701, addressing contempt."[40] The Commission recommended that the respondent be publicly censured and suspended from judicial office without pay for 30 days, and this Court accepted that recommendation.[41]

Unlike respondent in the instant case, the respondent in *Post* was repeatedly informed by an attorney that he was acting in violation of the law. Counsel, as an officer of the court, made numerous attempts to not

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[34] *Id*. at 983.

[35] *Id*. at 983-991.

[36] *Id*. at 983-994.

[37] *Id*. at 991-994.

[38] *Id*. at 976.

[39] *Id*. at 977.

[40] *Id*.

[41] *Id*. at 974.

only protect the constitutional rights of his client but also to assist the court in properly applying the law. In response, the respondent in *Post* utterly disregarded the concerns of the attorney and belittled him before holding him in contempt. These circumstances, in our view, plainly exhibit a "willful failure to observe the law."[42] The same cannot be said in this case, in which several attorneys, including the parents' attorneys, the children's individual attorneys, a prosecuting attorney, and the LGAL, did not object or offer any substantial resistance to respondent's decisions.

Further, our review of judicial misconduct matters involving a complaint about a court's abuse of its contempt power supports the conclusion that respondent's legal error did not constitute judicial misconduct. A clear case in which a judge abused the contempt power is *In re Seitz*.[43] In that case, the respondent ordered a youth home director "to release a juvenile female to her father after 9:00 a.m. for a hearing to be conducted in the courthouse that afternoon."[44] Although the order was contrary to an order of the chief judge, it "contained the statement that failure to comply would be deemed contempt."[45] The youth home director "expressed his concern about the order [to the chief judge], who instructed [the youth home director] not to release the girl to her father."[46] "[The youth home director] testified that in any conflict, he thought he would be required to follow the directive of the chief judge."[47] Therefore, the youth home director did not

[42] See *Morrow*, 496 Mich at 299.

[43] *In re Seitz*, 441 Mich 590; 495 NW2d 559 (1993).

[44] *Id.* at 601.

[45] *Id.*

[46] *Id.*

[47] *Id.*

release the juvenile to her father when he came to get her.[48]

The respondent had the youth home director arrested and brought to his courtroom. The respondent then "conducted a 'mock' hearing devoid of due process."[49] The respondent ignored the youth home director's request for counsel and ordered him to call the youth home and have the girl released.[50] The youth home director cited the chief judge's order, and the respondent found him in contempt of court and ordered him jailed.[51] Under these circumstances, this Court agreed with the Commission that the respondent had abused his contempt power because "the facts amply support the conclusion that [the respondent] was intent upon subverting the rules of his court and the decisions of his chief judge with which he disagreed . . . ."[52]

A less egregious example of a judge abusing the contempt power is presented in *In re Hague*,[53] in which the respondent "began systematically dismissing prostitution cases for the stated reason that the preprinted citation or ticket forms which had been issued to defendants as the charging document could not be used to initiate non-traffic ordinance violation cases." The city sought and received from the chief judge "a temporary order of superintending control directed to respondent which ordered" that the respondent " 'cease dismissing non-traffic ordinance complaints . . . based upon objection to their form until further order of this court.' "[54]

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[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 601-602.

[52] *Id*. at 604.

[53] *In re Hague*, 412 Mich 532, 540; 315 NW2d 524 (1982).

[54] *Id*.

Nonetheless, the respondent continued to act contrary to the order of superintending control. The respondent also threatened the city's assistant corporation counsel with contempt of court if he continued to bring prostitution cases:

> It is the order of this court that no further prostitution cases be brought into this courtroom, and they can be tried before a referee or any other judge in this court. Now whatever you want to do with them, that's your privilege.
>
> Mr. Representative of the Detroit Police Department and Officer, don't bring them in this courtroom anymore; that's an order of the court. If you do, I'm going to cite you for contempt of court the minute you walk through the court with the prostitutes; do you understand?[55]

This Court concluded that the respondent's "completely unjustified threat of contempt . . . was 'conduct prejudicial to the administration of justice' and an abuse of the court's contempt power warranting discipline."[56]

Seitz and *Hague* present clear examples of judges abusing the contempt power—abuse that constituted judicial misconduct. Both judges defied clearly controlling directives that they had no discretion to ignore. Their failure to comply again and again evinced a "willful failure to observe the law."[57]

In contrast, consider *In re Hocking*, in which the respondent held an attorney in contempt after the respondent

> instigated a confrontational exchange with [an attorney] by challenging her to tell him why her motion was not the frivolous action he clearly had predetermined it was, made

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[55] *Id*. at 554.

[56] *Id*. at 555.

[57] See *Morrow*, 496 Mich at 299.

> caustic comments in an abusive tone, and personally attacked [the attorney], conduct that is clearly prejudicial to the administration of justice [and] in violation of the Code of Judicial Conduct.[58]

The Court observed that the respondent illustrated "a total lack of self-control and an antagonistic mind-set predisposed to unfavorable disposition."[59] Even so, neither the master nor the Commission concluded that the respondent's contempt proceeding in and of itself was judicial misconduct.[60]

We conclude that respondent's behavior in this case is far more similar to *Hocking* than to *Post*, *Seitz*, and *Hague*. While all of these cases involved a lack of judicial temperament that was deemed judicial misconduct, *Post*, *Seitz*, and *Hague* also involved judicial misconduct relating to an abuse of the contempt power because those erroneous legal decisions also evinced a willful failure to obey the law. Like *Hocking*, respondent's decision to hold the children in contempt in this case did not reflect a willful failure to follow the law and is better characterized as legal error that could have been remedied on appeal. Thus, our caselaw supports the conclusion that respondent's legal error did not constitute judicial misconduct.

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[58] *In re Hocking*, 451 Mich 1, 23; 546 NW2d 234 (1996).

[59] *Id*.

[60] *Id*. at 22. This Court agreed with that conclusion:

> [The attorney] acted improperly in arguing the merits of the motion when she had been instructed not to do so and in continuing to argue after the court had ruled. Fortunately, such behavior is rare, but a judge has undoubted authority to control runaway behavior up to and including contempt. To hold that a trial judge may not express strong displeasure or even anger, would ignore the reality that the potential for such reactions induces a level of civility in the process, without which the system literally could not function. [*Id*. at 23.]

We also conclude that respondent acted with due diligence when holding the children in contempt. Due diligence is defined in *Black's Law Dictionary* as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."[61] It is significant that respondent approached these contempt proceedings as addressing matters of direct civil contempt. Pursuant to MCL 600.1701(a), a trial court may punish by fine, imprisonment, or both "contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, . . . directly tending to interrupt its proceedings or impair the respect due to its authority." Respondent ordered that supervised visitation between the father and his two younger children take place in the court's jury room. But the children refused to comply. Where, as here, the court believes contempt was committed "during its sitting" and in its "immediate view and presence," the contempt is direct and the court may summarily make a finding of contempt and punish the contemnor. No hearing is required for a finding of direct contempt.[62] Even though respondent proceeded on a theory of direct contempt and neither the appointment of counsel nor a hearing is required to make a summary finding of direct contempt, respondent conducted a hearing at which she addressed each child individually and gave them the opportunity to comply with the court's directive. Further, respondent appointed three

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[61] *Black's Law Dictionary* (10th ed).

[62] See *In re Contempt of Warriner*, 113 Mich App 549, 554-555; 317 NW2d 681 (1982) (acknowledging that "[t]he United States Supreme Court has long held that such summary punishment accords due process of law"), citing *Fisher v Pace*, 336 US 155; 69 S Ct 425; 93 L Ed 569 (1949), and *Ex Parte Terry*, 128 US 289; 9 S Ct 77; 32 L Ed 405 (1888).

independent attorneys to allow each of the children the opportunity to purge himself or herself of the contempt. The attorneys were informed that the contempt proceeding would begin only after they had an opportunity to meet individually and confidentially with their respective clients. After 30 minutes, respondent commenced the contempt hearing. Each attorney indicated a willingness to proceed. No attorney requested additional time to prepare for the hearing. This process—not required for proceedings involving direct contempt—shows that respondent acted with due diligence, even if she ultimately committed legal error. Accordingly, having reviewed the entire case, we cannot conclude that respondent committed judicial misconduct by holding the children in contempt.

C. DISCIPLINARY ANALYSIS

The Commission recommends that this Court suspend respondent for 30 days without pay. The Commission arrived at this recommendation after finding that several of the *Brown*[63] factors militated in favor of a more serious sanction.

In *Brown*, the Court articulated the following seven factors to consider when determining the seriousness of the misconduct at issue:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
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> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
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> (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;

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[63] *Brown*, 461 Mich 1291.

(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.[64]

The Commission concluded that respondent's misconduct (1) was isolated but could reoccur without intervention, (2) occurred on the bench, (3) was prejudicial to the administration of justice and the appearance of propriety, (4) implicated the actual administration of justice, (5) "was a spontaneous reaction to her continued frustration and inability to bring order to a dysfunctional relationship between the father and his children," though there was no effort "to contain or repair the damage,"[65] (6) undermined the ability of the

[64] *Id*. at 1292-1293.

[65] The Commission observed that although "[r]espondent's actions appear to have been contemplated for nearly a year, and she had the chance to reflect upon her actions during the course of a hearing that lasted nearly an hour," "the video record of the proceedings suggests that [respondent's] anger was a spontaneous reaction to her continued frustration and inability to bring order to a dysfunctional relationship between the father and his children." We agree that respondent's previous contemplation of a potential response to the children's failure to comply with her orders does not necessarily mean that respondent deliberately took the action a year later. The circumstances changed during the year, and according to the Commission, "[t]he fact that her

justice system to discover the truth about what occurred in this legal controversy, or to reach the most just result in this case,[66] and (7) did not involve the unequal application of justice on the basis of race,

actions on the day in question appear entirely out-of-character appears to confirm the fact that this is an isolated instance of a judge losing her temper, rather than a case of a chronically abusive judge."

[66] The Commission specifically found that respondent "did not intentionally interfere with the fact-finding process in the underlying litigation." However, the Commission also concluded that "by failing to respond to the children's allegations of violence exhibited by their father, or permitting them freely to articulate their reasons for their behavior on the record the first time they appeared in court before her, [r]espondent's misuse of her contempt power prevented her from taking the children's perspective into account." While we acknowledge that respondent's inappropriate behavior certainly curtailed the children's ability to "articulate their reasons for their behavior on the record," we do not agree that respondent failed to consider the children's allegations regarding their father's violence. LT's claim that his father had hit his mother had been addressed five years before the contempt hearing and was not substantiated by the police even though a complaint had been filed. Further, the record of the proceeding at which this incident was raised revealed that the mother had made an unsupported allegation in 2008 that the father had abused her and the children. Also, at the contempt hearing, respondent directly explained to LT that "[y]our father has never been charged with anything, your father's never been convicted of anything. Your father doesn't have a personal protection order against him."

In regard to RT's complaint that his father had abused him, the record reflects that respondent held a full evidentiary hearing on these allegations on March 23, 2015, and found insufficient proof of the allegations. At the public hearing, respondent explained in detail that "[w]e had had a hearing previously as to that issue where witnesses were allowed to be called where I heard one witness. I didn't prevent anyone else from calling any other witnesses. The parties chose not to call a witness. At that point, there was insufficient evidence to support [RT's] claim." She further stated that "[t]he parenting time supervisor, who was apparently a police officer, a retired police officer, testified and said *it did not occur*. So -- so I informed the child that basically we have to move on from this. Let's move on." (Emphasis added.) The record reflects that respondent was in fact aware of the children's allegations of their father's physical violence, but dismissed them as either stale and/or unsupported.

color, ethnic background, gender, or religion—the Commission stated that respondent's misconduct "did, however, target children."

We generally agree with the Commission's analysis of the *Brown* factors but are compelled to clarify the application of Factors 1 and 7. In regard to Factor 1, the Commission viewed respondent's conduct as an "isolated instance" in light of her "exemplary record." But the Commission nevertheless found that respondent seemed not to "recognize[] that her acts far exceeded the bounds of proper judicial conduct," and that her lack of awareness "suggest[ed] . . . a pattern that may repeat itself in the future, in the absence of any corrective action." But the fear of future misconduct by a judge who, by the Commission's account, has an exemplary record of public service and whose misconduct was "isolated" is not reason to impose a period of suspension.[67] To the contrary, it is because this is an isolated instance of misconduct by a judge with an otherwise exemplary record that a measured sanction should deter future misconduct. If this behavior repeats itself in the future, the Commission can initiate new proceedings to address that misconduct and a sanction may be imposed for a pattern of misconduct. We conclude that this factor unequivocally favors a lesser sanction.

In regard to Factor 7, we are not persuaded by the Commission's conclusion that a greater sanction is warranted because respondent "targeted" children. We acknowledge that respondent's treatment of the chil-

[67] The Commission's assessment of respondent's record of public service as exemplary is supported by the letters submitted by respondent both from members of the State Bar and the public, as well as a brief filed by joint amici curiae The American Academy of Matrimonial Lawyers (Michigan Chapter) and the Oakland County Bar Association.

dren was inappropriate. We expect judges to conduct themselves in a manner that is respectful and courteous to all individuals before the court, especially vulnerable individuals such as children. Respondent let her frustrations get in the way of this duty. Nonetheless, we do not believe respondent's conduct falls within the scope of Factor 7 because although her misconduct involved children, there is no evidence that her misconduct involved "the unequal application of justice . . . on the basis of a class of citizenship," which is what Factor 7 seems to require.[68] Assuming arguendo that age may be included within "such considerations as race, color, ethnic background, gender, or religion," we simply see no evidence that respondent treated the children differently from other persons who had previously defied court orders. Indeed, respondent jailed the mother for not complying with a court order. Respondent's assignment to a family court docket means that her cases often involve the custody of children. In our view, respondent's conduct during the hearing cannot be described as demonstrating animus toward children. Instead, her conduct demonstrated frustration with these particular children and their persistent refusal to follow the court's orders.[69] And while it is true that her conduct was inappropriate and crossed the line of good judicial temperament, there is

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[68] See *Brown*, 461 Mich at 1293.

[69] At oral argument, the Examiner conceded this point:

> [*Justice Viviano*]: Because she's upset because they're not complying. They're not doing what she's ordering them to do, right?
>
> [*Mr. Helland*]: Right. Yes. I agree with you.
>
> [*Justice Viviano*]: She has a right to be upset.
>
> [*Mr. Helland*]: I agree with that.

no evidence that respondent engaged in "the unequal application of justice" when holding the children in contempt. Therefore, we conclude that *Brown* Factors 1 and 7 do not weigh in favor of a more severe sanction.

The Commission reviewed five previous judicial discipline cases for guidance regarding the proper sanction in this case: *Morrow* (60-day suspension);[70] *Post* (30-day suspension);[71] *In re Servaas* (public censure);[72] *In re Moore* (6-month suspension);[73] and *Hocking* (3-day suspension).[74] The Commission noted that in *Moore*, "a persistent pattern of abusive misconduct" justified a 6-month suspension, whereas in *Morrow*, "a persistent disregard for the controlling law stemming from idealistic motives" justified a 60-day suspension. At the other end of the spectrum are *Hocking* and *Servaas*, "isolated cases of personal or professional misbehavior" that warranted "a short suspension or censure, particularly if the harm extend[ed] no further than offending the personal sensibilities of the affected parties." The Commission concluded that as in *Post*, "the combination of legal harm and intemperate behavior seems to call for more than a minimal sanction."[75] The Commission explained that respondent in this case

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[70] *Morrow*, 496 Mich 291.

[71] *Post*, 493 Mich 974.

[72] *In re Servaas*, 484 Mich 634; 774 NW2d 46 (2009).

[73] *In re Moore*, 464 Mich 98; 626 NW2d 374 (2001).

[74] *Hocking*, 451 Mich 1.

[75] We recognize that the Commission likely intended the word "intemperate" to refer to respondent's obvious frustration during the June 24, 2015 hearing, that is, "intemperate" in its more modern connotation. We note, however, that we have construed "habitual *intemperance*" in Const 1963, art 6, § 30(2), the constitutional provision concerning judicial misconduct proceedings, to mean "the abuse of alcohol." *In re Mikesell*, 396 Mich 517, 536; 243 NW2d 86 (1976). There are no such allegations in this case.

> crossed the line from proper demeanor to caustic abuse; and here, as in *Post*, the judge had misused the contempt power during the course of a heated exchange in open court. In this case, both Respondent's insulting and demeaning language, and subsequent finding of contempt, were not only abusive, but directed at children, rather than at a trained, albeit inexperienced attorney. If anything, this makes the misconduct worse than the judge's actions at issue in *Post*, which resulted in the judge's suspension for [sic, from] office for thirty days.

The Commission also noted that in *Post*, the attorney who was cited for contempt spent only a few hours in jail, whereas the children in this case spent 17 days confined at Children's Village. In sum, given respondent's exemplary record, the Commission determined that a 30-day suspension without pay was the appropriate sanction.

While "no two judicial misconduct cases are identical,"[76] we agree with the Commission that *Post* is somewhat analogous to the instant case, but as previously discussed, unlike *Post*, we conclude that respondent's decision to hold the children in contempt did not constitute judicial misconduct. Rather, this case is more analogous to *Hocking*, which likewise concluded that the respondent had not abused the contempt power but nonetheless held that the respondent's behavior during the proceeding in that case was prejudicial to the administration of justice.[77] In *Hocking*, the Commission had recommended a 30-day suspension, but because this Court disagreed with the Commission's conclusion that the respondent had abused the contempt power, the respondent was only given a 3-day suspension.[78]

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[76] *Brown*, 461 Mich at 1295.

[77] *Hocking*, 451 Mich at 23.

[78] *Id.* at 3-4, 27.

Further, we find that several mitigating factors in this case also compel a lesser sanction. First, as previously discussed, we believe that *Brown* Factors 1 (isolated misconduct) and 7 (misconduct not involving a specified class of citizenship) suggest a lesser sanction. Second, unlike *Post*, which involved only one proceeding, a criminal arraignment, the proceedings in this case were extremely contentious and protracted. Respondent presided over this difficult matter for several years and heard dozens of motions. This instance represents her single recorded lapse of good temperament. Third, unlike *Post*, respondent's frustration was understandable. While this Court certainly cannot condone respondent's behavior at the June 24, 2015 hearing, our review of the proceedings differs from the Commission's view that respondent targeted the children. The record is clear that as early as August 2010 these children embarked on a concerted effort to thwart meaningful interaction with their father and continued to do so despite respondent's orders to the contrary. Regardless of their age, there is no question that during the intervening years, each child knew they were *supposed* to have visitation with their father. And any person old enough to engage in this deliberately defiant behavior over a five-year period must appreciate that they could be called before the court to account for their actions.

Finally, there is no indication that respondent sought to personally benefit from her misconduct, which is also a "relevant mitigating factor in determining the appropriate discipline."[79] Nor is there any indication of "dishonest or selfish conduct [that would] warrant[] greater discipline than conduct lacking such

[79] *Morrow*, 496 Mich at 303.

characteristics."[80] Thus, we conclude that public censure is proportionate to the judicial misconduct established by the record.

D. COSTS

In the 28-day letter, the Examiner requested that respondent provide information concerning her conduct at the June 24, 2015 hearing during which she circled her temple with her finger and said that LT behaved similarly to Charles Manson and his cult. In her answer, respondent "denie[d] the truth of the statement that her gesture made while she was speaking was intended to indicate or even imply that [LT] was crazy. She believes that her hand motion was intended to indicate that Defendant Father should let the court know if [LT] had made any forward movement as a result of the therapy he would soon be receiving, simulating the motion of a wheel moving forward." The Master noted that the video of the hearing reflects that respondent "frequently speaks with her hands."

Before the Master, respondent acknowledged how this hand gesture is portrayed on the video, realizing the symbolism behind the gesture, and how it could be misunderstood. She posited that "[i]f anyone believes or believed that she was indicating that [LT] was crazy at the time, [she] will accept responsibility for the misunderstanding. However, she never intended to offend anyone in this way." The Master agreed with the Examiner that respondent's answer to the Commission was false. Specifically, the Master believed that the explanation proffered by respondent for the gesture

[80] *Id.*

was similar to her efforts at the July 10, 2015 proceeding to explain away her June 24, 2015 conduct in retrospect.

The Commission disagreed with the Master's conclusion that respondent's answer was false, and prefaced its analysis by stating that

> it is the Commission's conclusion that a false statement requires the speaker's knowledge that the statement is false and intended to deceive. The fact that a statement may be incorrect does not, by itself, render the statement "false" within the context of a legal proceeding. It may be discredited, or deemed unworthy of belief, but given the limits of human memory and perception, as well as the limitations of language, it would be unfair to impute motives of deception or falsehood to everyone who says something that someone else finds incredible, or that proves to be incorrect.
>
> Selective memory does not equal falsehood; incorrect memory does not equal falsehood; imprecision in expression does not equal falsehood; even an answer that one chooses to disbelieve does not equal a falsehood.

The Commission noted that "the only real fact contained in Respondent's response to the question about her 'circular gesture' was her 'belief' about what she intended." The Commission explained that "[h]er subsequent testimony at the hearing before the Master clarified that she did not recall making the gesture and was unaware she had done so until she viewed the video recording of the proceedings, but that she felt obligated to provide her best guess about what she intended." The Commission stated that "as long as she was candid about her lack of memory, we cannot deem speculations about her motives or intentions in performing actions months earlier --- actions that she could not even recall --- to be actionable falsehoods." In the Commission's view, "the simple answer --- 'I do

not remember what was in my mind at the time'---would have been both accurate and helpful." The Commission concluded that "the Examiner failed to prove the misconduct alleged in Count II by a preponderance of the evidence." But the Commission nonetheless held that "Respondent's answer to the 28-day letter was misleading enough to justify the imposition of costs under MCR 9.205(B)." According to the Commission, "[t]he answer given, while not actionably false, was sufficiently misleading to require a hearing to discover the facts, a facet of the hearing that the simpler answer would have prevented."

MCR 9.205(B) states:

> In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

In her petition to this Court, respondent notes that MCR 9.205(B) authorizes this Court to order payment of "the costs, fees, and expenses incurred by the [C]ommission in prosecuting the complaint **only** if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the [C]ommission, the [C]ommission's investigators, the [M]aster, or the Supreme Court." Respondent then highlights that the Commission "in its *de novo* review of the evidence appropriately determined that [respondent] **did not** make any misrepresentation to the Commission's investigators, the Master, or the Commission, and found specifically that her statements about her *belief* did not constitute intentional deception[.]"

A common definition of "misrepresent" is "to give a false or misleading representation of usu[ally] with an intent to deceive or be unfair[.]"[81] Note that "misrepresent" is defined in terms of a "misleading" statement, which renders the meaning of "misleading" somewhat tautological. But a common definition of "mislead" is "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit[.]"[82] These definitions make clear that both a misrepresentation and a misleading statement generally include an actual intent to deceive. While the definitions do not categorically exclude a lesser *mens rea*, we believe that respondent makes a solid point that "[i]t is inconsistent to find one without the other as both seemingly require a wrongful intent to misdirect." Even though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, there must be some showing of wrongful intent. In this case, respondent merely speculated as to her intent, and other than the possibility that the guess was self-serving, which the Commission acknowledged and rejected, we cannot conclude that respondent's guess is akin to either a misrepresentation or a misleading statement. Accordingly, we reject the Commission's request to impose costs.

III. RESPONSE TO THE PARTIAL DISSENT

For the most part, the partial dissent agrees with the majority's identification of the pertinent facts and law applicable to this case. The partial dissent, however, disagrees with "the majority's conclusions that respondent's exercise of her contempt power did not

[81] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[82] *Id*.

constitute misconduct and that her behavior warrants only public censure." The partial dissent maintains that "respondent did not act in good faith or with due diligence in the exercise of her contempt power" and that therefore the legal errors involved in that exercise of her contempt power merit a finding of judicial misconduct.

We disagree with the partial dissent's assertion that respondent did not act in good faith. Michigan law requires family courts to evaluate the "willingness and ability" of divorced parents to "facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."[83] It is apparent from the record that respondent acted in furtherance of this ideal. Nonetheless, for nearly five years, the children failed to make any meaningful effort or progress toward developing a relationship with their father. Throughout the year preceding the contempt hearing, respondent made progressive attempts to get the children to adhere to the court's directives to engage with their father. Various attempts at supervised visitation were tried, but they were thwarted by the mother, the children, or both.[84] The children's LGAL advised the court to consider draconian measures to obtain compliance from

[83] MCL 722.23(j).

[84] Recall that during this period the mother admitted to violating the parenting-time agreement after which she was temporarily jailed and later required to work at an animal shelter for two days. She also agreed to pay the father's attorney fees.

Moreover, recall that the mother had encouraged her children to call 911 on August 27, 2010, to report that the father had allegedly abused her. The responding officers saw no visible injuries to the mother, concluded that there was no probable cause to arrest the father, and referred the matter to DHS, which later closed it. On March 23, 2015, respondent held a full evidentiary hearing after RT complained to the court that his father had abused him. At that hearing, the parties called

this family. Respondent ultimately heeded the advice of the LGAL. Under the circumstances of this case and for the reasons stated in this opinion, we conclude that the record well establishes respondent's good faith in exercising her contempt power to facilitate a relationship between the children and the father.

We also disagree with the partial dissent that respondent did not act with due diligence in the exercise of her contempt power. As earlier explained, respondent did not act at a "breakneck pace" to find the children in contempt. To the contrary, respondent implemented processes not typically required in a direct contempt situation in order to afford the children an opportunity to comply with the court's directives.

The partial dissent also suggests that respondent's error was misconduct because the contempt order violated a basic principle of civil contempt—that the contemnor must be given the "keys to the jailhouse."[85] But again, it is not the violation of basic principles of law that transforms legal error into misconduct; it is acting without good faith and due diligence that compounds legal error and gives rise to judicial misconduct. For the reasons previously stated, we conclude that respondent acted in good faith and exercised due diligence.

The partial dissent is also perplexed that the majority concludes that it is significant that none of the many trained professionals who witnessed the con-

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no witnesses, the parenting-time supervisor testified that no abuse occurred, and respondent found insufficient proof to support RT's allegations.

[85] *Moroun*, 295 Mich App at 318 (opinion by K. F. KELLY, J.). Interestingly, under the dissent's theory, the trial judge in *Moroun* would have been subject to discipline for violating the longstanding principle that the contemnor must possess the keys to the jailhouse.

tempt proceeding interceded or signaled to respondent that she might be exceeding her authority. Contrary to the conclusion of the partial dissent, we do not "rely on attorneys and other bystanders to police a judge's proceedings . . . ." Appellate courts check reversible legal error, and the Commission checks judicial misconduct. But again, in drawing the line where legal error also constitutes judicial misconduct, we must assess the good faith and due diligence of the presiding judge. There were seven attorneys and several trained family court professionals in respondent's courtroom to protect various interests and aid in the administration of justice, and not one of them concluded that it was appropriate to aid the court in its judicial function or to lodge an objection to respondent's decision to hold the children in contempt. That so many trained professionals failed to object or otherwise intervene supports the conclusion that respondent acted in good faith and with due diligence. In other words, it is clear with the benefit of hindsight that respondent committed legal error, but viewing her conduct in the context in which it occurred—during heated litigation in a highly acrimonious proceeding—we cannot conclude that respondent's initiation of contempt proceedings and the process she followed during the proceedings demonstrate that she acted in bad faith or without due diligence.

Finally, the partial dissent takes issue with imposing a public censure rather than a 30-day suspension without pay. This divergence between the majority and the partial dissent is in large part due to our disagreement that respondent's erroneous finding of contempt itself constitutes judicial misconduct. In our opinion, a lower sanction is required because we do not accept the Commission's conclusion that respondent was guilty of misconduct in the exercise of her contempt power. But we also note that the partial dissent makes much of the fact that five of the seven *Brown* factors weigh in favor

of a "more severe sanction." The partial dissent fails to appreciate the context of the words "more severe." These factors suggest a more severe sanction in relation to the overall range of sanctions appropriate to the misconduct established. The severity of the misconduct plays a great role in determining the appropriate sanction range in the first instance. Because the judicial misconduct in this case only relates to respondent's demeanor and temperament, a lesser range of sanctions applies than would apply had this Court agreed with all the conclusions of misconduct found by the Commission. In this case, we have a judge with no prior record of misconduct who in an isolated instance exercised poor judgment and displayed a lack of appropriate judicial temperament and demeanor during a highly acrimonious and protracted divorce and custody proceeding. Under the circumstances, a public censure is appropriate.

IV. CONCLUSION

We order that respondent be publicly censured for committing judicial misconduct under the understandably difficult circumstances of the underlying divorce and ongoing custody matter. In sum, respondent became admittedly frustrated and exasperated at a June 24, 2015 hearing when attempting to convince three children to participate in parenting time with their father. Under these circumstances, we agree with the Commission that respondent exhibited a lack of judicial temperament during the proceedings in open court when she directed at the three children and their mother language that was insulting, demeaning, and humiliating. Respondent also committed legal error by holding the children in contempt, ordering them to be confined at the Oakland County Children's Village, and leaving in the hands of their father, who was soon

to be out of the United States, the ability of the children to purge themselves of civil contempt. But that decision did not constitute a "willful failure to observe the law," which would merit a finding of judicial misconduct. In sum, we agree in part with the Commission's conclusion that respondent committed judicial misconduct, and we hold that public censure is proportionate to the judicial misconduct established by the record. We also reject the Commission's recommendation that costs, fees, and expenses be imposed against respondent under MCR 9.205(B).

MARKMAN, C.J., and MCCORMACK, VIVIANO, LARSEN, and WILDER, JJ., concurred with ZAHRA, J.

VIVIANO, J. (*concurring*). I agree with the majority that a public censure is a sanction proportionate to the limited judicial misconduct in this case. I also agree with the majority that there is no basis on which to impose costs, fees, and expenses against respondent. I write separately, however, because I believe that in Judicial Tenure Commission (JTC) cases we should address all the legal bases for the findings of misconduct recommended to us by the JTC or explain why we do not.

The JTC found that respondent violated Canons 1, 2(A), 2(B), 3(A)(1), 3(A)(3), and 3(A)(9) of the Code of Judicial Conduct; committed misconduct under MCR 9.104(2) to (4); engaged in "misconduct in office" and "conduct clearly prejudicial to the administration of justice" under Const 1963, art 6, § 30(2) and MCR 9.205; violated MCR 9.205(A); and failed to exhibit due diligence.[1] The majority sustains only the JTC's find-

[1] The JTC's recommendation in this case follows what appears to be the JTC's custom of making a laundry list of findings of misconduct,

ings as to Canon 1, the first sentence of Canon 2(A), Canon 2(B), and Canon 3(A)(3). I agree with the majority's reasoning and conclusions with respect to these findings[2] and interpret the majority's silence as a rejection of the JTC's remaining findings.[3] And, with the exception of the JTC's finding under MCR 9.104(2), I also agree that no additional findings should be sustained.[4] I would simply explain why we reached the conclusion we did for each of the JTC's findings.

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including findings based on rules that are duplicative, vague, and, in my view, entirely unnecessary. This wide-net approach is unfair to respondents (and their attorneys) who must decide which of the myriad factual and legal issues that arise in these cases should be the focus of their presentation to this Court. I would encourage a more disciplined approach by the JTC in order to allow the lawyers and litigants to sharpen the issues for us to resolve by spending more time on the substance of the charges.

[2] Respondent does not argue that any of the canons establishing a basis for action here are aspirational in nature and thus fail to provide sufficient notice of prohibited conduct. Nor does respondent argue that when there is a more specific canon governing the misconduct alleged, the more general canons are inapplicable. See *In re Haley*, 476 Mich 180, 183; 720 NW2d 246 (2006) ("Having decided that respondent was in violation of a specific, controlling judicial canon, we conclude that it is inappropriate to also consider whether respondent created a general appearance of impropriety under Canon 2, as urged by the examiner."). Nor has respondent argued that MCR 9.205(A) is aspirational only, although I note that there is no language in MCR 9.205 providing that a violation of Subrule (A) may constitute a ground for action. To me, these questions are worth considering in the future.

[3] Respondent does not argue that we may not sanction her solely on the basis of violations of the Code of Judicial Conduct, i.e., without also finding a violation of Const 1963, art 6, § 30(2), see, e.g., *In re Kapcia*, 389 Mich 306, 311; 205 NW2d 436 (1973) (once the JTC makes a recommendation, "the Supreme Court 'may censure, suspend with or without salary, retire or remove' a judge on grounds specified in the Constitution"), so I would not reach that question either.

[4] I agree with the JTC to the extent it found that respondent engaged in "[c]onduct exposing the legal profession or courts to . . . reproach," contrary to MCR 9.104(2). But it is unclear whether MCR 9.104 even applies in this context because that rule, and the entire subchapter in

In my judgment, this Court should, as a matter of course, address all the legal bases for the findings of misconduct submitted to us by the JTC, just as I would expect the JTC, as a matter of course, to resolve all the allegations of misconduct in the formal complaint and to address all the findings of the master.[5] Respondent judges and the public are entitled to have this Court carefully and rigorously assess all the legal bases for the JTC's findings of misconduct to ensure that the ultimate sanction imposed is proportionate to the misconduct and supported by legal authority. More than that, too, respondent judges and the rest of the Michigan judiciary deserve the benefit of our careful consideration and reasoned opinion regarding each charge submitted to us. The bench should have the benefit of our explanation of the court rules, the Constitution, and the judicial canons as applied to particular conduct, especially because much of this authority is not specific about the conduct it prohibits.

In the end, I agree with the majority that respondent's courtroom conduct violated certain provisions of the Code of Judicial Conduct and that a public censure is a proportionate sanction. Accordingly, I concur.

MCCORMACK, J., concurred with VIVIANO, J.

BERNSTEIN, J. (*concurring in part and dissenting in part*). I agree with my colleagues in the majority that

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which it appears, governs professional disciplinary proceedings before the Attorney Discipline Board—not disciplinary proceedings before the JTC. However, because respondent has not challenged the JTC's conclusions on this basis, I would not address the issue. See *In re Simpson*, 500 Mich 533, 555 n 26; 902 NW2d 383 (2017).

[5] See generally *In re Simpson*, 500 Mich at 548-551 (noting the disconnect between the allegations in the formal complaint, the master's findings, and the JTC's findings).

the language and demeanor of respondent, Sixth Circuit Judge Lisa O. Gorcyca, throughout the June 24, 2015 hearing constituted judicial misconduct and that the imposition of costs under MCR 9.205(B) would not be appropriate in this case. I also agree in broad strokes with the majority's recitation of the underlying facts. However, I respectfully disagree with the majority's conclusions that respondent's exercise of her contempt power did not constitute misconduct and that her behavior warrants only public censure. I would have adopted the findings and recommendation of the Judicial Tenure Commission (Commission) to publicly censure respondent and suspend her from office for 30 days without pay.

I. ABUSE OF CONTEMPT POWER

The majority insists that respondent did not commit misconduct by holding the oldest child in contempt even though he was not subject to the June 24 parenting-time order at issue or by ordering all three children to be confined to Children's Village and delegating to their father the discretion to determine when the children had purged themselves of contempt. Rather, the majority insists, these actions constituted no more than legal error. As the majority notes, under MCR 9.203(B), "[a]n erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct." But as the plain language of the court rule makes clear, legal error is not automatically shielded from review by the Commission or by this Court—to be so shielded, a legal error must have been made in good faith and with due diligence. Legal error and judicial misconduct are not mutually exclusive. As this Court explained in *In re Laster*, 404 Mich 449, 462; 274 NW2d 742 (1979):

> Judicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review, but one does not necessarily exclude the other. One path seeks to correct past prejudice to a particular party; the other seeks to prevent potential prejudice to future litigants and the judiciary in general.

The majority's analysis overlooks the context of respondent's actions; that context demonstrates that respondent did not act in good faith or with due diligence in the exercise of her contempt power.

As this Court stated in *In re Hague*, 412 Mich 532, 555; 315 NW2d 524 (1982): "The contempt power is awesome and must be used with the utmost restraint. . . . Abuse of the contempt power, including unjustified threats to hold persons in contempt, constitutes misconduct warranting discipline." (Citations omitted.) Clearly, then, judges must be prudent in their use of this power, and they must be held responsible accordingly. See *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971) ("The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown.").

In this case, respondent entered a written order on June 23, 2015, stating that the father would have supervised parenting time with the two younger children the next day in respondent's jury room. The order expressly provided that the father's next visitation with the oldest child would occur on July 14, 2015, after the father returned from a business trip. Nevertheless, on June 24, 2015—the day after the visitation order entered—respondent held the oldest child, LT, in contempt because he refused to participate in parenting time with his father on that same day. The Commission properly concluded that respondent abused the contempt power by holding LT in contempt without

any legal basis. Respondent suggests that her actions were less egregious because she "did not act in the absence of any order whatsoever . . . ." However, that respondent can only argue in the negative here rather than positively pointing to any record evidence to validate the contempt order merely serves to underscore the point that she was and is unable to provide any clear justification for her decision to hold LT in contempt.[1]

As the Commission concluded, respondent also unlawfully delegated to the father the discretion to determine when any of the children had purged themselves of contempt. Even though respondent was aware that the father would be leaving shortly after the June 24 hearing for a weeks-long business trip to Israel, she ordered that LT be confined to Children's Village and announced that the father could let her know if LT "changed." With regard to the two younger children, RT and NT, respondent ordered:

> Your mother is not allowed to visit, no one on your mom's side is allowed to visit. Only your father and therapist and [legal guardian ad litem (LGAL)] Mr. Lansat. When you are ready to have lunch with your dad, to have dinner with your dad, to be normal human beings, I will review this when your dad tells me you are ready. Otherwise, you are living in Children's Village [until] you graduate from high school.

Respondent's contempt orders regarding all three children therefore violated a basic principle of civil contempt—that the contemnor must be given the "keys to the jailhouse." *In re Moroun*, 295 Mich App 312, 318;

[1] Indeed, to the extent that respondent intended to argue that holding LT in contempt was somehow related to an order, her argument must fail—LT clearly had not violated the June 23, 2015 order for visitation on June 24, 2015, because that part of the order was not directed to him.

814 NW2d 319 (2012) (opinion by K. F. KELLY, J.). In giving the father the sole authority to ask respondent to revisit her contempt orders, respondent completely removed from the children the ability to satisfy the court's demands and to lift the court's contempt order. This left the children powerless, with no way to purge themselves of contempt while the father was out of the country.

It is clear that respondent wielded her contempt power inappropriately. The majority would have us dismiss this as an innocent mistake, unworthy of our intervention. But this attitude is at odds with our established caselaw regarding the contempt power. We have made clear in cases like *Hague* and *Matish* that judges do not have the luxury of using this awesome power casually; they must wield it with care or risk facing judicial discipline.

I disagree with the majority's attempts to make factual distinctions between this case and prior judicial misconduct cases. The majority argues primarily that the legal errors respondent made when she held the children in contempt could have been remedied on appeal and that they were made with the parties' knowledge and without any objection. Because the bevy of lawyers and trained professionals present in the courtroom—the majority reels off a list of the children's appointed lawyers, the LGAL, a Friend of the Court counselor, and an assistant prosecuting attorney—did not object, the majority insists that respondent could not possibly have engaged in a "willful failure to observe the law."

First, I am hard-pressed to see how the weeks-long wrongful confinement of three children could be fully remedied by a standard appeal, but even if it could, the availability of appellate review does not exclude the

possibility of judicial misconduct warranting discipline. *Laster*, 404 Mich at 461-462. The majority's reliance on the number of people who did not object to respondent's contempt rulings is also perplexing. Regardless of how many attorneys were in the courtroom during the summary contempt hearing, only the children's appointed attorneys had any duty to raise objections on the children's behalf, and respondent's conduct left them woefully ill-prepared to do so. The children's attorneys were given no more than 30 minutes to confer with their young clients. They were not given an opportunity to review any pleadings or court orders and were given only a brief description of the situation by the LGAL.[2] Given the breakneck pace of the contempt hearing and the attorneys' lack of preparedness, it seems implausible that their lack of objection could serve as an endorsement of respondent's conduct. Moreover, even if the attorneys had been given adequate time to prepare, to rely on attorneys and other bystanders to police a judge's proceedings flies in the face of MCR 9.205(A), which provides, "A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides."[3] The majority is mistaken in tacitly condoning respondent's finger-pointing.

The majority also fails to take into account that, under MCR 9.203(B), a legal error is not judicial misconduct only if the error was made in good faith *and* with due diligence. The majority's conclusion that respondent's decisions did not demonstrate a willful

[2] NT's attorney assured respondent that she had encouraged the child "to apologize for whatever she did."

[3] To hold otherwise seems tantamount to insulating judicial misconduct against its consequences by way of ineffective assistance of counsel.

failure to observe the law encompasses only a review for good faith. Additionally, this conclusion is belied by the context in which the contempt hearing took place—within the divorce and child custody case as a whole. The majority focuses on distinguishing this case from *In re Post*, 493 Mich 974 (2013), in which the respondent ignored an attorney's efforts to inform him that he was acting in violation of the law. The majority suggests that because there was no objection to respondent's contempt orders, respondent could not have known that her actions were improper. Ergo, because respondent did not willfully violate the law, she did not commit judicial misconduct.

But respondent has made clear in her arguments to this Court that she had been displeased with the behavior of the children in the custody case for some time. By July 2013, she began threatening to hold the parents in contempt for their violations of court orders, and by August 2014, she was considering holding the children in contempt. Respondent had therefore been contemplating the actions she took on June 24, 2015, for nearly a year. She had ample time to consider whether her actions were lawful or appropriate. There were endless opportunities during that period for respondent to research the law of contempt and to thereby fulfill her duties under MCR 9.205(A). In these circumstances, I cannot see how such behavior could indicate either good faith or due diligence.[4]

[4] The majority contends that respondent acted with due diligence during the June 24, 2015 hearing because she "approached these contempt proceedings as addressing matters of direct civil contempt." But respondent initiated the contempt proceedings because she believed that the children had failed to comply with her visitation orders. Under these circumstances, the alleged contempt occurred in respondent's jury room where the visitation was to take place, not during the court's sitting and not in respondent's presence. Respondent at most witnessed

Respondent's failure to fully consider her course of action and her decision to enter patently inappropriate contempt orders reflect a lack of good faith and due diligence, and her actions were clearly prejudicial to the administration of justice. I would agree with the Commission that respondent committed judicial misconduct by holding the children in contempt.

II. SANCTION

As suggested by the majority's recitation of the facts, the divorce action underlying this judicial misconduct proceeding was unusually complicated and acrimonious. While these facts may render respondent's obvious frustration with the litigants and their children understandable, they do not obviate respondent's duty to diligently fulfill her judicial obligations and to conduct herself honorably and with dignity as a representative of our judicial system. In assessing the appropriate sanction for judicial misconduct, this Court strives to mete out judicial discipline in a consistent and proportionate manner in order to "maintain the honor and integrity of the judiciary, deter similar conduct, and further the administration of justice." *In re Hocking*, 451 Mich 1, 24; 546 NW2d 234 (1996). Furthermore, our "overriding duty in the area of judicial discipline proceedings is to treat 'equivalent cases in an equivalent manner and . . . unequivalent cases in a propor-

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a portion of one child's session with his father. To the extent that the children refused to comply with respondent's orders in the presence of the court, they did so *during the contempt proceedings initiated by respondent*. The magnitude of this error, in light of the amount of time that respondent had been contemplating holding the children in contempt, demonstrates that respondent did not act with "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* (10th ed).

tionate manner.' " *In re Morrow*, 496 Mich 291, 302; 854 NW2d 89 (2014), quoting *In re Brown*, 461 Mich 1291, 1292 (2000). "The purpose of [judicial disciplinary] proceedings is not to impose punishment on the respondent judge, or to exact any civil recovery, but to protect the people from corruption and abuse on the part of those who wield judicial power." *In re Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991). I fear that the mere public censure favored by the majority does not achieve these goals.

The majority opinion acknowledges that the Commission arrived at its recommendation of a 30-day suspension and public censure after finding that several of the factors set forth in *Brown*, 461 Mich 1291, militated in favor of a more serious sanction. However, the majority focuses nearly exclusively on two *Brown* factors that it believes weigh against a more serious sanction. *Brown* provides the following seven factors to consider when fashioning a judicial sanction:

> (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. [*Id*. at 1292-1293.]

In this case, the Commission concluded that the bulk of the *Brown* factors weighed in favor of a more severe sanction. Respondent's misconduct occurred on the bench, was prejudicial to both the actual administration of justice and the appearance of propriety, and impeded the court's ability to determine the best interests of the children and the best course of action to resolve the underlying custody case. Although respondent's demeanor during the proceedings was a spontaneous reaction to her frustration with the children, the Commission noted that respondent's decision to hold the children in contempt appeared to have been brewing for some time. Finally, the Commission noted that while the misconduct was isolated, it was likely to reoccur in the future absent corrective action. Moreover, although the misconduct did not involve a protected class of citizenship, it "target[ed] children." In some sense, then, the Commission concluded that each of the *Brown* factors weighed in favor of a more serious sanction or was related to some aggravating circumstance.

The majority claims to generally agree with the Commission's assessment of the *Brown* factors, but focuses its disciplinary analysis solely on the two *Brown* factors about which it disagrees with the Commission. The majority concludes that the Commission's analysis of Factor 1—whether misconduct is part of a pattern or practice—improperly focused on the possibility of future misconduct rather than on the fact that the misconduct was undisputedly isolated. The majority also complains that the Commission's analysis of

Factor 7—specifically, its conclusion that respondent "targeted" children—was inappropriate because there was no indication that respondent treated the children differently than she would have treated any other person who defied court orders. The majority goes on to determine that because these two *Brown* factors actually weigh in favor of a less severe sanction, respondent's misconduct warrants only public censure.

I agree with the majority that Factors 1 and 7 do not weigh in favor of a more severe sanction. However, I disagree with the majority regarding the effect that this conclusion should have on our ultimate disciplinary determination. Focus on only two of the factors ignores the fact that the remaining five *Brown* factors weigh in favor of a more severe sanction. Furthermore, the concerns articulated by the Commission in its discussion of Factors 1 and 7 represent aggravating factors highly relevant to our disciplinary analysis. As noted by the Commission, respondent has not expressed any remorse for her actions, nor has she even acknowledged that her demeanor and her contempt orders were inappropriate. Given that one of the aims of judicial discipline is to deter misconduct, we must keep a weather eye out for improper behavior that may be repeated in the future, and we must make clear that such conduct is unacceptable. And while there is no evidence that respondent targeted the children on the basis of their age, their youthfulness does render respondent's caustic language and hostile temperament even more troubling than the judicial behavior addressed in cases like *Post* and *Hocking*, in which the targets of judicial hostility were trained, adult attorneys.[5]

[5] An attorney could reasonably expect to have some unpleasant interactions with a judge. It appears that the children in this case had never appeared on the record before the June 24, 2015 hearing.

Contrary to the majority's conclusion, I believe that respondent's misbehavior in this case was more problematic than that in *Post* or *Hocking* and merits a more severe sanction. As earlier suggested, the children cited for contempt in this case and the attorneys in *Post* and *Hocking* were in very different positions in terms of knowledge of courtroom etiquette, the law, and authority in a general sense. In *Post*, the respondent repeatedly told the attorney to be quiet and sit down, responding to the attorney's attempt to enforce the defendant's Sixth Amendment right to the effective assistance of counsel with: "That's right. And that's not what he's getting at the moment." *Post*, 493 Mich at 986. In *Hocking*, the respondent was rude and abrupt with two attorneys and leveled a single personal attack against one of them. *Hocking*, 451 Mich at 23. By contrast, in this case respondent berated the children with personal attacks, questioning their intelligence, calling them brainwashed, comparing them to cult members, and referring to them as "mentally messed up." While the attorney cited for contempt in *Post* was only held in lockup for a few hours, the children in this case were told that they would be confined in jail indefinitely, be locked up in cells, be separated from their mother and one another, and have to go to the bathroom in public. The children were ultimately left at Children's Village for more than two weeks. Furthermore, the respondent in *Post* admitted wrongdoing and took responsibility for his misconduct, but respondent in this case continues to attempt to justify her behavior. I agree with the Commission that a 30-day suspension in addition to public censure would be appropriate.

III. CONCLUSION

Respondent's conduct and its consequences were severe. She allowed her frustration to result in the

verbal abuse and confinement of three young children for seventeen days. Respondent has continuously refused to recognize that this conduct could be seen as improper, and instead she has shifted responsibility to the children—individuals who were not parties to the case before her—and their attorneys for failing to object to her contempt holdings. Respondent's extreme misconduct and her inability to recognize its problematic nature warrant a severe sanction, even in the absence of other allegations of misconduct. I would impose the Commission's recommended public censure and 30-day suspension.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition September 6, 2016:

PEOPLE v TALONZO BROYLES, No. 151244; Court of Appeals No. 325300. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Allegan Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v LEDURA WATKINS, No. 152361; Court of Appeals No. 327106. Pursuant to MCR 7.305(H)(1), in lieu of granting leave, we vacate the August 26, 2015 order of the Court of Appeals and remand this case to the Wayne Circuit Court for reconsideration, under MCR 6.508(D), of Issues I and II of the defendant's motion for relief from judgment. The circuit court erred in applying *People v Cress*, 468 Mich 678 (2003), to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G). See *People v Swain*, 499 Mich 920 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test. In Issues I and II, the defendant provided "a claim of new evidence that was not discovered before the first" motion for relief from judgment, MCR 6.502(G)(2).

PEOPLE v VERDUZCO-RAMIREZ, No. 152578; Court of Appeals No. 328459. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for plenary consideration of the first of two claims of error that were raised in the defendant's delayed application for leave to appeal filed in the Court of Appeals on July 22, 2015, namely, whether the scoring of Offense Variable 14 was supported by a preponderance of the evidence. See *People v Hardy*, 494 Mich 430, 438 (2013).

PEOPLE v DANIEL FRITZ, No. 153326; Court of Appeals No. 330546. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of

our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v LADANE HUDSON, No. 153368; Court of Appeals No. 329778. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court. On remand, in addition to the relief ordered by the Court of Appeals, the circuit court shall reconsider the scoring of sentencing guidelines Offense Variable 10 in light of *People v Gloster*, 499 Mich 199 (2016).

PEOPLE v BAILEY, No. 153945; Court of Appeals No. 329620. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Reconsideration Granted September 6, 2016:

PEOPLE v JUSTIN HOWARD, No. 152995; Court of Appeals No. 322868. Leave to appeal denied at 499 Mich 929. On order of the Court, the motion for reconsideration of this Court's May 24, 2016 order is considered, and it is granted. We vacate our order dated May 24, 2016. On reconsideration, the application for leave to appeal the November 17, 2015 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Calhoun Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional restraint on its discretion, it may affirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional restraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied September 6, 2016:

PEOPLE v CURTIS ROUSE, No. 151271; Court of Appeals No. 323567.

PEOPLE v MIHALIC, No. 151654; Court of Appeals No. 325189.

PEOPLE v MICKEY HICKS, No. 151948; Court of Appeals No. 324944.

PEOPLE v DONALDSON, No. 151973; Court of Appeals No. 325139.

PEOPLE v DASGUPTA, No. 152394; Court of Appeals No. 328415.

PEOPLE v MOSLEY, No. 152429; Court of Appeals No. 328594.

PEOPLE v ISWED, No. 152433; Court of Appeals No. 328145.

PEOPLE v DIARRE HAMILTON, No. 152445; Court of Appeals No. 326949.

PEOPLE v MCQUEEN, No. 152507; Court of Appeals No. 328574.

PEOPLE v STADLER, No. 152592; Court of Appeals No. 327764.

PEOPLE v STETLER, No. 152696; Court of Appeals No. 328314.

PEOPLE v BOTHEL, No. 152706; Court of Appeals No. 328544.

VIVIANO, J., did not participate because he presided over this case in the circuit court at an earlier stage of the proceedings.

PEOPLE v WILKENS, No. 152709; Court of Appeals No. 328637.

GRIFFIN v GRIFFIN, Nos. 152740 and 152741; Court of Appeals Nos. 321988 and 324840.

PEOPLE v MCQUIRTER, No. 152770; Court of Appeals No. 329552.

PEOPLE v LAQWAN SCOTT, No. 152777; Court of Appeals No. 328416.

PEOPLE v WALTER, No. 152781; Court of Appeals No. 329345.

PEOPLE v JOSEPH FLOWERS, No. 152801; Court of Appeals No. 328945.

MCCORMACK, J., did not participate because of her prior involvement in this case.

PEOPLE v DEONTAE DAVIS, No. 152804; Court of Appeals No. 328287.

PEOPLE v SHEER, No. 152843; Court of Appeals No. 328623.

PEOPLE v LISTER, No. 152845; Court of Appeals No. 328917.

PEOPLE v DANTZLER, No. 152854; Court of Appeals No. 328723.

PEOPLE v THEODORE WILLIAMS, No. 152855; Court of Appeals No. 327980.

PEOPLE v SMALL, No. 152856; Court of Appeals No. 329301.

PEOPLE v HOUZE, No. 152887; Court of Appeals No. 329122.

PEOPLE v BRYANT BENTLEY, No. 152891; Court of Appeals No. 328596.

PEOPLE v BERKEY, No. 152896; Court of Appeals No. 329460.

PEOPLE v MCCRARY, No. 152897; Court of Appeals No. 329318.

PEOPLE v PERRIEN, No. 152976; Court of Appeals No. 317405.

AUDI v A J ESTAY, LLC, No. 153013; Court of Appeals No. 321418.

PEOPLE v LEO KENNEDY, No. 153038; Court of Appeals No. 322873.

SIRUT v SHELBY NURSING CENTER, No. 153054; Court of Appeals No. 327153.

PLAZA TOWERS CONDOMINIUM ASSOCIATION v CITY OF GRAND RAPIDS, No. 153056; Court of Appeals No. 323937.

BANK OF AMERICA, NA v EL-BEY, No. 153086; Court of Appeals No. 328542.

KRUPINSKI v NITKIN, No. 153095; Court of Appeals No. 321780.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

COLONIAL ACRES INDUSTRIAL PARK ASSOCIATION, INC v BASHISTA, No. 153164; Court of Appeals No. 329623.

PEOPLE v CHRISTOPHER TODD, No. 153175; Court of Appeals No. 322587.

TILSON v HENRY FORD HEALTH SYSTEM, No. 153186; Court of Appeals No. 328015.

HAMMOND v DEPARTMENT OF CORRECTIONS, No. 153190; Court of Appeals No. 322889.

CITY OF ROCHESTER HILLS v LUKES, No. 153201; Court of Appeals No. 328802.

J & N KOETS, INC v ONEMARKET PROPERTIES LAKE POINT, LLC, No. 153219; Court of Appeals No. 324007.

LORILLARD TOBACCO COMPANY v DEPARTMENT OF TREASURY, No. 153224; Court of Appeals No. 313256.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

PEOPLE v JETT, No. 153244; Court of Appeals No. 330725.

PEOPLE v ENRIQUE RODRIGUEZ, No. 153246; Court of Appeals No. 323266.

PEOPLE v SIMMONDS, No. 153255; Court of Appeals No. 330970.

PEOPLE v YOUSIF, No. 153256; Court of Appeals No. 328832.

SAPA EXTRUSIONS, INC v DEPARTMENT OF TREASURY, ET AL, Nos. 153265, 153266, 153267, 153268, 153269, 153270, 153271, 153272, 153273, 153274, 153275, 153276, 153277, 153278, and 153279; Court of Appeals Nos. 326414, 326415, 326512, 326513, 326585, 326586, 326732, 326733, 3262818, 326819, 327725, 327880, 327962, 327963, and 328231.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

INTERNATIONAL BUSINESS MACHINES CORPORATION v DEPARTMENT OF TREASURY, No. 153281; Court of Appeals No. 327360.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

CHADWELL v CITY OF MADISON HEIGHTS, No. 153292; Court of Appeals No. 330593.

PEOPLE v SEELEY, No. 153296; Court of Appeals No. 323557.

PEOPLE v PAYNE, No. 153303; Court of Appeals No. 323952.

PEOPLE v BENNIE ROBINSON, No. 153316; Court of Appeals No. 323467.

MANITOU NORTH AMERICA, INC v MCCORMICK INTERNATIONAL, LLC, No. 153348; Court of Appeals No. 324063.

PEOPLE v CHRISTOPHER NORFLEET, No. 153351; Court of Appeals No. 323792.

DETROIT HOUSING COMMISSION v SWEAT, No. 153357; Court of Appeals No. 323453.

AFSCME COUNCIL 25 LOCAL 2394 v SWEAT, No. 153359; Court of Appeals No. 323933.

PEOPLE v HAYMER, No. 153360; Court of Appeals No. 323612.

PEOPLE v MCHENRY, No. 153365; Court of Appeals No. 318852.

SAVAGE v SAMMUT, No. 153376; Court of Appeals No. 331010.

PEOPLE v KECKLER, No. 153384; Court of Appeals No. 329792.

PEOPLE v MATTHEW JENKINS, No. 153396; Court of Appeals No. 330561.

BURGESS v CRIME VICTIM SERVICES COMMISSION, No. 153400; Court of Appeals No. 328674.

PEOPLE v SAYLOR, No. 153412; Court of Appeals No. 330994.

PEOPLE v MORRIS, No. 153433; reported below: 314 Mich App 399.

PEOPLE v DARRYL STEWART, No. 153437; Court of Appeals No. 323684.

CSB INVESTORS v DEPARTMENT OF TREASURY, No. 153450; Court of Appeals No. 322897.

PEOPLE v PERLEBERG, No. 153456; Court of Appeals No. 330285.

PEOPLE v CORREA, No. 153457; Court of Appeals No. 330310.

PEOPLE v GALLMORE, No. 153458; Court of Appeals No. 324833.

PEOPLE v MARIO BROWN, No. 153466; Court of Appeals No. 324364.

PEOPLE v DEWEY, No. 153469; Court of Appeals No. 324275.

PEOPLE v BESON, No. 153470; Court of Appeals No. 322984.

PEOPLE v COMFORT, No. 153473; Court of Appeals No. 325330.

PEOPLE v MICHAEL TUCKER, No. 153476; Court of Appeals No. 329284.

PEOPLE v MORIN, No. 153477; Court of Appeals No. 325288.

PEOPLE v ANTONIO STRONG, No. 153479; Court of Appeals No. 324056.

PEOPLE v SIGERS, No. 153481; Court of Appeals No. 325159.

PEOPLE v BARASH, No. 153490; Court of Appeals No. 324545.

PEOPLE v DAVID SMITH, No. 153496; Court of Appeals No. 327062.

PEOPLE v DYKES, No. 153498; Court of Appeals No. 323944.

PEOPLE v LAUREANO-GONZALEZ, No. 153499; Court of Appeals No. 330819.

PEOPLE v HUNT, No. 153508; Court of Appeals No. 331468.

PEOPLE v PROUTY, No. 153509; Court of Appeals No. 331185.

PEOPLE v TREVOR CARRIER, No. 153516; Court of Appeals No. 324649.

BAYVIEW LOAN SERVICING, LLC v COTTON, No. 153517; Court of Appeals No. 330392.

PEOPLE v DOSS, No. 153524; Court of Appeals No. 331107.

PEOPLE v CONNER, No. 153536; Court of Appeals No. 323508.

PEOPLE v TERRY WILSON, No. 153548; Court of Appeals No. 323200.

PEOPLE v SHUKUR BROWN, No. 153555; Court of Appeals No. 324189.

PEOPLE v JAMES WHITE, No. 153556; Court of Appeals No. 323929.

PEOPLE v MARK DANIELS, No. 153570; Court of Appeals No. 331043.

REED v ACE FORWARDING, No. 153577; Court of Appeals No. 330494.

PEOPLE v BRENITAZE MOORE, No. 153578; Court of Appeals No. 331505.

PEOPLE v PEGO, No. 153582; Court of Appeals No. 331650.

PEOPLE v DEQUANTA HUDSON, No. 153591; Court of Appeals No. 325035.

HARLEY DAVIDSON MOTOR COMPANY, INC v DEPARTMENT OF TREASURY, ET AL, Nos. 153594, 153595, 153596, 153597, 153598, 153599, 153600, 153601, 153602, 153603, 153604, 153605, 153606, 153607, and 153608; Court of Appeals Nos. 325498, 326130, 326131, 326135, 327057, 327178, 327217, 327218, 327694, 327964, 327995, 328193, 328206, 328317, and 328967.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

PEOPLE v MIMS, No. 153613; Court of Appeals No. 331421.

PEOPLE v VANLUVEN, No. 153623; Court of Appeals No. 331366.

PEOPLE v FLORIBERTO MENDOZA, No. 153644; Court of Appeals No. 331297.

PEOPLE v ROLANDO ALVARADO, No. 153647; Court of Appeals No. 325121.

PEOPLE v HASS, No. 153666; Court of Appeals No. 330070.

In re PEACE ESTATE, No. 153722; Court of Appeals No. 324655.

PEOPLE v BLAIN, No. 153768; Court of Appeals No. 331992.

In re COTTON, No. 153885; Court of Appeals No. 333026.

PEOPLE v GILKEY, No. 153899; Court of Appeals No. 326172.

THOMAS v VILLAGE OF KALKASKA, No. 153931; Court of Appeals No. 328020.

OAKLAND COUNTY TREASURER v KUERBITZ, No. 153958; Court of Appeals No. 331763.

PEOPLE v RAHIM BOOKER, No. 153987; reported below: 314 Mich App 416.

PEOPLE v PINKNEY, No. 154018; reported below: 316 Mich App 450.

In re TAITT, No. 154104; Court of Appeals No. 332072.

Reconsideration Denied September 6, 2016:

PEOPLE v ERIC SULLIVAN, No. 150569; Court of Appeals No. 316063. Leave to appeal denied at 499 Mich 904.

PEOPLE v MOFFIT, No. 151044; Court of Appeals No. 323872. Leave to appeal denied at 499 Mich 966.

PEOPLE v CISTRUNK, No. 151069; Court of Appeals No. 322827. Leave to appeal denied at 499 Mich 986.

PEOPLE v JAMAL KING, No. 151697; Court of Appeals No. 325695. Leave to appeal denied at 499 Mich 881.

PEOPLE v JEROME HOLLOWAY, No. 151767; Court of Appeals No. 326368. Leave to appeal denied at 499 Mich 926.

PEOPLE v NEAL, No. 151934; Court of Appeals No. 327141. Leave to appeal denied at 499 Mich 914.

PEOPLE v HESS, Nos. 152039 and 152040; Court of Appeals Nos. 326261 and 326580. Leave to appeal denied at 499 Mich 926.

PEOPLE v DONALD FLOWERS, No. 152167; Court of Appeals No. 327477. Leave to appeal denied at 499 Mich 926.

PEOPLE v SOLIVAN, No. 152279; Court of Appeals No. 328266. Leave to appeal denied at 499 Mich 967.

DANY v BOARD OF LAW EXAMINERS, No. 152483. Superintending control denied at 499 Mich 918.

TITAN INSURANCE COMPANY v AMERICAN COUNTRY INSURANCE COMPANY and BRONSON METHODIST HOSPITAL v TITAN INSURANCE COMPANY, Nos. 152492 and 152493; Court of Appeals Nos. 319342 and 321598. Leave to appeal denied at 499 Mich 944.

PEOPLE v BERGMAN, No. 152698; reported below: 312 Mich App 471. Leave to appeal denied at 499 Mich 916.

PEOPLE v GILLIARD, No. 152776; Court of Appeals No. 329489. Leave to appeal denied at 499 Mich 916.

POWELL MOVING AND STORAGE, INC v DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT, UNEMPLOYMENT INSURANCE AGENCY, No. 152912; Court of Appeals No. 327449. Leave to appeal denied at 499 Mich 917.

WRIGHT v WRIGHT, No. 152929; Court of Appeals No. 329074. Leave to appeal denied at 499 Mich 929.

PEOPLE v REARICK, No. 152939; Court of Appeals No. 328644. Leave to appeal denied at 499 Mich 929.

PEOPLE v SAMUEL DAVIS, No. 153017; Court of Appeals No. 329280. Leave to appeal denied at 499 Mich 969.

PEOPLE v TAWAIN WILLIAMS, No. 153314; Court of Appeals No. 330683. Leave to appeal denied at 499 Mich 971.

Leave to Appeal Denied September 7, 2016:

LAPINE v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 153949; Court of Appeals No. 332493.

MICHIGAN COMPREHENSIVE CANNABIS LAW REFORM COMMITTEE v SECRETARY OF STATE, No. 154359; Court of Appeals No. 334560.

Superintending Control Denied September 7, 2016:

MICHIGAN COMPREHENSIVE CANNABIS LAW REFORM COMMITTEE v SECRETARY OF STATE, No. 154334.

Leave to Appeal Denied September 9, 2016:

In re POLLARD, No. 154218; Court of Appeals No. 331315.

CITY OF SOUTHFIELD v JORDAN DEVELOPMENT COMPANY, LLC, No. 154278; Court of Appeals No. 333970.

Rehearing Denied September 16, 2016:

INNOVATION VENTURES, LLC v LIQUID MANUFACTURING, LLC, No. 150591; opinion at 499 Mich 491.

ARBUCKLE v GENERAL MOTORS, LLC, No. 151277; opinion at 499 Mich 521.

Summary Disposition September 21, 2016:

PEOPLE v GEDDERT, No. 151280; Court of Appeals No. 325412. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Alpena Circuit Court, and we remand this case to the trial court for resentencing. The trial court assigned no points to any Offense Variables (OVs), but departed from the sentencing guidelines range in part because of the defendant's pattern of prior narcotics offenses. In light of this, based on facts reported in the presentence information report, the trial court was required to assign 10 points to OV 13 for a pattern of three or more controlled-substance felonies. MCL 777.43(1)(e). Even though the guidelines ranges are now advisory, the scoring of the guidelines themselves is mandatory, and the OVs must be assigned the highest number of points applicable. MCL 777.43(1); *People v Lockridge*, 498 Mich 358, 392 n 28 (2015). Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). We do not retain jurisdiction.

PEOPLE v WINE, No. 151411; Court of Appeals No. 318822. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Calhoun Circuit Court, and we remand this case to the trial court for resentencing pursuant to *People v Francisco*, 474 Mich 82 (2006). The trial court erred in assigning 10 points for Offense Variable 4 (OV 4), MCL 777.34, since there was no record support that the victims suffered psychological injury. In all other respects, leave to appeal is denied.

PEOPLE v DAVID SUTTON, No. 151849; Court of Appeals No. 326365. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Roscommon Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred by assigning 50 points under Offense Variable 11, MCL 777.41, for penetrations that did not arise out of the particular sentencing offense. *People v Johnson*, 474 Mich 96 (2006). Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Kimble*, 470 Mich 305 (2004). We do not retain jurisdiction.

Leave to Appeal Denied September 21, 2016:

PEOPLE v GIANDRE BURNS, No. 152688; Court of Appeals No. 321570.

PEOPLE v MCKINNEY, No. 153142; Court of Appeals No. 330229.

PEOPLE v CAGE, No. 153223; Court of Appeals No. 329826.

In re DENG, No. 153514; reported below: 314 Mich App 615.

PEOPLE v SCHRAUBEN, No. 153649; reported below: 314 Mich App 181.

Leave to Appeal Denied September 22, 2016:

BAILER v DETROIT CITY CLERK, No. 154459; Court of Appeals No. 334823.

Leave to Appeal Denied September 23, 2016:

HELD v NORTH SHORE CONDOMINIUM ASSOCIATION, No. 153311; Court of Appeals No. 321786.

ZAHRA, J. (*dissenting*). I would peremptorily reverse the judgment of the Court of Appeals and remand this case to the Ingham Circuit Court for entry of a judgment in favor of defendant North Shore Condominium Association because the plastic landscape edging over which plaintiff fell was open and obvious. As Judge METER opined in his dissenting opinion, "a picture is worth a thousand words."[1] The photographs of the area where plaintiff fell indicate that the edging can very clearly be seen curving around the sidewalk, as there is a distinct color difference between the edging and the mulch. Thus, "an average person with ordinary intelligence would have discovered [the edging] upon casual inspection."[2] Sometimes error in an unpublished opinion is so blatant, open, and obvious that it must be corrected to maintain clarity of the law for the bench and bar. This is such a case. I would reverse.

MARKMAN, J., joins the statement of ZAHRA, J.

In re KOZLOWSKI, No. 154229; Court of Appeals No. 330044.

Reconsideration Denied September 23, 2016:

PEOPLE v RADANDT, No. 150906; Court of Appeals No. 314337. Leave to appeal denied at 499 Mich 988.

In re MARTIN, No. 154086; Court of Appeals No. 330231. Leave to appeal denied at 499 Mich 1002.

Leave to Appeal Denied September 23, 2016:

In re DAVIS, No. 154466; Court of Appeals No. 334869.

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[1] *Held v North Shore Condo Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued February 4, 2016 (Docket No. 321786) (METER, J., dissenting), p 1.

[2] *Hoffner v Lanctoe*, 492 Mich 450, 461 (2012).

Summary Disposition September 27, 2016:

MADISON v AAA OF MICHIGAN, No. 149145; Court of Appeals No. 312880. By order of February 4, 2015, the application for leave to appeal the March 13, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *Hodge v State Farm Mut Auto Ins Co* (Docket No. 149043). On order of the Court, the case having been decided on June 6, 2016, 499 Mich 211 (2016), the application and motion for peremptory reversal are considered. In light of our opinion in *Hodge*, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the November 3, 2011 judgment entered in the 36th District Court, and remand this case to the district court for further proceedings.

PEOPLE v ERIK GUTIERREZ, No. 149647; Court of Appeals No. 315236. By order of November 25, 2014, the application for leave to appeal the May 22, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073). On order of the Court, the case having been decided on July 29, 2015, 498 Mich 358 (2015), the application is again considered. Pursuant to MCR 7.305(H)(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 St. Joseph Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v DEYONTA QUINN, No. 149860; Court of Appeals No. 315288. By order of March 3, 2015, the application for leave to appeal the June 26, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073). On order of the Court, the case having been decided on July 29, 2015, 498 Mich 358 (2015), the application is again considered. Pursuant to MCR 7.305(H)(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 Muskegon Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v KEVIN CLARK, No. 151621; Court of Appeals No. 318697. Pursuant to MCR 7.305(H)(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 Livingston Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015), and to determine whether the post-sentencing amendment to the presentence investigation report would have caused the court to impose a different sentence. With regard to the *Lockridge* issue, the trial court shall follow the procedure described in Part VI of our opinion. If, after taking into account both the unconstitutional constraint on its discretion and the amendment to the presentence investigation report, the trial court determines that it would have imposed the same sentence, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v GREGORY ARNOLD, No. 151978; Court of Appeals No. 326969. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. On remand, the trial court shall also strike from the presentence report any information that was objected to at sentencing and determined by the trial court to be inaccurate or irrelevant. MCL 771.14(6); MCR 6.425(E)(2). In all other respects, leave to appeal is denied.

PEOPLE v FOWLER, No. 152246; Court of Appeals No. 328139. Pursuant to MCR 7.305(H), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v TENNEY, No. 152700; Court of Appeals No. 328928. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v STARR, No. 153461; Court of Appeals No. 330785. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Crawford Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the

same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v SOLOMON, No. 153547; Court of Appeals No. 324034. Pursuant to MCR 7.305(H)(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 Saginaw Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v CYNTHIA FLEMING, No. 153551; Court of Appeals No. 323795. Pursuant to MCR 7.305(H)(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 to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v HINGA, No. 153785; Court of Appeals No. 325266. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Van Buren Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied September 27, 2016:

PEOPLE v GARLAND, No. 151516; Court of Appeals No. 324483.

PEOPLE v HAROLD VARNER, No. 151909; Court of Appeals No. 325804.

PEOPLE v SHAWN BREWER, No. 151933; Court of Appeals No. 327188.

PEOPLE v WILCOX, No. 152156; Court of Appeals No. 326673.

PEOPLE v CHAPMAN, No. 152211; Court of Appeals No. 321000.

PEOPLE v SCOTT JORDAN, No. 152364; Court of Appeals No. 327078.

PEOPLE v CORBIN, No. 152365; Court of Appeals No. 327755.

PEOPLE v GOODMAN, No. 152526; Court of Appeals No. 328106.

PEOPLE v WOODMANSEE, No. 152545; Court of Appeals No. 327693.

PEOPLE v MILBOURN, No. 152547; Court of Appeals No. 328546.

PEOPLE v POZNIAK, No. 152566; Court of Appeals No. 328852.
VIVIANO, J., did not participate because he presided over this case in the circuit court at an earlier stage of the proceedings.

PEOPLE v BENJAMIN ALLISON, No. 152704; Court of Appeals No. 329258.

PEOPLE v CRUMPLER, No. 152820; Court of Appeals No. 329546.

PEOPLE v GARY ROBINSON, No. 152821; Court of Appeals No. 328876.

PEOPLE v DUNCAN ALEXANDER, No. 152858; Court of Appeals No. 329079.

PEOPLE v LARRY MOORER, No. 152861; Court of Appeals No. 329172.

PEOPLE v CHARLES BENTLEY, No. 152870; Court of Appeals No. 329464.

PEOPLE v GIBBS, No. 152874; Court of Appeals No. 329618.

PEOPLE v IVES, No. 152900; Court of Appeals No. 328987.

PEOPLE v MCCLINTON, No. 152903; Court of Appeals No. 329819.

PEOPLE v MILLS, No. 152928; Court of Appeals No. 328052.

PEOPLE v TIMMY COLLIER, No. 152941; Court of Appeals No. 329437.

PEOPLE v TOMMY UNDERWOOD, No. 152955; Court of Appeals No. 329097.

PEOPLE v DARRYL CAIN, No. 152956; Court of Appeals No. 329210.

PEOPLE v FRAME, No. 152979; Court of Appeals No. 329774.

PEOPLE v KENNETH HARRISON, No. 153003; Court of Appeals No. 330350.

PEOPLE v WILLIAM COLLIER, No. 153004; Court of Appeals No. 329978.

PEOPLE v ALLANAH BENTON, No. 153009; Court of Appeals No. 329453.

PEOPLE v MCCAULEY, No. 153019; Court of Appeals No. 329340.

PEOPLE v KYLE WILSON, No. 153026; Court of Appeals No. 329482.

PEOPLE v BUSHRA, No. 153027; Court of Appeals No. 330234.

PEOPLE v MAURICE WILLIAMS, No. 153031; Court of Appeals No. 329268.

PEOPLE v MICHAEL PAUL OBRIEN, No. 153041; Court of Appeals No. 329160.

PEOPLE v SCHAEFER, No. 153065; Court of Appeals No. 322420.

WILTSE v DELTA COMMUNITY COLLEGE, No. 153071; Court of Appeals No. 323402.

PEOPLE v SHERMAN WAGNER, No. 153104; Court of Appeals No. 322058.

PEOPLE v GILBERT JOHNSON, No. 153138; Court of Appeals No. 323078.

PEOPLE v CHRISTOPHER SPEARS, No. 153188; Court of Appeals No. 329500.

PEOPLE v FLOYD, No. 153196; Court of Appeals No. 324610.

PEOPLE v RITA JOHNSON, No. 153215; Court of Appeals No. 322432.

PEOPLE v SESSOMS, No. 153226; Court of Appeals No. 323461.

MALE v RUSSELL, No. 153253; Court of Appeals No. 324000.

1ST STATE TITLE v LP RECORDINGS LLC, No. 153263; Court of Appeals No. 322964.

LIVNEH v COHEN LERNER & RABINOVITZ, PC, No. 153301; Court of Appeals No. 328830.

PEOPLE v DEMARCUS FINLEY, No. 153304; Court of Appeals No. 323661.

PEOPLE v GAMEZ, No. 153317; Court of Appeals No. 324199.

PEOPLE v COTTON, No. 153339; Court of Appeals No. 330373.

PEOPLE v ANDREW PHILLIPS, No. 153341; Court of Appeals No. 323333.

PEOPLE v DEANDREW JONES, No. 153361; Court of Appeals No. 324954.

PEOPLE v LAFRAMBOISE, No. 153362; Court of Appeals No. 323674.

SIMCOR CONSTRUCTION, INC v TRUPP, No. 153366; Court of Appeals No. 328731.

PEOPLE v SEAR, No. 153392; Court of Appeals No. 323429.

PEOPLE v LEDBETTER, No. 153397; Court of Appeals No. 323915.

HAYLEY v MARTIN, No. 153416; Court of Appeals No. 324689.

PEOPLE v BARONE, No. 153428; Court of Appeals No. 330138.

PEOPLE v GAMET, No. 153431; Court of Appeals No. 324181.

PEOPLE v PAUL, No. 153448; Court of Appeals No. 330952.

PEOPLE v HANDELSMAN, No. 153465; Court of Appeals No. 324712.

LIVNEH v COHEN LERNER & RABINOVITZ, PC, No. 153471; Court of Appeals No. 331556.

LAMIMAN v BANK OF NEW YORK MELLON TRUST COMPANY, NA, No. 153483; Court of Appeals No. 322974.

PEOPLE v MCGEE, No. 153495; Court of Appeals No. 330275.

PEOPLE v COATS, No. 153500; Court of Appeals No. 323713.

PEOPLE v DUARTE-BORGE, No. 153503; Court of Appeals No. 324435.

PEOPLE v GONZALES, No. 153507; Court of Appeals No. 329668.

PEOPLE v DESCHAEPMEESTER, No. 153513; Court of Appeals No. 330412.

HOLCOMB v GWT INC, No. 153518; Court of Appeals No. 325410.

PEOPLE v MOMO OWENS, No. 153521; Court of Appeals No. 331159.

PEOPLE v MADDOX, No. 153526; Court of Appeals No. 324084.

PEOPLE v DION WADE, No. 153527; Court of Appeals No. 324365.

PEOPLE v LASURE, No. 153529; Court of Appeals No. 331007.

PEOPLE v KOVALCHICK, No. 153530; Court of Appeals No. 330756.

PEOPLE v BLUMKE, No. 153532; Court of Appeals No. 323199.

HENSLEY v BOTSFORD GENERAL HOSPITAL, No. 153533; Court of Appeals No. 323805.

SDAO v MAKKI & ABDALLAH INVESTMENTS, No. 153534; Court of Appeals No. 322646.

PEOPLE v TERRY-JARRETT, No. 153538; Court of Appeals No. 324895.

PEOPLE v DONALD HOLLOWAY, No. 153539; Court of Appeals No. 323736.

PEOPLE v DORSEY, No. 153543; Court of Appeals No. 324270.

PEOPLE v CLEVELAND, No. 153544; Court of Appeals No. 324266.

PEOPLE v DUKULY, No. 153545; Court of Appeals No. 331166.

In re WIECINSKI TRUST, No. 153549; Court of Appeals No. 327982.

PEOPLE v CASHMERE SIMMONS, No. 153552; Court of Appeals No. 323918.

PEOPLE v HEWITT, No. 153554; Court of Appeals No. 324117.

PEOPLE v MONTROSS, No. 153560; Court of Appeals No. 325190.

PEOPLE v ANTHONY GREEN, No. 153564; Court of Appeals No. 331277.

JOHNSON v OUTBACK LODGE & EQUESTRIAN CENTER, LLC, No. 153566; Court of Appeals No. 323556.

PEOPLE v STOKES, No. 153571; Court of Appeals No. 325197.

PEOPLE v MURRAY, No. 153572; Court of Appeals No. 325181.

CITY OF DETROIT v TRIPLE-A VENTURE, LLC, No. 153576; Court of Appeals No. 323068.

PEOPLE v BOBBY SMITH, No. 153580; Court of Appeals No. 324537.

PEOPLE v RICKMAN, No. 153581; Court of Appeals No. 324386.

EMPLOYERS INSURANCE COMPANY OF WAUSAU v HEARTHSTONE SENIOR SERVICES, LP, No. 153585; Court of Appeals No. 324776.

PEOPLE v CHERELLE UNDERWOOD, No. 153592; Court of Appeals No. 322877.

MCKISSACK v MCKISSACK, No. 153610; Court of Appeals No. 325099.

BOTIMER v MACOMB COUNTY CONCEALED WEAPONS BOARD, No. 153612; Court of Appeals No. 324059.

GOODWIN v CITY OF LINCOLN PARK, MORALES v CITY OF ECORSE, and AUTO CLUB GROUP INSURANCE COMPANY v CITY OF LINCOLN PARK, Nos. 153615, 153616, and 153617; Court of Appeals Nos. 323785, 323788, and 323791.

BIENENSTOCK NATIONWIDE REPORTING & VIDEO v HERMAN J ANDERSON, PLLC, No. 153618; Court of Appeals No. 328982.

HAKKANI v POWERHOUSE GYM-ROCHESTER, INC, No. 153620; Court of Appeals No. 326320.

PEOPLE v DENG, No. 153624; Court of Appeals No. 324816.

GLENN v DEPARTMENT OF COMMUNITY HEALTH, No. 153627; Court of Appeals No. 330250.

PEOPLE v STEVEN DENT, No. 153633; Court of Appeals No. 323727.

PEOPLE v STROUD, No. 153637; Court of Appeals No. 322812.

PEOPLE v DARIO WRIGHT, No. 153639; Court of Appeals No. 323682.

PEOPLE v TREMAYNE ANDERSON, No. 153640; Court of Appeals No. 325852.

PEOPLE v VAZQUEZ, No. 153641; Court of Appeals No. 331330.

PEOPLE v PAUL, No. 153645; Court of Appeals No. 330953.

PEOPLE v DERRICK WALTON, No. 153646; Court of Appeals No. 330941.

PEOPLE v MOLTANE, No. 153648; Court of Appeals No. 325165.

GRIEVANCE ADMINISTRATOR v KYLE, No. 153650.

PEOPLE v MAGEE, No. 153659; Court of Appeals No. 325227.

PEOPLE v FOLEY, No. 153662; Court of Appeals No. 324414.

PEOPLE v JOHN ROBINSON, No. 153664; Court of Appeals No. 331239.

EDWARD H GREEN TRUST v JOSEPH, No. 153672; Court of Appeals No. 324404.

PEOPLE v JASON ALEXANDER, No. 153675; Court of Appeals No. 325903.

PEOPLE v MALLOY, No. 153676; Court of Appeals No. 331484.

PEOPLE v CLAUDE DAVIS, No. 153677; Court of Appeals No. 322977.

PEOPLE v JACORI THOMAS, No. 153680; Court of Appeals No. 331393.

PEOPLE v MCFOLLEY, No. 153681; Court of Appeals No. 324884.

PEOPLE v THOMAS FLEMING, No. 153688; Court of Appeals No. 325118.

GREGERSON v GREGERSON, No. 153692; Court of Appeals No. 328036.

PEOPLE v EDWARD DICKERSON, No. 153702; Court of Appeals No. 324055.

TERRY v CONSUMERS ENERGY COMPANY, No. 153707; Court of Appeals No. 325017.

PEOPLE v MURRELL, No. 153717; Court of Appeals No. 330859.

DASEMA v HAMBLIN, No. 153725; Court of Appeals No. 332277.

PEOPLE v WARE, Nos. 153735 and 153736; Court of Appeals Nos. 323710 and 323711.

PEOPLE v MORRELL, No. 153738; Court of Appeals No. 330591.

PEOPLE v THOMAS COOK, No. 153761; Court of Appeals No. 331596.

PEOPLE v WHITLOW, No. 153764; Court of Appeals No. 324401.

PEOPLE v DAILY, No. 153765; Court of Appeals No. 323054.

PEOPLE v SINGLER, No. 153767; Court of Appeals No. 331642.

PEOPLE v DAVISON, No. 153806; Court of Appeals No. 324479.

HARDRICK v AUTO CLUB INSURANCE ASSOCIATION, No. 153807; Court of Appeals No. 326270.

DORR v STATE OF MICHIGAN, No. 153811; Court of Appeals No. 326241.

PEOPLE v CURTIS BAKER, No. 153823; Court of Appeals No. 331575.

PEOPLE v RONALD CLAY, No. 153865; Court of Appeals No. 329802.

PEOPLE v DAJUNT PORTER, No. 153870; Court of Appeals No. 331496.

PEOPLE v EASLEY, No. 153887; Court of Appeals No. 325827.

PEOPLE v ARTIS JOHNSON, No. 153918; Court of Appeals No. 331839.

PEOPLE v RUTH SUTTON, No. 153928; Court of Appeals No. 332302.

GRR CAPITAL FUNDING, LLC v S D BENNER, LLC, No. 153933; Court of Appeals No. 326963.

PEOPLE v HENNEHN REEVES, No. 154005; Court of Appeals No. 332839.

CITY OF DETROIT v CITY OF HIGHLAND PARK, No. 154017; Court of Appeals No. 327448.

PEOPLE v CASTORENA, No. 154074; Court of Appeals No. 325786.

PEOPLE v CANDY LAWSON, No. 154083; Court of Appeals No. 332570.

Superintending Control Denied September 27, 2016:

ARNETT v ATTORNEY GRIEVANCE COMMISSION, No. 153515.

Complaint for Superintending Control Dismissed September 27, 2016:

GURSTEN v ATTORNEY GRIEVANCE COMMISSION, No. 152816. By order of June 22, 2016, the Attorney Grievance Commission was directed to provide a supplemental response to the complaint for superintending control. On order of the Court, the supplemental response having been received and the Grievance Administrator having stated that AGC File No. 0935-14 will be reopened for further investigation, the complaint for superintending control is again considered, and it is dismissed, without prejudice and without costs. The motion to vacate admonishment and appoint independent counsel is denied.

MCCORMACK, J., did not participate because she may have independent knowledge regarding this case.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

Reconsideration Denied September 27, 2016:

In re SOLTYS ESTATE, No. 151299; Court of Appeals No. 311143. Leave to appeal denied at 499 Mich 952.

PEOPLE v DUJUAN QUINN, No. 151427; Court of Appeals No. 324709. Leave to appeal denied at 498 Mich 949.

PEOPLE v QUINCY ROBERTS, No. 151660; Court of Appeals No. 325545. Order on reconsideration entered at 499 Mich 960.

CARROLL v DEPARTMENT OF CORRECTIONS, No. 152379; Court of Appeals No. 328204. Leave to appeal denied at 499 Mich 882.

PEOPLE v TIMOTHY DIXON, No. 152393; Court of Appeals No. 317219. Leave to appeal denied at 499 Mich 882.

THE DETROIT EDISON COMPANY v STENMAN, No. 152418; Court of Appeals No. 321203. Leave to appeal denied at 499 Mich 871.

PEOPLE v DEANGELO TAJUAN JONES, No. 152495; Court of Appeals No. 328288. Leave to appeal denied at 499 Mich 967.

PEOPLE v DELAGARZA, No. 152827; Court of Appeals No. 329372. Leave to appeal denied at 499 Mich 956.

YOUNCE v JPMORGAN CHASE BANK NA, No. 152952; Court of Appeals No. 323242. Leave to appeal denied at 499 Mich 929.

Reconsideration Denied September 28, 2016:

HOME-OWNERS INSURANCE COMPANY v SIMON, No. 151466; Court of Appeals No. 323726. Leave to appeal denied at 498 Mich 885.

In re TAITT, No. 154104; Court of Appeals No. 332072. Leave to appeal denied at 500 Mich 857.

Summary Disposition September 29, 2016:

PEOPLE v ROBERT BAKER, No. 150972; Court of Appeals No. 324234. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Roscommon Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. On remand, because the trial court determined that it would not take the challenged information in the PSIR into account at sentencing, the trial court shall also direct the probation officer to delete the challenged information from the PSIR as required by MCR 6.425(E)(2)(a) and assure that a corrected copy of the report is prepared and transmitted to the Michigan Department of Corrections per MCR 6.425 and MCL 771.14(6). In all other respects, leave to appeal is denied.

PEOPLE v DAVID FRANKLIN, No. 152295; Court of Appeals No. 327585. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the April 6, 2015 order of the Kent Circuit Court, and we remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), for a determination whether the defendant was denied the effective assistance of appellate counsel on direct appeal due to counsel's failure to file an application for leave to appeal on the defendant's behalf and challenge the scoring of Offense Variable 13, MCL 777.43. The motion to remand pursuant to *People v Lockridge*, 498 Mich 358 (2015), is denied. We do not retain jurisdiction.

LANSING ICE AND FUEL COMPANY v SMITH, No. 152771; Court of Appeals No. 328648. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v RONALD TOWNSEND, No. 153153; Court of Appeals No. 327112. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion applying the facts of the case to MCR 6.310(C) and we remand this case to the Wayne Circuit Court for consideration of the defendant's claim under MCR 6.310(C). In all other respects, leave to appeal is denied.

PEOPLE v TOMMY BROWN, No. 153546; Court of Appeals No. 323793. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the fourth habitual offender statute, MCL 769.12(1)(a), operated to preclude relief in this case pursuant to *People v Lockridge*, 498 Mich 358 (2015). The Court of Appeals clearly erred in relying on a subsection of the statute that was adopted by amendment after the offenses were committed in this case. See 2012 PA 319 (eff 10/1/12). We remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant.

With regard to the defendant's challenge to the assessment of court costs, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v BURGESS, No. 153866; Court of Appeals No. 331907. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 29, 2016:

PEOPLE v REA, No. 153908; reported below: 315 Mich App 151. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the location where the defendant was operating a vehicle was a place within the purview of MCL 257.625. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied September 29, 2016:

PEOPLE v JOEL KING, No. 151231; Court of Appeals No. 325183.

PEOPLE v MEEK, No. 152291; Court of Appeals No. 325149.

BERNSTEIN, J., would remand this case to the Court of Appeals as on leave granted.

PEOPLE v FREEMAN, No. 152340; Court of Appeals No. 311257.

BERNSTEIN, J., would grant leave to appeal.

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

PEOPLE v SPENCER WILLIAMS, No. 152385; Court of Appeals No. 326911.

PEOPLE v RICKY NELSON, No. 152568; Court of Appeals No. 329493.

PEOPLE v WILSHAUN KING, No. 152653; Court of Appeals No. 327239.

GUPPY v WYOMING COMMUNITY CHURCH, No. 153021; Court of Appeals No. 328889.

PEOPLE v HENKE, No. 153663; Court of Appeals No. 331825.

Summary Disposition September 30, 2016:

TRANTHAM v STATE DISBURSEMENT UNIT, No. 153191; reported below: 313 Mich App 157. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that the $0.25 assessment earmarked for the Attorney General's operations fund is a tax, because the issue was not raised by the parties and was not necessary to its decision on the takings question. We further vacate the Court of Appeals ruling remanding this case to the Court of Claims to develop a record on the constitutionality of the $0.25 assessment, as the issues identified by the panel were not raised by either party and not necessary to the court's conclusion. In all other respects, leave to appeal is denied.

In re VASQUEZ, No. 154338; Court of Appeals No. 329681.

Statements Regarding Decisions on Motion for Disqualification Entered September 30, 2016:

PEOPLE v ROBERT COOK, No. 154394; Court of Appeals No. 317010.

YOUNG, C.J. To establish a basis for disqualifying a judge, a party must show that the judge has an actual bias, which is both personal and extrajudicial, against the party or that the probability of actual bias is too high to be constitutionally tolerable. *Cain v Dep't of Corrections*, 451 Mich 470, 497-498 (1996); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). Adverse rulings do not establish actual bias unless they "display

a deep-seated antagonism [by the judge] that would make fair judgment impossible." *Cain* at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

Here, the defendant-appellant seeks to disqualify me and other members of the Court based on (1) our denial of his earlier application for leave to appeal and various motions by an order dated September 5, 2014, and (2) a vague and unsupported allegation of an insurance fraud cover-up. I am unaware of the alleged insurance fraud and do not harbor any personal bias against the defendant-appellant. I therefore decline to recuse myself from participating in the decision of this case.

MARKMAN, J. To establish a basis for disqualifying a judge, a party must show that the judge has an actual bias, which is both personal and extrajudicial, against the party or that the probability of actual bias is too high to be constitutionally tolerable. *Cain v Dep't of Corrections*, 451 Mich 470, 497-498 (1996); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). Adverse rulings do not establish actual bias unless they "display a deep-seated antagonism [by the judge] that would make fair judgment impossible." *Cain* at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

Here, the defendant-appellant seeks to disqualify me and other members of the Court based on (1) our denial of his earlier application for leave to appeal and various motions by an order dated September 5, 2014, and (2) a vague and unsupported allegation of an insurance fraud cover-up. I am unaware of the alleged insurance fraud and do not harbor any personal bias against the defendant-appellant. I therefore decline to recuse myself from participating in the decision of this case.

ZAHRA, J. To establish a basis for disqualifying a judge, a party must show that the judge has an actual bias, which is both personal and extrajudicial, against the party or that the probability of actual bias is too high to be constitutionally tolerable. *Cain v Dep't of Corrections*, 451 Mich 470, 497-498 (1996); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). Adverse rulings do not establish actual bias unless they "display a deep-seated antagonism [by the judge] that would make fair judgment impossible." *Cain* at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

Here, the defendant-appellant seeks to disqualify me and other members of the Court based on (1) our denial of his earlier application for leave to appeal and various motions by an order dated September 5, 2014, and (2) a vague and unsupported allegation of an insurance fraud cover-up. I am unaware of the alleged insurance fraud and do not harbor any personal bias against the defendant-appellant. I therefore decline to recuse myself from participating in the decision of this case.

MCCORMACK, J. To establish a basis for disqualifying a judge, a party must show that the judge has an actual bias, which is both personal and extrajudicial, against the party or that the probability of actual bias is too high to be constitutionally tolerable. *Cain v Dep't of Corrections*, 451 Mich 470, 497-498 (1996); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). Adverse rulings do not establish actual bias unless they "display

a deep-seated antagonism [by the judge] that would make fair judgment impossible." *Cain* at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

Here, the defendant-appellant seeks to disqualify me and other members of the Court based on (1) our denial of his earlier application for leave to appeal and various motions by an order dated September 5, 2014, and (2) a vague and unsupported allegation of an insurance fraud cover-up. I am unaware of the alleged insurance fraud and do not harbor any personal bias against the defendant-appellant. I therefore decline to recuse myself from participating in the decision of this case.

VIVIANO, J. To establish a basis for disqualifying a judge, a party must show that the judge has an actual bias, which is both personal and extrajudicial, against the party or that the probability of actual bias is too high to be constitutionally tolerable. *Cain v Dep't of Corrections*, 451 Mich 470, 497-498 (1996); *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). Adverse rulings do not establish actual bias unless they "display a deep-seated antagonism [by the judge] that would make fair judgment impossible." *Cain* at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

Here, the defendant-appellant seeks to disqualify me and other members of the Court based on (1) our denial of his earlier application for leave to appeal and various motions by an order dated September 5, 2014, and (2) a vague and unsupported allegation of an insurance fraud cover-up. I am unaware of the alleged insurance fraud and do not harbor any personal bias against the defendant-appellant. I therefore decline to recuse myself from participating in the decision of this case.

Summary Disposition October 5, 2016:

PEOPLE V PRATER, No. 151620; Court of Appeals No. 325980. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentences of the Emmet Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred in assigning points for Offense Variables 12 and 13, MCL 777.42 and MCL 777.43, respectively, which changed the defendant's guidelines range. *People v Francisco*, 474 Mich 82 (2006). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V MICHAEL D HARRIS, Nos. 152690 and 152691; Court of Appeals Nos. 328446 and 328447. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the orders entered by the Ingham Circuit Court on June 22, 2015. We vacate that part of the orders stating: "Further, this Court will not entertain any further motions by the defendant pertaining to this specific matter. It will be considered closed and allowed no further review as of the date of this Order." We further vacate that part of the orders stating, "IT IS FURTHER ORDERED that pursuant to MCR 2.602(A)(3) this Court finds that this decision resolves the last pending claim and closes the above captioned case." A judgment of conviction and sentence that is not subject to appellate review may be reviewed only in accordance with the provisions of MCR Subchapter 6.500. MCR 6.501. Motions that do not substantially comply with the

requirements of the court rules and successive motions for relief from judgment may be returned to the defendant under certain conditions. MCR 6.502(D); MCR 6.502(G)(1). But a defendant may file a second or subsequent motion for relief from judgment based on a retroactive change in law or a claim of new evidence. MCR 6.502(G)(2). In all other respects, leave to appeal is denied.

PEOPLE v MENARD, No. 152899; Court of Appeals No. 321688. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Delta Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 5, 2016:

PEOPLE v LYLES, No. 153185; Court of Appeals No. 315323. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the trial court's failure to correctly instruct the jury regarding defendant's evidence of good character was sufficiently prejudicial to warrant a new trial. The parties should not submit mere restatements of their application papers.

Order Denying Request for Advisory Opinion Entered October 5, 2016:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249, No. 154085. By order of July 20, 2016, the Governor and any member of the House or Senate were invited to file briefs regarding this request for an advisory opinion. In addition, the Court requested the Attorney General to submit separate briefs arguing both sides of the questions presented in the July 20, 2016 order. On order of the Court, the briefs having been received, the request by the Governor for an advisory opinion on the constitutionality of Section 152b contained in 2016 PA 249 is again considered, and it is denied, because we are not persuaded that granting the request would be an appropriate exercise of the Court's discretion.

Leave to Appeal Denied October 5, 2016:

SINCLAIR v CITY OF GROSSE POINTE FARMS, STONISCH v CITY OF GROSSE POINTE FARMS, ALLISON v CITY OF GROSSE POINTE FARMS, ABRAHAM v CITY OF GROSSE POINTE FARMS, BOURBEAU v CITY OF GROSSE POINTE FARMS, and CHOLODY v CITY OF GROSSE POINTE FARMS, Nos. 151983, 151984, 151985, 151986, 151987, and 151988; Court of Appeals Nos. 319317, 319318, 319319, 319368, 319370, and 319371.

MIDWEST MEMORIAL GROUP LLC v CITIGROUP GLOBAL MARKETS INC, No. 152810; Court of Appeals No. 322338.

PEOPLE v GARNER, No. 152886; Court of Appeals No. 329343.

PEOPLE v ROBERT PATTERSON, No. 153302; Court of Appeals No. 329830.

PRICE v CALLIS, No. 153387; Court of Appeals No. 329004.

PEOPLE v LAMAR WALKER, No. 153442; Court of Appeals No. 322810.

TURUNEN v DEPARTMENT OF NATURAL RESOURCES DIRECTOR, No. 154465; Court of Appeals No. 332811.

Summary Disposition October 7, 2016:

PEOPLE v LUTZ, No. 153463; Court of Appeals No. 324193. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 7, 2016:

ENBRIDGE ENERGY LIMITED PARTNERSHIP v UPPER PENINSULA POWER COMPANY, Nos. 153116 and 153118; reported below: 313 Mich App 669. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in holding that the analysis provided in *Dodge v Detroit Trust Co*, 300 Mich 575, 613 (1942), was relevant to the determination whether the Michigan Public Service Commission (MPSC) exceeded its statutory authority by enforcing a settlement agreement that included a revenue decoupling mechanism for an electric utility; (2) if *Dodge* applies, whether the petitioner was barred from arguing that the settlement agreement is unenforceable or void; and (3) whether the petitioner is procedurally barred from challenging the MPSC's prior orders when it failed to intervene in the cases or appeal from the orders. The parties may address other issues but should not submit mere restatements of their application papers.

Leave to Appeal Denied October 7, 2016:

PEOPLE v DIAPOLIS SMITH, No. 151905; Court of Appeals No. 326278.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 12, 2016:

PEOPLE v SWIFT, No. 151439; Court of Appeals No. 318680. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Nicholas J. Vendittelli, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel, addressing: (1) whether serving the habitual offender notice prior to the defendant's arraignment on the information satisfies the 21-day time requirement under MCL 769.13, and (2) if not, whether the harmless error rules apply to the failure to serve the habitual offender notice within the 21-day time requirement under MCL 769.13. With regard to the latter issue, see *In re Forfeiture of Bail Bond*, 496 Mich 320, 330 (2014); see also MCL 769.26 and MCR 2.613. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied October 12, 2016:

MCLAIN v LANSING FIRE DEPARTMENT, No. 151421; reported below: 309 Mich App 335.

PEOPLE v ANTHONY BALL and PEOPLE v ACKLEY, Nos. 154509 and 154510; Court of Appeals Nos. 334591 and 334592.

DAVIS v WAYNE CIRCUIT CLERK, No. 154512; Court of Appeals No. 334989.

Leave to Appeal Before Decision by the Court of Appeals Denied October 12, 2016:

DAVIS v WAYNE CIRCUIT CLERK, No. 154511; Court of Appeals No. 334989.

Summary Disposition October 18, 2016:

CHILDS v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC, No. 153643; Court of Appeals No. 329296. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied October 18, 2016:

TERAN v RITTLEY, No. 152927; reported below: 313 Mich App 197.

JONES v PEAKE, No. 153951; Court of Appeals No. 328566.

Summary Disposition October 26, 2016:

PEOPLE v RONALD JOHNSON, No. 150703; Court of Appeals No. 315247. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing pursuant to *People v Francisco*, 474 Mich 82 (2006). The trial court erred in assigning 50 points for Prior Record Variable 1 (PRV 1), MCL 777.51. As the prosecutor concedes, the record supports a score of only 25 points because the defendant only has one prior high severity felony conviction. In all other respects, leave to appeal is denied.

PEOPLE v EDMONDS, No. 153589; Court of Appeals No. 324869. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the claims raised in the defendant's Standard 4 brief. On February 12, 2016, the Court of Appeals granted the defendant's motion to extend the time for filing his Standard 4 brief and accepted the brief submitted on February 8, 2016, for filing. However, the Court of Appeals judgment does not address the claims raised in the defendant's Standard 4 brief. In all other respects, leave to appeal is denied.

PEOPLE v JAMES KEYS, No. 153708; Court of Appeals No. 331489. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v JAMES KEYS, No. 153710; Court of Appeals No. 331490. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v JAMES KEYS, No. 153712; Court of Appeals No. 331493. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v SHOLLENBERGER, No. 153739; Court of Appeals No. 331643. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its

discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v STEPHENS, No. 153781; Court of Appeals No. 324802. Pursuant to MCR 7.305(H)(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 Oakland Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v KIRCHEN, No. 153965; Court of Appeals No. 332150. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Reconsideration Granted October 26, 2016:

PEOPLE v KUPRES, No. 150443; Court of Appeals No. 316044. Leave to appeal denied at 498 Mich 904. We vacate our order dated October 28, 2015. On reconsideration, the application for leave to appeal the September 25, 2014 judgment of the Court of Appeals is considered and, it appearing to this Court that the cases of *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946–8) are pending on appeal before this Court and that the decisions in those cases may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decisions in those cases.

PEOPLE v GOGINS, No. 152264; Court of Appeals No. 325682. Leave to appeal denied at 499 Mich 882. We vacate our order dated March 29, 2016. On reconsideration, the application for leave to appeal the July 9, 2015 judgment of the Court of Appeals is considered and, it appearing to this Court that the cases of *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946–8) are pending on appeal before this Court and that the decisions in those cases may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decisions in those cases.

Leave to Appeal Denied October 26, 2016:

PEOPLE v STEVEN JACKSON, No. 153588; Court of Appeals No. 325725.

PEOPLE v RUSS, No. 151459; Court of Appeals No. 318097.

PEOPLE v OUSLEY, No. 151979; Court of Appeals No. 326878.

PEOPLE v DYSON, No. 152152; Court of Appeals No. 325621.

PEOPLE v JORGEANTONIO ALVARADO, No. 152333; Court of Appeals No. 328030.

PEOPLE v RAHAAB CHILDS, No. 152389; Court of Appeals No. 328515.

PEOPLE v RONALD THOMPSON, No. 152921; Court of Appeals No. 328944.

PEOPLE v BRIDGEFORTH, No. 152940; Court of Appeals No. 327956.

PEOPLE v DEMETRIUS CLARK, No. 152943; Court of Appeals No. 329182.

PEOPLE v PANNELL, No. 152953; Court of Appeals No. 329250.

PEOPLE v VALIANT WHITE, No. 152957; Court of Appeals No. 329797.

PEOPLE v STEVEN WHITE, No. 152965; Court of Appeals No. 328877.

PEOPLE v ISADORE HALL, No. 152986; Court of Appeals No. 329713.

PEOPLE v THOMAS MILLER, No. 153043; Court of Appeals No. 329003.

PEOPLE v CARLOS HICKS, No. 153050; Court of Appeals No. 329059.

PEOPLE v BOYKINS, No. 153059; Court of Appeals No. 328556.

PEOPLE v COLVIN, No. 153064; Court of Appeals No. 330028.

PEOPLE v SNOW, No. 153068; Court of Appeals No. 327163.

PEOPLE v DUNIGAN, No. 153111; Court of Appeals No. 329758.

PEOPLE v LASLEY, No. 153112; Court of Appeals No. 322969.

PEOPLE v RIGGINS, No. 153119; Court of Appeals No. 329239.

PEOPLE v HARRINGTON, No. 153126; Court of Appeals No. 329322.

PEOPLE v DAVID VAUGHN, No. 153146; Court of Appeals No. 329775.

PEOPLE v SEARCY, No. 153147; Court of Appeals No. 330257.

PEOPLE v JAMISON, No. 153150; Court of Appeals No. 329081.

PEOPLE v BUCHANAN, No. 153162; Court of Appeals No. 318727.

PEOPLE v KYLE, No. 153165; Court of Appeals No. 330203.

PEOPLE v MICHAEL DARNELL HARRIS, No. 153167; Court of Appeals No. 330716.

PEOPLE v VINCENT, No. 153169; Court of Appeals No. 329440.

PEOPLE v ETHERIDGE, No. 153177; Court of Appeals No. 329488.

PEOPLE v FRED EDWARDS, No. 153179; Court of Appeals No. 330053.

PEOPLE v BYAS, No. 153210; Court of Appeals No. 328920.

PEOPLE v WOUTERS, No. 153211; Court of Appeals No. 331112.

PEOPLE v HAYES, No. 153227; Court of Appeals No. 329876.

PEOPLE v AARON THOMAS, No. 153229; Court of Appeals No. 329980.

PEOPLE v GEORGE BENTON, No. 153247; Court of Appeals No. 329634.

PEOPLE v NACHUM, No. 153215; Court of Appeals No. 329701.

PEOPLE v BRICKFORD, No. 153264; Court of Appeals No. 329351.

PEOPLE v PAUL DAVIS, No. 153284; Court of Appeals No. 330556.

PEOPLE v ROBERT NELSON, No. 153286; Court of Appeals No. 330885.

JAMERSON v TITAN INSURANCE COMPANY, No. 153322; Court of Appeals No. 324589.

PEOPLE v COSGROVE, No. 153336; Court of Appeals No. 331053.

PEOPLE v ORLANDO MITCHELL, No. 153342; Court of Appeals No. 324426.

MOIR v MOIR, No. 153419; Court of Appeals No. 323725.

PEOPLE v CHRISTOPHER FRANKLIN, No. 153446; Court of Appeals No. 330473.

PEOPLE v BELLAMY, No. 153453; Court of Appeals No. 329570.

In re RONALD BENNETT, No. 153467; Court of Appeals No. 329934.

PEOPLE v GARTEN, No. 153486; Court of Appeals No. 323670.

PEOPLE v TONY HARRIS, No. 153523; Court of Appeals No. 322750.

J & N KOETS, INC v REDMOND, No. 153567; Court of Appeals No. 326955.

RANDAZZO v CITY OF INKSTER, Nos. 153568 and 153569; Court of Appeals Nos. 324149 and 324400.

CITY OF PONTIAC v OTTAWA TOWER II, LLC, No. 153593; Court of Appeals No. 324548.

PEOPLE v SOWA, No. 153622; Court of Appeals No. 325268.

RODRIQUEZ v DELTA TOWNSHIP, No. 153634; Court of Appeals No. 324444.

PEOPLE v FREW, No. 153665; Court of Appeals No. 324961.

MERRIWEATHER-SHANE v MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION, No. 153667; Court of Appeals No. 325886.

PEOPLE v EUGENE BROWN, No. 153704; Court of Appeals No. 324575.

PEOPLE v BOWLING, No. 153713; Court of Appeals No. 324006.

PEOPLE v FELDER, No. 153715; Court of Appeals No. 324621.

PEOPLE v CEDRIC SIMPSON, No. 153724; Court of Appeals No. 324889.

PEOPLE v WEST, No. 153728; Court of Appeals No. 324458.

PEOPLE v BOOTH, No. 153731; Court of Appeals No. 324630.

WHITE v EDS CARE MANAGEMENT LLC, No. 153734; Court of Appeals No. 329827.

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 153737; Court of Appeals No. 329929.

PEOPLE v KELSEY DANIELS, No. 153741; Court of Appeals No. 324565.

PEOPLE v WATERMAN, No. 153760; Court of Appeals No. 324886.

PEOPLE v MCMAHEN, No. 153762; Court of Appeals No. 324423.

TREVINO v JAMESON, No. 153771; Court of Appeals No. 328362.

PEOPLE v VAN-Y, No. 153777; Court of Appeals No. 332058.

PEOPLE v JAMES PHILLIPS, No. 153779; Court of Appeals No. 325854.

GRAVEL-HENKEL v AAA MICHIGAN, No. 153782; Court of Appeals No. 325435.

PEOPLE v SWYGART, No. 153794; Court of Appeals No. 323740.

PEOPLE v KRESS, No. 153795; Court of Appeals No. 331629.

In re PETITION OF CASS COUNTY TREASURER FOR FORECLOSURE, No. 153797; Court of Appeals No. 324519.

PEOPLE v BONNIE WILLIAMS, No. 153798; Court of Appeals No. 331713.

PEOPLE v BERNARD JONES, No. 153799; Court of Appeals No. 331150.

PEOPLE v ANDRE NOBLE, No. 153801; Court of Appeals No. 325637.

PEOPLE v PIERCE, No. 153802; Court of Appeals No. 325346.

PEOPLE v ROBERT ANDERSON, No. 153805; Court of Appeals No. 331539.

PEOPLE v SACHS, No. 153812; Court of Appeals No. 330439.

PEOPLE v SPENCER, No. 153813; Court of Appeals No. 331771.

PEOPLE v LEE THOMPSON, No. 153814; Court of Appeals No. 326012.

PEOPLE v MICHAEL DAVIS, No. 153816; Court of Appeals No. 325565.

PEOPLE v DANIEL MYERS, No. 153818; Court of Appeals No. 323943.

PEOPLE v TERRANCE JOHNSON, No. 153819; Court of Appeals No. 331449.

PEOPLE v HREHA, No. 153821; Court of Appeals No. 324389.

PEOPLE v YNES LEE, No. 153825; Court of Appeals No. 331628.

BROWN v JPMORGAN CHASE BANK NATIONAL ASSOCIATION, No. 153853; Court of Appeals No. 325825.

PEOPLE v MCCASKEY, No. 153859; Court of Appeals No. 329262.

PEOPLE v DAVONTAH NELSON, No. 153860; Court of Appeals No. 326343.

PEOPLE v GENTZ, No. 153867; Court of Appeals No. 332055.

PEOPLE v DRUMMOND, No. 153871; Court of Appeals No. 325104.

PEOPLE v ROUNDS, No. 153873; Court of Appeals No. 325698.

PEOPLE v MOREHOUSE, No. 153874; Court of Appeals No. 330832.

PEOPLE v ZACKARY WILLIAMS, No. 153876; Court of Appeals No. 330818.

PEOPLE v PURNELL, No. 153879; Court of Appeals No. 332048.

PEOPLE v BRAYON JONES, No. 153880; Court of Appeals No. 331694.

RODGERS v JPMORGAN CHASE BANK NA, No. 153888; reported below: 315 Mich App 301.

COX v FEATHERSTONE, No. 153891; Court of Appeals No. 326078.

PEOPLE v YELDER, No. 153892; Court of Appeals No. 325101.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MATTHEW BRANDON, No. 153903; Court of Appeals No. 323334.

PEOPLE v FABIAN ELLIS, No. 153905; Court of Appeals No. 325902.

BROOKS v JACKSON, No. 153907; Court of Appeals No. 330102.

PEOPLE v TEIVARIOL MOORE, No. 153911; Court of Appeals No. 330801.

PEOPLE v KLEINERT, No. 153927; Court of Appeals No. 326356.

PEOPLE v RANKINS, No. 153950; Court of Appeals No. 325567.

PEOPLE v DEMON THOMPSON, No. 153955; Court of Appeals No. 326007.

PEOPLE v JAMES BRYANT, No. 153962; Court of Appeals No. 324881.

PEOPLE v RAINBOLT, No. 153967; Court of Appeals No. 325600.

PEOPLE v ADAM NELSON, No. 153972; Court of Appeals No. 325708.

PEOPLE v FOX, No. 153993; Court of Appeals No. 331227.

PEOPLE v BRIDGES, No. 154010; Court of Appeals No. 332606.

PEOPLE v ROGERS, No. 154015; Court of Appeals No. 325732.

PEOPLE v MARCUS SMITH, No. 154049; Court of Appeals No. 326009.

PEOPLE v ARTHUR ROUSE, No. 154291; Court of Appeals No. 333701.

PEOPLE v VICTOR WALKER, No. 154318; Court of Appeals No. 330441.

SARAHA v SARAHA, No. 154366; Court of Appeals No. 331226.

PEOPLE v PIERRE TAYLOR, No. 154399; Court of Appeals No. 310771.

PEOPLE v MARK VARNER, No. 154467; Court of Appeals No. 333535.

Superintending Control Denied October 26, 2016:

DICKSON v ATTORNEY GRIEVANCE COMMISSION, No. 153574

RINCONES v ATTORNEY GRIEVANCE COMMISSION, No. 153575.

WHITE v ATTORNEY GRIEVANCE COMMISSION, No. 153611.

WHITE v ATTORNEY GRIEVANCE COMMISSION, No. 154076.

Reconsideration Denied October 26, 2016:

PEOPLE v JEFFREY HAWKINS, No. 150457; Court of Appeals No. 321158. Leave to appeal denied at 498 Mich 947.

PEOPLE v MCNAMEE, No. 151043; Court of Appeals No. 324635. Leave to appeal denied at 498 Mich 948.

PEOPLE v LEON TAYLOR, No. 151203; Court of Appeals No. 325573. Leave to appeal denied at 498 Mich 948.

PEOPLE v HOWARD HUGHES, No. 151448; Court of Appeals No. 323458. Leave to appeal denied at 498 Mich 949.

PEOPLE v TROTTER, No. 152304; Court of Appeals No. 327847. Leave to appeal denied at 499 Mich 967.

PEOPLE v GARVIN, No. 152388; Court of Appeals No. 328480. Leave to appeal denied at 499 Mich 967.

WILLIAMS v JERVISS-FETHKE INSURANCE AGENCY, No. 152882; Court of Appeals No. 323434. Leave to appeal denied at 499 Mich 968.

PEOPLE v O'CONNELL, No. 152949; Court of Appeals No. 321939. Leave to appeal denied at 499 Mich 969.

In re AWAD ESTATE, No. 153091; Court of Appeals No. 323163. Leave to appeal denied at 499 Mich 970.

Summary Disposition November 2, 2016:

PEOPLE v JAMES CHANDLER, No. 151219; Court of Appeals No. 318872. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the last paragraph of Section III.B. of the Court of Appeals opinion, and we remand this case to the Isabella Circuit Court. The trial

court shall consider whether the defendant was properly assigned 15 points on Offense Variable 10 (OV 10) for "predatory conduct" under MCL 777.40(1)(a) and (3)(a), or whether the 15-point score was improperly based solely on the conduct of the defendant's co-offenders. See *People v Gloster*, 499 Mich 199 (2016). If the trial court determines that OV 10 was scored incorrectly, the court shall resentence the defendant. *People v Francisco*, 474 Mich 82 (2006). If, however, the trial court determines that OV 10 was correctly scored, the court shall determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). In making this determination, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v LANCE, No. 151612; Court of Appeals No. 319727. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals, and we remand this case to the Oakland Circuit Court for a hearing to determine whether the defendant received ineffective assistance of counsel. *People v Ginther*, 390 Mich 436 (1973). The trial court shall determine whether the defendant's trial counsel exercised reasonable strategy in failing to seek dismissal of the criminal charges on the basis that they were barred by the six-year statute of limitations of MCL 767.24. The trial court shall consider the March 1, 2013 filing of the information to be the event that stopped the running of the statute of limitations. If the trial court determines that counsel did not exercise reasonable strategy, it must vacate the defendant's convictions. If there is a factual dispute as to whether the defendant's charges were barred by the statute of limitations, the trial court may order a new trial, at which the defendant may present a statute-of-limitations defense to the trier of fact. See *People v Price*, 74 Mich 37, 44 (1889); *People v Wright*, 161 Mich App 682, 685-686 (1987); *People v Artman*, 218 Mich App 236, 239 (1996); *People v Owen*, 251 Mich App 76, 86 (2002).

Order Requiring Settlement Proceedings and Granting Leave to Appeal if the Settlement Proceedings Fail Entered November 2, 2016:

CITY OF HUNTINGTON WOODS v CITY OF OAK PARK, No. 152035; reported below: 311 Mich App 96. On October 5, 2016, the Court heard oral argument on the application for leave to appeal the June 11, 2015 judgment of the Court of Appeals. We direct the parties to participate in settlement proceedings, and we appoint Chief Judge MICHAEL J. TALBOT to act as the mediator. The Chief Judge may direct the parties to produce any additional information he believes will facilitate mediation. Any additional information, statements, or comments made during these

proceedings will be confidential and will not become part of the record, except on motion by one of the parties. See, e.g., MCR 7.213(A)(2)(f); MCR 2.412(C). The mediator shall file a status report with this Court within 42 days of the date of this order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318.

If the parties are not able to resolve the dispute through settlement discussions, the date of the filing of the mediator's status report shall be considered the date leave to appeal is granted, for purposes of the briefing deadlines for calendar cases. The parties shall include among the issues to be briefed: (1) whether the revenue-sharing scheme provided in MCL 600.8379(1)(c) relates to a political subdivision's obligation to fund a district court; (2) whether the appropriation obligation in MCL 600.8271 creates an independent funding obligation; (3) whether the 45th District Court is "within" the political subdivisions of appellants or whether "the expenses of maintaining, financing, or operating the district court . . . were incurred in" the political subdivisions of appellants within the meaning of MCL 600.8103(3), MCL 600.8104(2), or both; (4) if so, whether the city of Oak Park is currently funding "the expenses of maintaining, financing, or operating the district court . . . incurred in any other political subdivision"; and (5) whether the 45th District Court may rescind its agreement with appellants that the district court is not required to sit in appellants' political subdivisions.

The Attorney General, the Michigan District Judges Association, the Michigan Court Administrators Association, the Michigan Municipal League, and the Michigan Townships Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MARKMAN and LARSEN, JJ., would grant leave to appeal only.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 2, 2016:

TODD v NBC UNIVERSAL, No. 153049; Court of Appeals No. 323235. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the erroneous statements contained in the television show aired by the defendant NBC Universal (MSNBC) must be considered in context with the pertinent facts and circumstances surrounding the statements, and if so, whether the statements viewed in that context rise to the level of extreme and outrageous conduct; (2) whether the statements in question are protected by the First Amendment; and (3) whether the plaintiff should have been permitted to amend his complaint. The parties should not submit mere restatements of their application papers.

NEXTEER AUTOMOTIVE CORPORATION v MANDO AMERICA CORPORATION, No. 153413; reported below: 314 Mich App 391. The parties shall file supplemental briefs within 42 days of the date of this order addressing:

(1) whether a party asserting an express waiver of a right to arbitrate must demonstrate that it was prejudiced by the actions of the party asserting that right; and if not, (2) whether the case management order in this case constituted an express waiver of the right of the defendant, Mando America Corporation, to arbitrate. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 2, 2016:

PEOPLE v ROSCOE MARTIN, No. 151795; Court of Appeals No. 319400. On order of the Court, the application for leave to appeal the June 2, 2015 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. Although the Court of Appeals in this case relied on *People v Herron*, 303 Mich App 392 (2013), which this Court overruled in *People v Lockridge*, 498 Mich 358 (2015), we are not persuaded that the defendant has established a threshold showing of plain error under *Lockridge* or that the questions presented should otherwise be reviewed by this Court. The application for leave to appeal is therefore denied.

PEOPLE v PORTIS, No. 152695; Court of Appeals No. 322270.

HINSBERG v HINSBERG, Nos. 152790, 152791, and 152792; Court of Appeals Nos. 324046, 324455, and 325807.

DEPARTMENT OF ENVIRONMENTAL QUALITY v MORLEY, No. 153072; reported below: 314 Mich App 306.

GOODSON v KATRANJI, No. 153250; Court of Appeals No. 329548.

PEOPLE v STRAUSBAUGH, No. 153320; Court of Appeals No. 328491.

PEOPLE v WREN, No. 153331; Court of Appeals No. 324118.

PEOPLE v MARQUEL WHITE, No. 153383; Court of Appeals No. 323465.

PEOPLE v LAPE, No. 153485; Court of Appeals No. 331013.

In re SCHWEIN ESTATE, No. 153522; reported below: 314 Mich App 51.

SWEAT v DETROIT HOUSING COMMISSION, No. 153558; Court of Appeals No. 324846.

Superintending Control Denied November 3, 2016:

MEIER v ATTORNEY DISCIPLINE BOARD, No. 154605.

Summary Disposition November 4, 2016:

PEOPLE v SARDY, No. 153222; reported below: 313 Mich App 679. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II of the Court of Appeals opinion and we remand this case to that

court for reconsideration of: (1) whether the complainant was unavailable for Confrontation Clause purposes, see *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *United States v Owens*, 484 US 554, 559-560; 108 S Ct 838; 98 L Ed 2d 951 (1988); and (2) whether the defendant's confrontation rights were violated at trial by the trial court's limitation on cross-examination of the complainant, compare *Owens*, *supra*, with *Delaware v Van Arsdall*, 475 US 673, 679 (1986). In all other respects, leave to appeal is denied.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 4, 2016:

WINKLER v MARIST FATHERS OF DETROIT, INC, No. 152889; Court of Appeals No. 323511. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the doctrine of ecclesiastical abstention involves a question of a court's subject-matter jurisdiction over a claim, compare *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602, 616 (2009), with *Dlaikan v Roodbeen*, 206 Mich App 591, 594 (1994); (2) whether the Court of Appeals correctly concluded that consideration of plaintiff's challenge to defendant's admission decision would have impermissibly entangled the trial court "in questions of religious doctrine or ecclesiastical polity," *Dlaikan*, 206 Mich App at 594; and (3) whether this Court should overrule *Dlaikan*, and if so, on what basis. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v MELVIN HOWARD, No. 153651; Court of Appeals No. 324388. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether manifest necessity justified the grant of a mistrial at the defendant's first trial; (2) whether defense counsel implicitly consented to the grant of a mistrial; (3) whether defense counsel was ineffective for not moving to dismiss on double jeopardy grounds prior to retrial; and (4) whether the statement in *People v Johnson*, 396 Mich 424, 432 (1976), that "[m]ere silence or failure to object to the jury's discharge is not such consent" is an accurate statement of law. Compare *Johnson* with *People v Lett*, 466 Mich 206, 223 n 15 (2002), and cases cited therein. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 4, 2016:

In re PIERSON, No. 154571; Court of Appeals No. 328675.

RADLER v RADLER, No. 154602; Court of Appeals No. 334214.

Leave to Appeal Denied November 9, 2016:

PEOPLE v BARRERA, No. 153629; Court of Appeals No. 331318.

MARKMAN, J. (*concurring*). For the reasons set forth in my concurring statement in *People v Keefe*, 498 Mich 962 (2015), I concur with the Court's order as it pertains to the sentence imposed in this case.

Summary Disposition November 17, 2016:

PEOPLE v MACKENZIE, No. 153848; Court of Appeals No. 324893. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals addressing the defendant's claim of ineffective assistance of trial counsel with regard to counsel's handling of the withdrawal of the defendant's *nolo contendere* plea, pursuant to MCR 6.310(B)(2). We remand this case to the Court of Appeals, which shall retain jurisdiction while remanding the case to the Ionia Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). At the conclusion of the hearing, the circuit court shall then forward the record and its findings to the Court of Appeals, which shall address the issues presented by the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 17, 2016:

PEOPLE v DWAYNE WILSON, No. 154039; Court of Appeals No. 324856. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 750.227b(1) of the felony-firearm statute requires two prior convictions under this subsection to have arisen from separate criminal incidents in order for a third conviction under the subsection to trigger the 10-year imprisonment penalty; and, if not (2) whether this Court should overrule *People v Stewart*, 441 Mich 89 (1992), which, in holding that the two prior convictions must have arisen from separate criminal incidents, relied upon *People v Preuss*, 436 Mich 714 (1990), the reasoning of which was overruled by *People v Gardner*, 482 Mich 41 (2008). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 17, 2016:

PEOPLE v MICHAEL D HARRIS, No. 152981; Court of Appeals No. 329743.

PEOPLE v BUGGS, No. 153452; Court of Appeals No. 330889.

JACKSON v SUTHERLAND, No. 153472; Court of Appeals No. 324600.

PEOPLE v EBRAHIMI, No. 153492; Court of Appeals No. 324551.

PEOPLE v BYARD, No. 153687; Court of Appeals No. 324870.

PEOPLE v DWAYNE WILSON, No. 154041; Court of Appeals No. 324856.

Order Denying Motion to Show Cause Entered November 17, 2016:

In re RIEMAN, No. 152094.

Leave to Appeal Denied November 18, 2016:

PEOPLE v ROBERT COOK, No. 154394; Court of Appeals No. 317010.

In re RHODES, No. 154589; Court of Appeals No. 331300.

Superintending Control Denied November 18, 2016:

CONSTANT v ATTORNEY GRIEVANCE COMMISSION, No. 153609.

Summary Disposition November 23, 2016:

In re CM, No. 153906; reported below: 315 Mich App 39. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals erred by reading this Court's October 28, 2015 remand order as "calling for a decision on the merits regardless of any such procedural concerns." We further remand this case to the Court of Appeals to reconsider Mackinac County's motion to intervene. If the Court of Appeals grants the motion to intervene, it shall then permit the filing of Mackinac County's motion for reconsideration. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

KUHLGERT v MICHIGAN STATE UNIVERSITY, No. 154499; Court of Appeals No. 332442. Pursuant to MCR 7.305(H)(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 consider: (1) whether the plaintiff's claims are barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), see MCL 418.131(1); *Sewell v Clearing Machine Corp*, 419 Mich 56, 62 (1984); and if not, (2) whether the Court of Claims erred by denying United Educators' motion to intervene. We do not retain jurisdiction.

PEOPLE v LOFTIES, No. 153042; Court of Appeals No. 329257. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the August 19, 2015 opinion of the Kent Circuit Court. Contrary to the circuit court's holding, the defendant has satisfied MCR 6.502(G) by demonstrating a retroactive change in the law. When he was convicted pursuant to MCL 333.7401(2)(a)(*i*) in 1997, he was ineligible for parole. See MCL 333.7401(3) (1997 ed.). Now, however, he is eligible for parole. MCL 791.234(7), (10). The circuit court erroneously concluded that MCL 333.7413 prohibited parole in this case, but that

statute precludes parole eligibility only when both the current and prior convictions are for violations of MCL 333.7401(2)(a)(*ii*) or (*iii*), MCL 333.7403(2)(a)(*ii*) or (*iii*), or conspiracy to commit those offenses. The defendant's prior drug convictions did not rise to that level of severity because each of them involved less than 50 grams of controlled substances. Nevertheless, the circuit court properly denied the defendant's motion, because the defendant failed to establish entitlement to relief under MCR 6.508(D). The parole board has jurisdiction over the administration of MCL 791.234. MCL 791.234(7).

PEOPLE v STOVER, No. 153154; Court of Appeals No. 321742. Pursuant to MCR 7.305(H)(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 to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v AGAR, No. 153435; reported below: 314 Mich App 636. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III of the Court of Appeals judgment entitled "DENIAL OF DUE PROCESS." *People v Riley*, 465 Mich 442, 447 (2001). We also reverse in part the judgment of the Court of Appeals to the extent that the Court of Appeals vacated the defendant's convictions and ordered a new trial. We do not disturb the Court of Appeals determination that "[i]t was an abuse of discretion to deny the defendant access to an expert witness" under MCL 775.15. However, the error in denying funds may not have prejudiced the defendant, and, at this point in the proceedings, it would be premature to vacate the defendant's convictions before the results of independent forensic analysis are known. We remand this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order.

Within 56 days of the date of this order, the trial court shall provide funds sufficient to permit the defendant to obtain his own expert on computer forensic analysis. Within 56 days of the provision of such funds, the defendant shall file a statement in the trial court indicating whether he will seek further relief under either MCL 775.15, the Due Process Clause of the United States Constitution, or both based on the expert's evaluation and, if so, shall attach an offer of proof indicating how the expert's testimony would be material and favorable to the defense. The trial court may extend the time for filing this statement on good cause shown. Within 56 days of the filing of the statement, the trial court shall address in writing whether the absence of a defense expert sufficiently prejudiced the defendant such that a new trial is warranted. We do not retain jurisdiction.

Leave to Appeal Granted November 23, 2016:

HAKSLUOTO v MT CLEMENS REGIONAL MEDICAL CENTER, No. 153723; reported below: 314 Mich App 424. The parties shall include among the issues to be briefed: (1) whether a notice of intent under MCL 600.2912b that is mailed on what would otherwise be the last day of the limitations period of MCL 600.5805(6) tolls the limitations period, as provided by MCL 600.5856(c); and (2) if the limitations period was tolled in this case, whether the plaintiffs were required to file on the 182nd day of the notice period or the day after the 182nd day in order for their complaint to be timely. See MCR 1.108(1) ("the period runs until the end of the . . . day").

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 23, 2016:

PEOPLE v DENSON, No. 152916; Court of Appeals No. 321200. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Genesee Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent, and if so, to appoint Jonathan B. D. Simon, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. The parties shall file supplemental briefs within 42 days following the appointment of counsel addressing: (1) whether the trial court erred when it admitted evidence under MRE 404(b) of the circumstances underlying defendant's 2002 conviction for assault with intent to do great bodily harm and, if so, (2) whether the error was harmless. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 23, 2016:

PEOPLE v NAJEE WILKINS, No. 151173; Court of Appeals No. 324779.

KYOCERA CORPORATION v HEMLOCK SEMICONDUCTOR, LLC, No. 153238; reported below: 313 Mich App 437.

SWOFFORD v PETROW, No. 153380; Court of Appeals No. 324530.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

PEOPLE v TONKOVICH, No. 153654; Court of Appeals No. 331402.

SHINN v MICHIGAN ASSIGNED CLAIMS FACILITY, No. 153691; reported below: 314 Mich App 765.

PEOPLE v SESI, No. 154048; Court of Appeals No. 331755.

PEOPLE v DELAPAZ, No. 154064; Court of Appeals No. 332447.

YOUNG, C.J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. I would grant leave to appeal because I believe that this Court's peremptory order in *People v Johnson* was poorly reasoned and inconsistent with the text of MCL 750.520a(r), the statute defining sexual penetration.[1] *Johnson* is erroneous and should be overruled.

The prosecution in this case sought to amend the information to charge defendant with one count of first-degree criminal sexual conduct pursuant to MCL 750.520b(1)(c). The defendant had pushed a 14-year-old girl's head down onto his penis, forcing the victim's mouth to make contact with defendant's penis. The trial court denied the prosecution's motion, concluding it was bound by this Court's order in *Johnson* to hold that under the circumstances there was no "sexual penetration" as required by MCL 750.520b(1)(c).

MCL 750.520a(r) defines "sexual penetration" to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . . " The statute unambiguously defines "fellatio" as a type of "sexual penetration." The term "fellatio" means "oral stimulation of the penis."[2] "The clear definition of the word 'fellatio' encompasses any penile stimulation accomplished using the mouth."[3] Kissing, as allegedly occurred in this case, in *Conway*,[4] and in *Johnson*,[5] therefore fits within the statutory definition of fellatio.

However, under *Johnson*, proof of "fellatio" constituting "sexual penetration" under MCL 750.520b requires proof of "intrusion."[6] This additional "intrusion" requirement is incompatible with the statutory language, as explained above, and places inconsistent constructions on

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[1] *People v Johnson*, 432 Mich 931 (1989). See *People v Conway*, 469 Mich 857, 857 (2003) (YOUNG, J., dissenting) (explaining why *Johnson* should be overruled).

[2] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Conway*, 469 Mich at 857 (YOUNG, J., dissenting) ("The term fellatio is defined as '*oral stimulation of the penis*.' "), quoting *Random House Webster's College Dictionary* (2001).

[3] *Conway*, 469 Mich at 857 (YOUNG, J., dissenting).

[4] *Id*.

[5] *People v Johnson*, 164 Mich App 634, 647 (1987) (KELLY, J., dissenting).

[6] See *Johnson*, 432 Mich at 931; *Johnson*, 164 Mich App at 647-648 (KELLY, J., dissenting).

the expressly listed parallel crimes of "fellatio" and "cunnilingus."[7] Instead, in this case, the relevant inquiry to determine whether the prosecution has demonstrated "sexual penetration" under MCL 750.520b(1)(c) is not whether there has been "intrusion," but whether there was "fellatio."

I continue to believe that *Johnson* is wrong and should be overruled. At the very least, this issue should be given this Court's full attention and resolved by a reasoned opinion, rather than a peremptory order.[8] I would grant leave to appeal.

In re STORIE, No. 154650; Court of Appeals No. 332451.

Application for Leave to Appeal Dismissed November 23, 2016:

INTERNATIONAL BUSINESS MACHINES CORP v DEPARTMENT OF TREASURY, No. 154369; reported below: 316 Mich App 346. The motion to strike the notice of intervention is considered, and it is granted. There is no justiciable controversy because the losing party below did not file an application for leave to appeal and the Attorney General does not represent an aggrieved party. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006). The application for leave to appeal is dismissed.

Summary Disposition November 30, 2016:

BUNCH v AUTO CLUB GROUP INSURANCE COMPANY, No. 154114; Court of Appeals No. 330166. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals as on reconsideration granted to address the issue whether the defendant waived its right to assert a defense based on MCL 500.3106(1) by failing to plead the effect of that statute as an affirmative defense in its responsive pleading.

PEOPLE v ANTJUAN JACKSON, No. 154183; Court of Appeals No. 332307. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied November 30, 2016:

PEOPLE v JACQUES, No. 151627; Court of Appeals No. 325543.

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[7] MCL 750.520a(r). See also *Conway*, 469 Mich at 857-858 (YOUNG, J., dissenting) ("I believe that the Legislature clearly defined fellatio as a *type* of intrusion that establishes sexual penetration. This is certainly consistent with this Court's approach to oral contact with female genitalia, where we have stated that penetration into the vagina is not necessary to establish CSC-I.").

[8] Compare *Johnson*, 432 Mich at 931.

PEOPLE v EDWARD WATKINS, No. 151912; Court of Appeals No. 320098.

CRAFT RECREATION COMPANY, LLC v HOME-OWNERS INSURANCE COMPANY, No. 152518; Court of Appeals No. 321435.

PEOPLE v SHAWN YOUNG, No. 152826; Court of Appeals No. 329582.

PEOPLE v JERMAINE HUNTER, No. 152837; Court of Appeals No. 328993.

PEOPLE v HARTLAND TOWNSHIP, No. 153016; Court of Appeals No. 321347.

PEOPLE v MARK JACKSON, No. 153087; Court of Appeals No. 329167.

PEOPLE v BOU, No. 153089; Court of Appeals No. 329571.

PEOPLE v HARDEN, No. 153097; Court of Appeals No. 328689.

PEOPLE v MCDONALD, No. 153102; Court of Appeals No. 329874.

PEOPLE v DARRYL JORDAN, No. 153141; Court of Appeals No. 330013.

PEOPLE v HERBERT CHANDLER, No. 153144; Court of Appeals No. 329341.

PEOPLE v EDDIE SMITH, No. 153166; Court of Appeals No. 329975.

PEOPLE v LAURENCIO RODRIGUEZ, No. 153168; Court of Appeals No. 329410.

PEOPLE v JASON THOMAS, No. 153204; Court of Appeals No. 330027.

PEOPLE v ALBERT WOODS, No. 153234; Court of Appeals No. 330085.

PEOPLE v DENNIS DURRELL HOSKINS, No. 153236; Court of Appeals No. 329714.

PEOPLE v FREDERICK MATTHEWS, No. 153257; Court of Appeals No. 329994.

PEOPLE v HEAD, No. 153294; Court of Appeals No. 323035.

PEOPLE v SMALLEY, No. 153295; Court of Appeals No. 322743.

PEOPLE v LIEW, No. 153390; Court of Appeals No. 330302.

PEOPLE v JOHN GREEN, No. 153393; Court of Appeals No. 329342.

PEOPLE v RANES, No. 153398; Court of Appeals No. 330277.

PEOPLE v DEJUAN GREEN, No. 153407; Court of Appeals No. 330512.

PEOPLE v CHAPPLE, No. 153408; Court of Appeals No. 330323.

PEOPLE v MOUNTS, No. 153410; Court of Appeals No. 330430.

PEOPLE v TYREESE MOORE, No. 153411; Court of Appeals No. 329942.

PEOPLE v JERRY JOHNSON, No. 153417; Court of Appeals No. 330200.

PEOPLE v CRAIG BROWN, No. 153429; Court of Appeals No. 329734.

PEOPLE v MANNION, No. 153438; Court of Appeals No. 330809.

PEOPLE v REMBISH, No. 153439; Court of Appeals No. 329957.

JONES v JONES, No. 153449; Court of Appeals No. 329378.

PEOPLE v BRIAN SMITH, No. 153468; Court of Appeals No. 329554.

PEOPLE v LEADINGHAM, No. 153480; Court of Appeals No. 330357.

PEOPLE v SOUTHWELL, No. 153482; Court of Appeals No. 330264.

PEOPLE v RICHARD, No. 153488; Court of Appeals No. 331606.

PEOPLE v ANDRE GALLOWAY, No. 153497; Court of Appeals No. 330160.

PEOPLE v CHARLES BENSON, No. 153504; Court of Appeals No. 329308.

PEOPLE v REMBISH, No. 153506; Court of Appeals No. 330258.

PEOPLE v DALTON, No. 153519; Court of Appeals No. 331314.

PEOPLE v FARRIS, No. 153525; Court of Appeals No. 324324.

PEOPLE v WILLIE JONES, No. 153540; Court of Appeals No. 330475.

PEOPLE v FORD, No. 153557; Court of Appeals No. 330708.

PEOPLE v PLASTER, No. 153562; Court of Appeals No. 330904.

PEOPLE v TIMOTHY FIELDS, No. 153563; Court of Appeals No. 331018.

PEOPLE v CHRISTIAN, No. 153565; Court of Appeals No. 330427.

PEOPLE v NAYMON STEWART, No. 153579; Court of Appeals No. 330906.

PEOPLE v SEARIGHT, No. 153583; Court of Appeals No. 330411.

PEOPLE v BOONE, No. 153587; Court of Appeals No. 331847.

PEOPLE v ANDRE HUNTER, No. 153590; Court of Appeals No. 324615.

PEOPLE v ZAPATA, No. 153614; Court of Appeals No. 331813.

PEOPLE v LOUIS PICKETT, No. 153619; Court of Appeals No. 331219.

FREMONT INSURANCE COMPANY v GRO-GREEN FARMS, INC, No. 153626; Court of Appeals No. 324075.

PEOPLE v MCMILLIAN, No. 153628; Court of Appeals No. 331668.

PEOPLE v HUCKABY, No. 153630; Court of Appeals No. 330015.

PEOPLE v SHERWIN SHELTON, No. 153631; Court of Appeals No. 330858.

PEOPLE v WOODMAN, No. 153657; Court of Appeals No. 331334.

PEOPLE v ROMERO THOMAS, No. 153658; Court of Appeals No. 324273.

PEOPLE v ROMERO THOMAS, No. 153660; Court of Appeals No. 324274.

PEOPLE v KERSEY, No. 153678; Court of Appeals No. 324674.

PEOPLE v MANN, No. 153682; Court of Appeals No. 330640.

PAPE v DOBRONSKI, No. 153690; Court of Appeals No. 330206.

PEOPLE v MARKEST THOMPSON, No. 153703; Court of Appeals No. 325542.

COASTAL COMMUNICATIONS OF MICHIGAN, LLC v AT&T SERVICES, INC, No. 153706; Court of Appeals No. 324241.

PEOPLE v ANDRE BROWN, No. 153721; Court of Appeals No. 331316.

PEOPLE v ATWOOD, No. 153726; Court of Appeals No. 331812.

PEOPLE v HARDWICK, No. 153727; Court of Appeals No. 331344.

PEOPLE v DEWEESE, No. 153740; Court of Appeals No. 330687.

PEOPLE v FREES, No. 153743; Court of Appeals No. 331752.

PEOPLE v PHOUANGPHET, No. 153744; Court of Appeals No. 332075.

HELLENGA v SELECT SPECIALTY HOSPITAL KALAMAZOO, INC, No. 153753; Court of Appeals No. 329243.

PEOPLE v DAMON MARTIN, No. 153756; Court of Appeals No. 323096.

GAMBLE v KOLAKOWSKI, No. 153769; Court of Appeals No. 326178.

PEOPLE v KEVIN VARNER, No. 153775; Court of Appeals No. 324705.

PEOPLE v SAGE LEWIS, No. 153792; Court of Appeals No. 330717.

PEOPLE v LIGGION, No. 153796; Court of Appeals No. 325166.

PEOPLE v COHEN, No. 153804; Court of Appeals No. 330777.

LUMAJ v WALKER, No. 153815; Court of Appeals No. 323786.

PEOPLE v HAMIN DIXON, No. 153817; Court of Appeals No. 330511.

PEOPLE v MICHAEL COOK, No. 153820; Court of Appeals No. 331263.

PEOPLE v GREGORY LEE, No. 153822; Court of Appeals No. 325039.

PEOPLE v CHESTER COLE, No. 153826; Court of Appeals No. 331524.

PEOPLE v NASSIRI, No. 153834; Court of Appeals No. 324868.

PEOPLE v DERRICK CHATMAN, No. 153835; Court of Appeals No. 331572.

COLOMA EMERGENCY AMBULANCE, INC v ONDERLINDE, No. 153839; Court of Appeals No. 325616.

PEOPLE v FRIZZELL, No. 153844; Court of Appeals No. 330651.

PEOPLE v JEROME MARTIN, No. 153845; Court of Appeals No. 331675.

DETROIT FREE PRESS INC v UNIVERSITY OF MICHIGAN REGENTS, No. 153852; reported below: 315 Mich App 294.

BERNSTEIN, J., did not participate.

WILLIAM P FROLING REVOCABLE LIVING TRUST v PELICAN PROPERTY, LLC, Nos. 153855 and 153856; Court of Appeals Nos. 322019 and 323074.

PEOPLE v RICHARD STRONG, No. 153862; Court of Appeals No. 315080.

STERLING MORTGAGE & INVESTMENT COMPANY v JOHNSTON, No. 153864; reported below: 315 Mich App 724.

PEOPLE v JEQUIS MAYES, No. 153868; Court of Appeals No. 325454.

PEOPLE v ARDIS, No. 153869; Court of Appeals No. 324671.

PEOPLE v PHILLIP, No. 153877; Court of Appeals No. 324675.

JOHNSTON v STERLING MORTGAGE & INVESTMENT COMPANY, No. 153883; reported below: 315 Mich App 724.

PEOPLE v KEVIN BERRY, No. 153895; Court of Appeals No. 331732.

PEOPLE v ARMSTRONG-NICHOLS, No. 153897; Court of Appeals No. 323681.

WARD v OAKS CORRECTIONAL FACILITY WARDEN, No. 153898; Court of Appeals No. 330995.

PEOPLE v PEREZ, No. 153901; Court of Appeals No. 325038.

WILLIAM BEAUMONT HOSPITAL v WASS, No. 153909; reported below: 315 Mich App 392.

PEOPLE v ELATRACHE, No. 153913; Court of Appeals No. 324918.

PEOPLE v NOBLE MOORER, No. 153915; Court of Appeals No. 325103.

PEOPLE v VAN THOMPKINS, No. 153916; Court of Appeals No. 332264.

PEOPLE v DEON CRAWFORD, No. 153926; Court of Appeals No. 330353.

PEOPLE v MILLINER, No. 153929; Court of Appeals No. 325108.

PEOPLE v MILO JOHNSON, No. 153934; Court of Appeals No. 324567.

PEOPLE v DICKENS, No. 153935; Court of Appeals No. 330817.

PEOPLE v SILSBY, No. 153940; Court of Appeals No. 330564.

PEOPLE v JAMES MCCRAY, No. 153941; Court of Appeals No. 331385.

PEOPLE v BRYNER, No. 153944; Court of Appeals No. 318405.

PEOPLE v AUDRY REED, No. 153954; Court of Appeals No. 330967.

PEOPLE v LEON COTTRELL, No. 153964; Court of Appeals No. 331088.

PEOPLE v MENGEL, No. 153983; Court of Appeals No. 331644.

PEOPLE v ARNETT, No. 153984; Court of Appeals No. 320095.

PEOPLE v BRANDON BROWN, No. 153985; Court of Appeals No. 326430.

ST ONGE v SMITH, No. 153988; Court of Appeals No. 324878.

PEOPLE v SEXTON, No. 153990; Court of Appeals No. 331465.

PEOPLE v ALBERS, No. 153991; Court of Appeals No. 331056.

PEOPLE v LARRY JONES, No. 153998; Court of Appeals No. 332293.

PEOPLE v BARRY MILLER, No. 153999; Court of Appeals No. 325764.

WILLIAMS v NATIONAL INTERSTATE INSURANCE COMPANY, No. 154003; Court of Appeals No. 323343.

PEOPLE v CHRISTINA SEARS, No. 154011; Court of Appeals No. 331872.

PEOPLE v FELICIA HALE, No. 154013; Court of Appeals No. 331158.

PEOPLE v BROSKEY, No. 154014; Court of Appeals No. 330563.

PEOPLE v THORNGATE, No. 154021; Court of Appeals No. 326104.

PEOPLE v BURCH, No. 154022; Court of Appeals No. 322814.

PEOPLE v STEVEN BROWN, No. 154025; Court of Appeals No. 331212.

PEOPLE v ANDRE DENT, No. 154028; Court of Appeals No. 325562.

In re BANFIELD IRREVOCABLE TRUST, Nos. 154035, 154037, 154036, and 154038; Court of Appeals Nos. 321204, 325422, 321206, and 325423.

PEOPLE v PHILLIP JONES, No. 154050; Court of Appeals No. 331290.

JOE v COMMUNITY EMERGENCY MEDICAL SERVICE, No. 154054; Court of Appeals No. 323276.

PEOPLE v DUREN, No. 154060; Court of Appeals No. 324836.

PEOPLE v JORDAN DUNN, No. 154063; Court of Appeals No. 323403.

PEOPLE v REIGN, No. 154070; Court of Appeals No. 332031.

HILTON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 154075; Court of Appeals No. 331595.

PEOPLE v HAPSON, No. 154078; Court of Appeals No. 324818.

PEOPLE v PRESCOTT, No. 154090; Court of Appeals No. 326739.

PEOPLE v ANTHONY JOHNSON, No. 154095; Court of Appeals No. 326388.

PEOPLE v SOULES, No. 154096; Court of Appeals No. 326554.

PEOPLE v TEWANA SULLIVAN, No. 154098; Court of Appeals No. 332388.

PEOPLE v TENEYUQUE, No. 154106; Court of Appeals No. 331853.

PEOPLE v LONGMIRE, No. 154122; Court of Appeals No. 331397.

PEOPLE v LOFTIS, No. 154123; Court of Appeals No. 332620.

PEOPLE v LERRICK MYERS, No. 154132; Court of Appeals No. 333680.

PEOPLE v TYRONE BELL, No. 154135; Court of Appeals No. 331009.

PEOPLE v RANIS HILL, No. 154138; Court of Appeals No. 332304.

PEOPLE v EDWARD FINLEY, No. 154142; Court of Appeals No. 331463.

BOLENBAUGH v ENBRIDGE, INC, No. 154147; Court of Appeals No. 325063.

PEOPLE v TYRONE ANDREWS, No. 154150; Court of Appeals No. 325978.

PEOPLE v ALPHONSO JORDAN, No. 154153; Court of Appeals No. 326392.

PEOPLE v KEENAN KING, No. 154157; Court of Appeals No. 331689.

GREINER v MACOMB COUNTY DEPARTMENT OF ROADS, No. 154164; Court of Appeals No. 330587.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

VAN REYENDAM v THOMAS, No. 154173; Court of Appeals No. 331070.

PEOPLE v DONALD GOWING, No. 154177; Court of Appeals No. 331577.

PEOPLE v DELMAR GOWING, No. 154178; Court of Appeals No. 331753.

BAKRI v SENTINEL INSURANCE COMPANY, No. 154182; Court of Appeals No. 326109.

PEOPLE v BUIE, No. 154187; Court of Appeals No. 332720.

ALBACE v RAAW ENTERPRISES, LLC, No. 154188; Court of Appeals No. 326435.

PEOPLE v KRISTOFFERSON THOMAS, No. 154197; Court of Appeals No. 326645.

PEOPLE v MARK CAIN, No. 154198; Court of Appeals No. 332884.

PEOPLE v LUNDY, No. 154214; Court of Appeals No. 325985.

PEOPLE v KEVIN SEARS, No. 154225; Court of Appeals No. 333272.

PEOPLE v JASON STRONG, No. 154228; Court of Appeals No. 325031.

PEOPLE v BIRL HILL, No. 154234; Court of Appeals No. 326550.

PEOPLE v STEVEN JAMES, No. 154235; Court of Appeals No. 326393.

PEOPLE v SEED, No. 154245; Court of Appeals No. 332949.

PEOPLE v CRAMPTON, No. 154251; Court of Appeals No. 326785.

PEOPLE v CURTIS MAYES, No. 154252; Court of Appeals No. 326052.

PEOPLE v VARNADO, No. 154256; Court of Appeals No. 326896.

PEOPLE v KEYSHAUN DAVIS, No. 154283; Court of Appeals No. 332930.

PEOPLE v DARNELL CHEATHAM, No. 154286; Court of Appeals No. 325935.

MACATAWA BANK v COMMAND, No. 154303; Court of Appeals No. 332235.

PEOPLE v LAMAR CRAIG, No. 154304; Court of Appeals No. 332578.

PEOPLE v FREDERICK MATTHEWS, No. 154352; Court of Appeals No. 333689.

PEOPLE v RAKESK WHITE, No. 154452; Court of Appeals No. 326701.

SAFDAR v AZIZ, No. 154500; Court of Appeals No. 333595.

Superintending Control Denied November 30, 2016:

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 154115.

BALLARD v ATTORNEY GRIEVANCE COMMISSION, No. 154151.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 154327.

Reconsideration Denied November 30, 2016:

PEOPLE v HAROLD VARNER, No. 151909; Court of Appeals No. 325804. Leave to appeal denied at 500 Mich 864.

PEOPLE v BELTOWSKI, No. 152158; Court of Appeals No. 326192. Leave to appeal denied at 499 Mich 983.

PEOPLE v WITBRODT, No. 152231; Court of Appeals No. 326074. Leave to appeal denied at 499 Mich 983.

PEOPLE v EDWARD MOORE, No. 152417; Court of Appeals No. 328196. Leave to appeal denied at 499 Mich 983.

PEOPLE v JOHNSTON, No. 152501; Court of Appeals No. 328284. Leave to appeal denied at 499 Mich 983.

PEOPLE v GOODMAN, No. 152526; Court of Appeals No. 328106. Leave to appeal denied at 500 Mich 864.

PEOPLE v THEODORE WILLIAMS, No. 152855; Court of Appeals No. 327980. Leave to appeal denied at 500 Mich 853.

PEOPLE v SMALL, No. 152856; Court of Appeals No. 329301. Leave to appeal denied at 500 Mich 853.

PEOPLE v BRYANT BENTLEY, No. 152891; Court of Appeals No. 328596. Leave to appeal denied at 500 Mich 853.

ADAS v WILLIAM BEAUMONT HOSPITAL, No. 152907; Court of Appeals No. 318397. Leave to appeal denied at 499 Mich 984.

BORMUTH v GRAND RIVER ENVIRONMENTAL ACTION TEAM, No. 153007; Court of Appeals No. 321865. Leave to appeal denied at 499 Mich 969.

PEOPLE v MAURICE WILLIAMS, No. 153031; Court of Appeals No. 329268. Leave to appeal denied at 500 Mich 865.

PEOPLE v ANTHONY WALKER, No. 153197; Court of Appeals No. 322133. Leave to appeal denied at 499 Mich 985.

PEOPLE v NICHOLAS JACKSON, No. 153493; Court of Appeals No. 330958. Leave to appeal denied at 499 Mich 987.

OAKLAND COUNTY TREASURER v KUERBITZ, No. 153958; Court of Appeals No. 331763. Leave to appeal denied at 500 Mich 857.

Summary Disposition December 7, 2016:

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 153841; Court of Appeals No. 330795. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals order granting the motion to dismiss the appeal, and remand this case to the Court of Appeals for plenary consideration as on leave granted of whether MCL 211.78k(7) requires payment of the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal where the taxpayer does not seek to challenge the foreclosures for all of the parcels. If the Court of Appeals concludes that MCL 211.78k(7) does not impose such a requirement, it shall reinstate the appeal and proceed in accordance with MCR 7.204. We do not retain jurisdiction.

PEOPLE v GOSS, No. 153956; Court of Appeals No. 332331. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the probation revocation and the sentence of the Wayne Circuit Court and we remand this case to the trial court for a probation revocation hearing and possible resentencing. See MCL 771.4. Without holding a probation violation hearing as required by MCR 6.445(E), the trial court found that the defendant had violated the terms of his probation. And, while the court did not state the grounds for such a finding, it was made immediately after having sentenced the defendant for his felony murder conviction and associated charges in an unrelated case. However, the murder was committed more than eight months before the defendant was placed on probation for the crime charged in this case. Because MCL 771.3(1)(a) provides that "[d]uring the term of his or her probation, the probationer shall not violate any criminal law of this state . . . ," the defendant could not have violated the terms of his probation for having committed an act amounting to a violation of a criminal law that preceded the imposition of the order of probation issued in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 7, 2016:

TEDDY 23, LLC v MICHIGAN FILM OFFICE, Nos. 153420 and 153421;

reported below: 313 Mich App 557. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Claims had jurisdiction over plaintiffs' claim under MCL 600.6419(1)(a); and (2) whether MCL 600.631 created exclusive jurisdiction over plaintiffs' claim in the circuit court, including whether the denial of the postproduction certificate of completion was a "decision . . . of [a] state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law." The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied December 7, 2016:

PEOPLE v AGNEW, No. 152007; Court of Appeals No. 326670.

MCCORMACK, J., did not participate because of her prior involvement in this case.

PEOPLE v LAMBETH, No. 152265; Court of Appeals No. 326464.

PEOPLE v THOMAS HARRIS, No. 153053; Court of Appeals No. 329299.

WILLIAMSON v GENERAL MOTORS, LLC, No. 153586; Court of Appeals No. 330261.

KAPLAN v HENDRICKS, No. 153621; Court of Appeals No. 325246.

AUTO-OWNERS INSURANCE COMPANY v WILSON, No. 153653; Court of Appeals No. 330686.

PEOPLE v SLAUGHTER-BUTLER, No. 153718; Court of Appeals No. 323763.

PEOPLE v OVERSTREET, No. 153752; Court of Appeals No. 323646.

PEOPLE v REGINALD WALKER, No. 153808; Court of Appeals No. 320559.

PEOPLE v LILEY, No. 153810; Court of Appeals No. 323920.

LECH v HUNTMORE ESTATES CONDOMINIUM ASSOCIATION, No. 153904; reported below: 315 Mich App 288.

PEOPLE v DARIUS KEYS, No. 153942; Court of Appeals No. 332494.

Statements of Recusal Entered December 8, 2016:

ATTORNEY GENERAL v BOARD OF STATE CANVASSERS and TRUMP v BOARD OF STATE CANVASSERS, Nos. 154862, 154886, 154868, and 154887; reported below: 318 Mich App 242.

YOUNG, C.J. As I have previously stated, *anybody* can make a list.[1] In this regard, after serving as a jurist for 21 years, 18 on this Court, I fully acknowledge that, at the age of 65, the probability of my being selected and appointed from the president-elect's infamous list of United States Supreme Court potential appointees is extraordinarily remote.[2] Indeed, the oldest justices *ever* appointed in the history of the United States Supreme Court were approximately my age at the time of their appointment.[3] The conflict supposed by intervening defendant is both speculatively hypothetical and, in my case, improbable.

In the normal course of events, I believe that justices have a duty to sit on cases that come before the Court and should disqualify themselves only when the conflict is real and so patent that recusal is necessary.[4] This duty to sit is required because justices who recuse themselves cannot be replaced, and every disqualification alters the composition of the Court the citizens have chosen. As significant, disqualifications disrupt the decision-making and process in a particular case that only a full complement of justices can provide. As I have previously written, recusal is mandated whenever a judge is *actually* biased and cannot impartially hear a case.[5] I have no actual bias, and the intervening defendant makes no claims to the contrary.

After the disintegration of the political question doctrine and such cases as *Bush v Gore*,[6] courts are increasingly called upon to settle frank political questions. Now, more than ever, a bit of judicial restraint is required to resist the calls of political sirens who urge the courts to engage in politics by another name.[7]

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[1] Chad Livengood, The Detroit News, *Young on Trump's List for High Court Nominations* (posted September 23, 2016) (accessed December 6, 2016) [https://perma.cc/MHD5-GSFL].

[2] Indeed, I am confident that the only two sexagenarians guaranteed to never be confirmed by the Senate are me and my law school classmate, Judge Merrick Garland.

[3] Justice Horace Harmon Lurton was 65 years old when he was appointed to the Court in 1909. Justice Charles Evans Hughes was 67 years old when he was reappointed to the Court in 1930, having previously served between 1910 and 1916. In modern times, Justice Ruth Bader Ginsburg, aged 60, was the oldest justice appointed.

[4] *Adair v Michigan*, 474 Mich 1027, 1040-1041 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.).

[5] See 485 Mich cxxx, clxvii-clxxxv (2009) (YOUNG, J., dissenting); *Pellegrino v AMPCO Sys Parking*, 485 Mich 1134, 1155-1165 (2010) (statement by YOUNG, J.).

[6] *Bush v Gore*, 531 US 98; 121 S Ct 525; 148 L Ed 2d 388 (2000).

[7] The need for such restraint is illustrated by the actions taken by another law school classmate, federal judge Mark Goldsmith, who has already taken it upon himself to judicially alter the recount process our

With reluctance, and for being a name on a list,[8] I grant intervening defendant's motions for disqualification because of the unique circumstances of this case—a challenge of the state's delegation to the College of Electors assigned to the president-elect—that has brought national attention to this matter. I do so in order that the decision made by my colleagues in this case will not be *legitimately* challenged by base speculation and groundless innuendo by the partisans in this controversy and beyond.

LARSEN, J. I grant the motions to disqualify myself from participation in *Attorney General v Bd of State Canvassers* (Docket Nos. 154862 and 154886) and *Trump v Bd of State Canvassers* (Docket Nos. 154868 and 154887). I do not do so lightly. Justices of this Court are obligated "to remain on any case absent good grounds for recusal." *Adair v Michigan*, 474 Mich 1027, 1040-1041 (2006) (statement by TAYLOR, C.J., and MARKMAN, J.). The citizens of Michigan elect the Justices to resolve the complex disputes that reach the Supreme Court, and we must not shrink from that duty. In the lower courts, a recused judge is replaced by a substitute. In our Court, a recusal leaves the Court shorthanded and, therefore, "deprives the public and litigants of the full collegial body that they have selected as the state's court of last resort." *Id*. at 1040. Nonetheless, I conclude that the unique circumstances of this case demand my recusal.

Before the November 8, 2016 election, now President-elect Donald J. Trump, or his campaign, included me on a list of 21 possible nominees to fill the vacancy on the United States Supreme Court created by the untimely passing of Justice Antonin Scalia. I did not seek inclusion on the list, had no notice of my inclusion before its publication, and have had no contact with the president-elect, or his campaign, regarding the vacancy. Yet the president-elect and his surrogates have repeatedly affirmed his intention to select someone from the list to fill the vacancy.

My appearance on the president-elect's list and his presence as a party in these cases creates a conflict requiring my disqualification. Accordingly, I grant the motions for disqualification.

Legislature has unambiguously created. See *Stein v Thomas*, opinion and order of the United States District Court for the Eastern District of Michigan, issued December 5, 2016 (Case No. 16-cv-14233). See also *Stein v Thomas*, order of the United States Court of Appeals for the Sixth Circuit, entered December 6, 2016 (Case No. 16-2690) (affirming Judge Goldsmith's injunction but reminding him that he must dissolve it if the Michigan courts dismiss the recount petition.)

[8] My presence on "the list" creates a conflict. Even though no one representing the president-elect has ever contacted me or asked whether I am interested in serving on the United States Supreme Court, being listed is a potential boon, however remote. And now that the person offering this boon is a party in my Court, it is appropriate to remedy this conflict by declining to participate in this matter.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 9, 2016:

POWER PLAY INTERNATIONAL, INC v REDDY, No. 154347; Court of Appeals No. 325805. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the trial court erred in awarding attorney fees following a postjudgment hearing rather than submitting the attorney fee issue to the jury. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar 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.

Leave to Appeal Denied December 9, 2016:

LEI v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 153422; Court of Appeals No. 325168.

MARKMAN, J. (*dissenting*). Plaintiff was struck by an uninsured motorist while crossing a street. At the time of the accident, plaintiff lived part of the time with her stepgrandmother, Merilyn Goetz, who was insured by defendant. The issue here is whether plaintiff is Merilyn's "relative" under this coverage. The trial court denied defendant's motion for summary disposition and subsequently entered a consent judgment in favor of plaintiff that allowed defendant to file an appeal. In a split decision, the Court of Appeals reversed, holding that plaintiff was not Merilyn's relative under the policy.

The pertinent policy defines "relative" as "a person residing in the same household as you, and related to you by blood, marriage, or adoption, and includes a ward, stepchild, or foster child." Plaintiff argues, and the trial court held, that plaintiff is Merilyn's relative because she is related to Merilyn "by marriage." The Court of Appeals disagreed, holding that because the phrase "and includes a . . . stepchild" provides that stepchildren are relatives in addition to persons related to the insured by marriage, this necessarily signifies that the phrase "related to you by . . . marriage" does not include step-relationships. According to the Court of Appeals, if the phrase "related to you by . . . marriage" is interpreted to include step-relationships, the phrase "and includes a . . . stepchild" would be rendered surplusage. The Court of Appeals dissent, on the other hand, concluded that the phrase "and includes a ward, stepchild, or foster child" is not meant to be limiting, but rather illustrative and expansive so as to communicate the broad meaning of the word "related." According to the dissent, the phrase "related to you by . . . marriage" must mean more than just the named insured's spouse because otherwise it would render the phrase mere surplusage given that the policy defines the word "you" to include the named insured's spouse.

Both sides, in my view, raise good arguments. On the one hand, if the phrase "related to you by . . . marriage" includes step-relationships, why does the policy proceed to state "and includes a . . . stepchild"? On the other hand, if the phrase "related to you by . . . marriage" does not include step-relationships, what does it include? The Court of Appeals held that it includes the named insured's spouse. However, as the dissenting judge pointed out, a spouse is already covered under the definition of "you." It seems that no matter how the contract is interpreted, one of the two phrases is rendered surplusage.

The dissenting judge concluded that the best way to interpret the contract is to conclude that the phrase "related to you by . . . marriage" includes step-relationships and the phrase "and includes a . . . stepchild" is simply illustrative. Defendant argues that this cannot be correct because neither a ward nor a foster child is necessarily "related to you by blood, marriage, or adoption." Therefore, we would have to conclude that the phrase "and includes a ward, stepchild, or foster child" is intended to expand coverage with regards to a ward or a foster child, but is only intended to be illustrative with regards to a stepchild. Perhaps that is appropriate though because a ward or a foster child could be "related to you by . . . marriage," and in that case the phrase would be illustrative rather than expansive. In other words, it might simply be the case that the parties to the contract intended the phrase to be both illustrative and expansive depending on the circumstances.

Because I believe that the dissent sets forth a reasonably persuasive harmonizing analysis of the policy language and because "when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not 'contrary to public policy,' " *Bloomfield Estates Improvement Ass'n v Birmingham*, 479 Mich 206, 213 (2007) (citation omitted), I would grant leave to appeal to consider whether the Court of Appeals correctly interpreted the instant policy.

BERNSTEIN, J., joins the statement of MARKMAN, J.

ATTORNEY GENERAL v BOARD OF STATE CANVASSERS and TRUMP v BOARD OF STATE CANVASSERS, Nos. 154886 and 154887; reported below: 318 Mich App 242.

ZAHRA and VIVIANO, JJ. (*concurring*). We concur with the Court's denial order and with the Court of Appeals' judgment that it leaves in place. We write separately because we believe there are additional textual arguments that support the Court of Appeals' conclusion that petitioner failed to adequately allege that she "is aggrieved on account of fraud or mistake in the canvass of the votes . . . ."

This case presents a question of statutory interpretation. "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute."[1] It is a longstanding, fundamental maxim of statutory inter-

[1] *Hannay v Dep't of Transp*, 497 Mich 45, 57 (2014) (quotation marks and citation omitted).

pretation that we must examine the statute as a whole, taking care to read the individual words and phrases in the context of the entire legislative scheme.[2] In doing so, we must give effect to every word and phrase in the statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.[3]

In order for the candidate to successfully petition for a recount, the petition must allege "that the *candidate is aggrieved on account of* fraud or mistake . . . ."[4] "Account" means "to be the sole or primary factor[.]"[5] Thus, there must be a causal relationship between the alleged fraud or mistake and the alleged harm. To satisfy the statutory requirements, the petition must allege both parts of this causal relationship. To determine otherwise would impermissibly render the Legislature's inclusion of the phrase "the candidate is aggrieved on account of" nugatory. Therefore, under MCL 168.879(1)(b), the petition must allege both that fraud or mistake exists and that the alleged fraud or mistake caused the candidate to be aggrieved.[6]

The conclusion that a candidate is obligated to allege both requirements is also supported by the amendments to the relevant language of MCL 168.879(1)(b). "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."[7] When enacted, MCL 168.879(1)(b) provided that "[a]ny candi

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[2] *Madugula v Taub*, 496 Mich 685, 696 (2014).

[3] *Johnson v Recca*, 492 Mich 169, 177 (2012).

[4] MCL 168.879(1)(b) (emphasis added).

[5] *Merriam-Webster's Collegiate Dictionary* (11th ed). To understand the meaning of words in a statute that are not otherwise defined, we may resort to dictionary definitions for guidance. *People v Jones*, 467 Mich 301, 304 (2002). When terms at issue have a peculiar legal meaning, it is appropriate to consult a legal dictionary. *Id*. at 304-305. See also MCL 8.3a.

[6] "Aggrieved" is a term of art defined as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." *Black's Law Dictionary* (10th ed). An "aggrieved party" is "a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." *Id*. at 1297. Thus, to be "aggrieved," a party must demonstrate that it has been harmed in some fashion. Accordingly, we agree with the Court of Appeals that MCL 168.879(1)(b) "requires that the candidate allege a loss or injury that resulted from fraud or mistake in the canvassing of votes." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 251 (2016).

[7] *Bush v Shabahang*, 484 Mich 156, 167 (2009).

date . . . who *considers himself aggrieved* on account of any fraud or mistake" could file a petition.[8] In 1980, the Legislature amended the statute to provide that "[t]he petition *shall allege* that the candidate *is aggrieved* on account of fraud or mistake . . . ."[9] The statute was then amended to its current form in 1999.[10] These amendments demonstrate that the Legislature rejected the prior, more permissive standard in favor of a more stringent one imposing the added requirement that a candidate must allege that he or she *is aggrieved* by the fraud or mistake.

Additional textual clues support our construction. Recount procedures are also statutorily defined for elections in smaller jurisdictions within the state, such as counties, cities, and townships.[11] Like the prior versions of MCL 168.879(1)(b), MCL 168.862 provides that "[a] candidate for office *who believes he or she is aggrieved* on account of fraud or mistake in the canvass or returns of the votes by the election inspectors may petition for a recount . . . as provided in this chapter."[12]

In contrast to the current version of MCL 168.879(1), a candidate petitioning a local board of canvassers is not obligated to allege facts showing that he or she is aggrieved; it is enough to allege that one "believes" he or she is aggrieved. Therefore, in MCL 168.862 and MCL 168.865, enacted by the same public act as MCL 168.879(1),[13] the Legislature demonstrated its ability to dispense with the "aggrieved" pleading requirement. Had it intended to do the same for MCL 168.879(1), the Legislature clearly knew how to do so.[14] The different language it chose is a clear indication that the Legislature intended for a candidate bringing a petition under MCL 168.879(1) to allege that

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[8] 1954 PA 116, § 879 (emphasis added). This more permissive standard had been present in this state's election law for almost 70 years. See 1887 PA 208 (allowing "any candidate voted for at any election, conceiving himself aggrieved on account of any fraud or mistake in the canvass of votes" to petition for a recount).

[9] 1980 PA 61, § 879 (emphasis added).

[10] 1999 PA 216.

[11] MCL 168.861 *et seq*.

[12] Emphasis added. There is no requirement in this subchapter, MCL 168.861 through MCL 168.877, that the candidate must allege that he or she is aggrieved. See MCL 168.865 ("Such petition shall be sworn to and shall set forth as near as may be the nature of the mistakes or frauds complained of and the city, ward, township, village and precinct in which they are alleged to have occurred, and shall ask for a correction thereof.").

[13] 1954 PA 116.

[14] See *People v Miller*, 498 Mich 13, 24-25 (2015).

he or she has been aggrieved on account of the alleged fraud or mistake.[15]

Having determined that a candidate must allege that fraud or mistake exists and that the alleged fraud or mistake caused the candidate to be aggrieved, the next question is the level of specificity with which those allegations must be pleaded.[16] Are specific allegations required or may a candidate simply cut-and-paste the statutory language into the petition? Once again, reading the statutory language in context provides the answer. The Legislature has expressly permitted candidates petitioning for a recount under MCL 168.879(1) to allege fraud or mistake without specification. Immediately following the requirement that the candidate must allege that he or she is aggrieved on account of fraud or mistake, MCL 168.879(1)(b) states:

> The petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner. If evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification.

This provision sets a very low bar—it allows bare allegations of fraud or mistake to suffice.[17]

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[15] This is further corroborated by MCL 168.863, also enacted by 1954 PA 116, which broadly permits qualified and registered electors to petition for a recount concerning proposed amendments or other ballot questions without any allegation that they are aggrieved:

> A qualified and registered elector voting in a city, township, or village election *who believes there has been fraud or error committed* by the inspectors of election in its canvass or returns of the votes cast at the election, . . . *may petition for a recount of the votes cast* . . . . [Emphasis added.]

[16] In court, pleadings must be specific enough to reasonably inform the adverse party of the nature of the claims at issue. See *Weymers v Khera*, 454 Mich 639, 654 (1997); MCR 2.111(B)(1) (stating that a pleading must contain "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"). Moreover, in court pleadings, "the circumstances constituting fraud or mistake must be stated with particularity." MCR 2.112(B)(1).

[17] *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 497 (1983). Notably, however, while bare allegations can be sufficient under the statute, a candidate is still required to plead with greater specificity when possible. See MCL 168.879(1)(f) ("The petition sets forth as nearly

Although the Legislature clearly intended to allow bare allegations to suffice with respect to fraud or mistake, it did not similarly lower the bar with respect to the requirement to allege that the candidate is aggrieved. Instead, the Legislature was silent on this point. "It is a familiar rule that inclusion by specific mention excludes what is not mentioned."[18] Because the Legislature relaxed the pleading standard with respect to fraud or mistake but not with respect to the "aggrieved" requirement, we may not read a relaxed pleading standard with respect to the latter into the statute.[19] Therefore, a candidate must include in the petition some allegation describing how he or she has been aggrieved.

In this case, although much ink has been spilled over petitioner's motivation for this recount and the resulting cost to the State, those considerations do not inform our analysis. Instead, "it is the actual language of a statute to which this Court must ultimately be faithful."[20] This Court has long recognized that "[t]he proceedings for a recount are purely statutory, and the statutory requirements must be observed."[21] Simply put, "[n]oncompliance with statutory requirements concerning recounts precludes a recount."[22]

The petition here states, "I and the undersigned members of my slate of electors, individually and collectively, are aggrieved on account of fraud or mistake in the canvass of votes . . . ." As the Court of Appeals recognized, petitioner "merely parroted the language of MCL 168.879(1)(b) in her petition."[23] Thus, petitioner failed to allege that she has been harmed or that her legal rights have been infringed in any way whatsoever. Because she has not done so, petitioner failed to satisfy the statutory requirement of alleging that she was aggrieved as required by MCL 168.879(1)(b).[24] Accordingly, the Court of Appeals correctly con-

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as possible the nature and character of the fraud or mistakes alleged and the counties, cities, or townships and the precincts in which they exist.").

[18] *Mich Wolverine Student Co-op, Inc v Wm Goodyear & Co*, 314 Mich 590, 599 (1946) (quotation marks and citation omitted).

[19] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210 (1993).

[20] *Stone v Williamson*, 482 Mich 144, 198 n 15 (2008) (MARKMAN, J., concurring).

[21] *Wheeler v Coleman*, 176 Mich 285, 288 (1913).

[22] *Ryan v Wayne Co Bd of Canvassers*, 396 Mich 213, 216 (1976).

[23] *Bd of State Canvassers*, 318 Mich App at 254.

[24] The Court of Appeals concluded that petitioner was required to allege that she would have won the election but for fraud or mistake. A candidate's rights under Michigan law may be impacted by the outcome of an election short of a change in result. See, e.g., MCL 168.613a(2) ("A political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not

cluded that "the Board had a clear legal duty to reject [the] petition."[25] For these reasons, we concur with this Court's order denying leave to appeal.[26]

MARKMAN, J., joins the statement of ZAHRA and VIVIANO, JJ.

MCCORMACK, J. (*dissenting*). I would order expedited oral argument on intervening defendant-appellant Jill Stein's application for leave to appeal. The Court of Appeals, relying on our precedent, has ruled that

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participate in the presidential primary election."). But petitioner is not entitled to any relief here because she has not alleged that she is aggrieved in any way.

[25] *Bd of State Canvassers*, 318 Mich App at 254.

[26] A federal court ordered a recount to commence, notwithstanding Michigan's statutory two-day waiting period. *Stein v Thomas*, opinion and order of the United States District Court for the Eastern District of Michigan, issued December 5, 2016 (Case No. 16-cv-14233). After the Court of Appeals found that petitioner was not an aggrieved party, the federal court dissolved its injunction, with the recount only partially completed. In the federal proceeding, petitioner argued that the failure to continue the "recount amounts to maintaining a system of voting that denies Michigan voters the right to have their votes counted" in violation of the Equal Protection Clause, the Due Process Clause and the First Amendment to our United States Constitution. The federal court rejected petitioner's claim, concluding she had "not presented evidence of tampering or mistake. Instead, [she] present[s] speculative claims going to the vulnerability of the voting machinery—but not actual injury." *Stein v Thomas*, order of the United States District Court for the Eastern District of Michigan, entered December 7, 2016 (Case No. 16-cv-14233), p 7. The federal court concluded: "[I]nvoking a court's aid to remedy [this] problem in the manner [petitioner has] chosen—seeking a recount as an audit of the election to test whether the vulnerability led to actual compromise of the voting system—has never been endorsed by any court, and would require, at a minimum, evidence of significant fraud or mistake—and not speculative fear of them. Such evidence has not been presented here." *Id*.

Despite these rulings, petitioner continues to allege in this Court that the "[s]topping [of] the recount at this point will actually *decrease* public confidence in our election system . . . ." We respectfully disagree. Petitioner lost an election by more than 2.2 million votes and then waited several weeks to request a statewide recount without any allegation—much less evidence—that there was fraud or mistake in the vote counting process. Petitioner has now had her day in several courts with appellate review. The electors of this state should be permitted to carry out their constitutional and statutory duties. See generally US Const, art II, § 1; 3 USC 7; MCL 168.47.

her petition for a recount does not satisfy the requirements of MCL 168.879(1)(b) because she is not an "aggrieved" candidate under the statute. That is not so clear. The Court of Appeals relied on dictionary definitions and our precedents defining who constitutes an "aggrieved party," but I question the applicability of those precedents to this case given the statutory language. MCL 168.879(1)(b) provides some of the requirements that a petition for a recount must meet:

> The petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by the inspectors, or by a board of county canvassers or the board of state canvassers. The petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner. If evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification.

The statute thus establishes that if evidence of "wrongdoing," i.e., "fraud or mistake," is not available, the petitioner need only allege fraud or mistake in the canvass of the votes "without further specification." The requirement that the candidate be "aggrieved" is specifically connected to the "fraud or mistake" component: the candidate's aggrieved status is "on account of fraud or mistake in the canvass of the votes . . . ."

Given the link between the petitioner's aggrieved status and the fraud or mistake and the lowered standard for alleging fraud or a mistake when evidence thereof is not available, I question the Court of Appeals' reliance on our precedent from other contexts defining who is an "aggrieved party." The statute seems to provide its own definition: an "aggrieved" candidate is one who "alleges" she or he is aggrieved "on account of fraud or mistake" in the canvass. If evidence of wrongdoing in the canvass is not available, the petitioner may allege fraud or a mistake in the canvass "without further specification." I find it significant that the Legislature not only included a lesser requirement for showing evidence of fraud or mistake when evidence of wrongdoing is not available, but also required only that the petition "allege[]" that the candidate is aggrieved, not that she or he show, establish, or prove that the candidate is aggrieved. In light of these textual clues, I am inclined to think that appellant's reading that the petition need only allege that the candidate is aggrieved and nothing more might be correct. Because the Court of Appeals' conclusion to the contrary is at least questionable, I would order expedited oral argument to further review the matter.

I also question whether the Court of Appeals' analysis effectively negates the statutory recount procedure. It seems possible to me that applying the definition of "aggrieved party" from our precedents in other contexts to the administrative recount process outlined in MCL 168.879(1)(b) might result in a scenario in which arguably *no* candidate could show he or she was aggrieved. Given that no one has contended throughout this process that a recount was likely to change the ultimate result, it is questionable whether any candidate in this historically tight

election could demonstrate a concrete and particularized injury in order to satisfy a heightened "aggrieved" requirement. But surely the Legislature has not enacted a recount process no candidate could satisfy.[1]

Finally, the appellant's application raises significant questions about the workability of the standard set by the Court of Appeals for whether a candidate is aggrieved under MCL 168.879(1)(b). The Court of Appeals held that "to meet the 'aggrieved' candidate requirement under MCL 168.879(1)(b), the candidate must be able to allege a good-faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 252 (2016). What this means is far from clear. What does it mean to have had a "good-faith belief" that the candidate "would have had a reasonable chance of winning the election"? What is the proper quantification of "a reasonable chance"? These are questions not answered in this case simply because the Court of Appeals has said, "no change in the vote totals is reasonably likely to change the previously announced result in Dr. Stein's favor." *Id*. at 254. That observation offers sorely little guidance, however, for future cases in which a candidate has a slightly more "good-faith belief" that there is a "reasonable chance" that she or he won the election. Given that there is another at least equally reasonable way to read the statutory language that provides no such uncertainty about its application, I believe we owe the public more than what the Court of Appeals has provided here. The rule of law requires predictable, reliable standards.

The stakes in this case may be low, but the public significance of the issues presented could not be higher. I respectfully dissent and would order expedited oral argument on the application to give this Court an opportunity to consider the important legal questions implicated here.

BERNSTEIN, J., joins the statement of MCCORMACK, J., in part.

BERNSTEIN, J. (*dissenting*). I concur with Justice MCCORMACK's concerns about the Court of Appeals' interpretation of MCL 168.879(1)(b), but I would reverse the Court of Appeals rather than order expedited oral argument, because I believe that the Court of Appeals clearly erred. I write to further explain why I believe that appellant Jill Stein has met the statutory requirements for a recount. MCL 168.879(1)(b) states that a candidate for office, like appellant, may petition for a recount if:

> The petition alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by the inspectors, or by a board of

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[1] In light of the fact that the recount provision in MCL 168.879 has existed in various forms since 1913, including the proviso that a candidate requesting a recount is charged a per precinct (previously per county) fee for such a recount, it is reasonable to surmise that the Legislature might have thought that fee a sufficient means to prevent frivolous requests for recounts. The Legislature has over time increased the per precinct cost assessed to initiate recounts. See MCL 168.881.

> county canvassers or the board of state canvassers. The petition shall contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner. If evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification.

I agree with Justice MCCORMACK that, when read in context, the word "aggrieved" is undeniably modified by language immediately following it: "on account of fraud or mistake." A plain language reading of the statute suggests that the first sentence of this statute only presents *one* requirement: that the petition *allege* that the candidate is aggrieved *by virtue of* the existence of fraud or mistake. The statute does *not* require a petition to allege both: (1) that the candidate is aggrieved; and (2) that there is fraud or mistake.

The Court of Appeals erred by holding that the statute contains those requirements and compounded that error by reading language into the "aggrieved" requirement that cannot be found in the statute itself. "The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999). The most reliable evidence of the Legislature's intent is the language of the statute. *Id*. The Court of Appeals states that, to be aggrieved, "the candidate must be able to allege a good-faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 252 (2016). Nowhere in the statute does the Legislature indicate that: (1) the candidate must have a good faith belief; (2) "but for" causation is required; and (3) the candidate would have had a "reasonable" chance of winning the election. Regarding this last requirement, I would note that MCL 168.879(1)(b) does not require that an election be particularly close in order for a candidate to request a recount.[1] Indeed, I believe that such a requirement could render nugatory MCL 168.880a(1), which provides for an automatic recount when there is a vote differential of 2,000 votes or less. Because "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm Fire & Cas Co v Old Republic Ins Co*, 466

[1] Had the Legislature intended to allow only the most popular candidates to request a recount, it could have easily made that clear in the statute. For instance, the Legislature could have stated that only a candidate who receives a certain percentage of the popular vote may petition for a recount. Or, alternatively, that only candidates within a certain margin of victory may request a recount. The Legislature did none of this. Indeed, the Court of Appeals' interpretation would seem to permit blatant fraud to be committed against a minor candidate, who would have no recourse if they stood an improbable chance of winning outright.

Mich 142, 146 (2002), I would prefer a construction of the statute that would avoid rendering MCL 168.880a(1) needless surplusage. More generally, I see no reason for the Court of Appeals to read in three requirements that the Legislature did not see fit to include in the text of the statute.

Moreover, I would hold that appellant's petition meets the requirements of MCL 168.879(1)(b). The statute states that "[i]f evidence of wrongdoing is not available, the petitioner is only required to allege fraud or a mistake in the petition without further specification." MCL 168.879(1)(b). Appellant's petition meets this standard by generally alleging fraud or mistake in the canvass of the votes. Because I would hold that a petition sufficiently alleges that a candidate is aggrieved *because* of the presence of fraud or mistake, appellant does not need to make a more specific showing as to whether she is aggrieved.

Nonetheless, even if the statute does require that a petition allege both that a candidate is aggrieved and that there is fraud or mistake, I would hold that appellant has met that burden. MCL 168.879(1)(b) leaves the term "aggrieved" undefined. In such a situation, we consult a dictionary to give statutory words their ordinary and common meaning. See *People v Thompson*, 477 Mich 146, 153 (2007). Aggrieved can be defined as "suffering from an infringement or denial of legal rights." *Merriam-Webster's Collegiate Dictionary* (11th ed). The Court of Appeals' conclusion that a candidate is "aggrieved" only when the mistake or fraud alleged is outcome-determinative is inconsistent with the text of the statute and the practical reality of our political system. Appellant argues that she has a right to have her supporters register their votes for her, and that those votes be accurately counted.[2] In an election contest, any loss of votes is a wrong in itself, given the central importance of elections in our representative democracy.[3] Indeed, our election laws must be construed "as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others." *Kennedy v Bd of State Canvassers*, 127 Mich App 493, 496-497 (1983).

Additionally, the number of votes a candidate receives has a wide effect outside of that particular election. In Michigan, "[a] political party that received 5% or less of the total vote cast nationwide for the office of president in the last presidential election shall not participate in the presidential primary election." MCL 168.613a(2). And "the right to be on the election ballot is precisely what separates a political party from any

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[2] "It's not the voting that's democracy, it's the counting[.]" Stoppard, *Jumpers* (New York: Grove Press, 1972), p 35.

[3] "A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law." Hamilton, *Second Letter from Phocion* (April 1784), as published in *The Papers of Alexander Hamilton Volume III: 1782-1786*, Syrett & Cooke, eds (New York: Columbia University Press, 1962), pp 544-545.

other interest group." *Timmons v Twin Cities Area New Party*, 520 US 351, 373 (1997) (Stevens, J., dissenting). Furthermore, under federal election laws, a candidate is eligible for partial public funding based on election performance. See 26 USC 9002 *et seq*. Therefore, even a candidate who is unlikely to win an election has significant legal and financial interest in ensuring that the total vote count is accurate and may be aggrieved by any error in the canvass of the votes. Although appellant does not argue that her party's ability to appear on the ballot for the next presidential primary election is threatened or would change based on the recount, these factors cast further doubt on the Court of Appeals' holding that a candidate must have a reasonable chance of *winning* an election in order to petition for a recount.

Accordingly, I would find that the Court of Appeals erred in interpreting MCL 168.879(1)(b). Because the word "aggrieved" is modified by the phrase "on account of fraud or mistake," I would find that an allegation of fraud or mistake is a sufficient showing for a candidate to be considered aggrieved. Moreover, the Court of Appeals' interpretation of the word "aggrieved" finds no basis in the plain language of the statute and violates our primary objective to give effect to the intent of the Legislature. I would reverse the Court of Appeals and allow the recount to resume.

YOUNG, C.J., and LARSEN, J., did not participate.

Leave to Appeal Before Decision by the Court of Appeals Denied December 9, 2016:

TRUMP v BOARD OF STATE CANVASSERS, No. 154868; reported below: 318 Mich App 242. On order of the Court, the motions for immediate consideration, to supplement, and for *pro hac vice* admission are granted. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is denied as moot. The Court of Appeals issued the writ of mandamus on December 6, 2016, retaining jurisdiction. There is no further relief available to this appellant from this Court at this time.

YOUNG, C.J., and LARSEN, J., did not participate.

Motion to Withdraw Application for Leave to Appeal Before Decision by the Court of Appeals Granted December 9, 2016:

ATTORNEY GENERAL v BOARD OF STATE CANVASSERS, No. 154862; reported below: 318 Mich App 242. On order of the Court, the motion to withdraw the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is granted.

YOUNG, C.J., and LARSEN, J., did not participate.

Summary Disposition December 21, 2016:

PEOPLE v RODERICK DAVIS, No. 154087; Court of Appeals No. 332800. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Kent Circuit Court, and we remand this case to that court for resentencing. The circuit court erred

in assigning 10 points for Offense Variable 9 (OV 9), MCL 777.39, where fewer than two victims were placed in danger of physical injury or loss of life. Because correcting the OV score changes the applicable guidelines range, resentencing is required. *People v Kimble*, 470 Mich 305 (2004).

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered December 21, 2016:

In re KOEHLER ESTATE, Nos. 153669 and 153670; reported below: 314 Mich App 667. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (a) whether MCL 700.2114(4) applies to inheritance from or through a posthumous child for purposes of demonstrating heirship; (b) if so, what types of evidentiary proofs might satisfy MCL 700.2114(4) in cases involving inheritance from or through a posthumous child; and (c) whether the burden to demonstrate the requirements of MCL 700.2114(4) rests with the potential heir or with the party challenging heirship.[1]

DANCER V CLARK CONSTRUCTION COMPANY, INC, Nos. 153830 and 153889; Court of Appeals No. 324314. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiffs presented sufficient evidence to establish genuine issues of material fact with regard to the common-work-area doctrine's "element three, danger creating a high degree of risk to a significant number of workmen, and element four, a common work area." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 58-59 (2004). The parties should not submit mere restatements of their application papers.

The application for leave to appeal in Docket No. 153889 remains pending.

PEOPLE V GARY LEWIS, No. 154396; Court of Appeals No. 325782. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the denial of counsel to the defendant at his preliminary examination is an error requiring automatic reversal or whether harmless error analysis applies. The parties should not submit mere restatements of their application papers.

The application for leave to appeal as cross-appellant remains pending.

Leave to Appeal Denied December 21, 2016:

SIMPSON V PICKENS, No. 152036; reported below: 311 Mich App 127. On December 7, 2016, the Court heard oral argument on the application for leave to appeal the June 16, 2015 judgment of the Court

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[1] REPORTER'S NOTE: Order language as amended by an order of the Court entered January 18, 2017.

of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., would reverse the judgment of the Court of Appeals.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY, No. 153346; reported below: 313 Mich App 572.

PEOPLE v SHADELL LOVE, No. 153491; Court of Appeals No. 323742.

PEOPLE v MICHAEL ROBINSON, No. 153542; Court of Appeals No. 330041.

SHAMMOUT v KALAMAZOO JAYCEE, No. 153689; Court of Appeals No. 323532.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

SCHWARCK v ARTIC CAT, INC and BONNO v ARTIC CAT, INC, Nos. 153699 and 153700; Court of Appeals Nos. 322696 and 325439.

MARKMAN, J. (*dissenting*). I would grant leave to appeal in light of the Court of Appeals dissent to assess whether that court erred by vacating the trial court's grant of summary disposition. Although a close call in certain respects, I am concerned nonetheless that the Court of Appeals may have misconstrued aspects of the deposition testimonies of both plaintiffs' reconstruction expert and the fire chief and thereby engaged in excessive speculation concerning the chain of events leading to the tragic accident in this case.

ZAHRA, J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals majority erred by finding a genuine issue of material fact regarding causation with respect to plaintiffs' products liability claim. While undeniably a tragic accident, I tend to agree with the trial court and the Court of Appeals dissent, which both found plaintiffs' theory of causation speculative. Plaintiffs may show causation circumstantially, but evidence "must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 163-164 (1994). It is not "sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id*. at 164. The gravamen of plaintiffs' causation theory is that the gear shift was in "silent reverse" mode. Plaintiffs' theory is a possibility, but no more probable than other contemplated theories. Consequently, I question whether the majority correctly concluded that plaintiffs established a genuine issue of material fact regarding causation.

PEOPLE v DUKE, No. 153882; Court of Appeals No. 325473.

KOSIS v CITY OF LIVONIA, No. 153976; Court of Appeals No. 326211.

STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS, No. 154034; reported below: 315 Mich App 449.

BANK v MICHIGAN EDUCATION ASSOCIATION-NEA, No. 154065; Court of Appeals No. 326668.

PEOPLE v ROSE, No. 154131; Court of Appeals No. 332684.

PEOPLE v ERIC DAVIS, No. 154299; Court of Appeals No. 332989.

GRZEBYK v AUTOMOBILE CLUB INSURANCE ASSOCIATION, No. 154665; Court of Appeals No. 333707.

In re MCGEE, No. 154736; Court of Appeals No. 331536.

Summary Disposition December 22, 2016:

In re CONTEMPT OF DORSEY, No. 150298; reported below: 306 Mich App 571. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals. We agree that MCL 712A.2 gave the Livingston Circuit Court Family Division ("family court") subject matter jurisdiction over the juvenile proceeding in which it entered the drug test order underlying the contempt orders. The appellant has mounted a collateral attack on that order, asserting that the family court lost subject matter jurisdiction because it violated MCL 712A.6. That argument amounts only to a claim that the court improperly exercised its subject matter jurisdiction to hear the juvenile delinquency case. The appellant's collateral attack is accordingly barred. See *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544-545 (1935). We decline to address whether this Court should adopt any other exceptions to the general rule barring such collateral attacks because, under the circumstances presented in this case, the appellant had a meaningful opportunity to appeal the drug test order, and there is no indication that her rights could not have been vindicated had she pursued an appeal through the normal procedures. We therefore vacate that part of the Court of Appeals judgment addressing whether the family court order for random drug screens constituted an illegal search and seizure, because it was unnecessary to decide the case.

However, the appellee conceded in its first supplemental brief that the appellant may be entitled to some form of relief. See *Rose v Aaron*, 345 Mich 613, 615 (1956) ("We do not think, in view of the circumstances of this case and the provisions of the lower court's order, that that court is called upon to protect its dignity by resentencing defendant for violation of a temporary restraining order improperly entered."), citing *Holland v Weed*, 87 Mich 584, 590 (1891). Given that the appellee conceded the underlying order was improperly entered, and that enforcement of the contempt orders has been stayed pending appeal, the Livingston Circuit Court Family Division shall not be required to enforce the contempt orders on remand.

Reconsideration Granted December 28, 2016:

PEOPLE v SHUKUR BROWN, No. 153555; Court of Appeals No. 324189. We vacate our order dated September 6, 2016. On reconsideration, the application for leave to appeal the February 25, 2016 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1),

in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional restraint on its discretion, it may affirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional restraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied December 28, 2016:

PEOPLE v AARON WILLIAMS, No. 152317; Court of Appeals No. 328103.

PEOPLE v HAYNES, No. 152942; Court of Appeals No. 328753.

PEOPLE v DONALD LEE JAMES, No. 153243; Court of Appeals No. 322890.

PEOPLE v AARON WILLIAMS, No. 153249; reported below: 314 Mich App 140.

PEOPLE v HANEY, No. 153297; Court of Appeals No. 330813.

PEOPLE v CLOUSE, No. 153321; Court of Appeals No. 330016.

PEOPLE v FLYNN, No. 153338; Court of Appeals No. 330804.

PEOPLE v JAMES ADAMS, No. 153350; Court of Appeals No. 329530.

PEOPLE v NEWKIRK, No. 153381; Court of Appeals No. 330709.

PEOPLE v MAXIE, No. 153399; Court of Appeals No. 330298.

ALTICOR, INC v DEPARTMENT OF TREASURY, No. 153406; Court of Appeals No. 323350.

HEICHEL v GEICO INDEMNITY COMPANY, Nos. 153501 and 153502; Court of Appeals Nos. 323818 and 324045.

BINDSCHATEL v MUNSON MEDICAL CENTER, No. 153550; Court of Appeals No. 323769.

PEOPLE v DWAN CHATMAN, No. 153635; Court of Appeals No. 330017.

PEOPLE v CHARLES YOUNG, Nos. 153673 and 153674; Court of Appeals Nos. 324607 and 324608.

PEOPLE v BRUCE PARKER, No. 153683; Court of Appeals No. 331179.

DUBUC v COPELAND PAVING INC, No. 153693; Court of Appeals No. 325228.

PEOPLE v ANDRE COLLINS, No. 153695; Court of Appeals No. 330514.

PEOPLE v FORDHAM, No. 153719; Court of Appeals No. 330299.

PEOPLE v HAMPTON, No. 153720; Court of Appeals No. 331844.

PEOPLE v STEGALL, No. 153742; Court of Appeals No. 329479. On order of the Court, the application for leave to appeal the March 24, 2016 order of the Court of Appeals is considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D) in Wayne Circuit Court Docket No. 08-012105-FC. We take no action regarding Wayne Circuit Court Docket No. 08-008387-FC, as defendant has not sought leave to appeal in that case.

PEOPLE v VASQUEZ, No. 153747; Court of Appeals No. 325778.

PEOPLE v DAVID OWENS, No. 153749; Court of Appeals No. 330601.

PEOPLE v MERCADO, No. 153754; Court of Appeals No. 331933.

PEOPLE v LAUNDRY, No. 153755; Court of Appeals No. 329905.

PEOPLE v HAROLD JOHNSON, No. 153774; Court of Appeals No. 331527.

EMPLOYERS MUTUAL CASUALTY COMPANY v MID-MICHIGAN SOLAR, LLC, Nos. 153790 and 153791; Court of Appeals Nos. 325082 and 326553.

PEOPLE v HERRON, No. 153800; Court of Appeals No. 331194.

PEOPLE v HOLLINS, No. 153824; Court of Appeals No. 330903.

PEOPLE v SIMON PHILLIPS, No. 153827; Court of Appeals No. 331488.

PRAXAIR, INC v DETROIT BULK STORAGE, INC, No. 153842; Court of Appeals No. 323354.

PEOPLE v WARREN MITCHELL, No. 153847; Court of Appeals No. 331863.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v STORMZAND ESTATE, No. 153861; Court of Appeals No. 325326.

PEOPLE v IVORY, No. 153878; Court of Appeals No. 325055.

ACUITY v CUSHMAN, No. 153890; Court of Appeals No. 325679.

PEOPLE v HARVEY, No. 153894; Court of Appeals No. 331291.

KAPPEN TREE SERVICE, LLC v DEPARTMENT OF TREASURY, No. 153896; Court of Appeals No. 325984.

HAMOOD v STANOWSKI, No. 153910; Court of Appeals No. 326089.

PEOPLE v SHAMBLIN, No. 153920; Court of Appeals No. 325653.

PEOPLE v STIDHAM, No. 153923; Court of Appeals No. 332205.

PEOPLE v CHAD PATTERSON, No. 153939; Court of Appeals No. 326555.

PEOPLE v OVERTON, No. 153943; Court of Appeals No. 330875.

PEOPLE v FISH, No. 153947; Court of Appeals No. 325010.

PEOPLE v WIMBERLY, No. 153960; Court of Appeals Nos. 322923 and 325763.

PEOPLE v NENROD, No. 153969; Court of Appeals No. 331912.

PEOPLE v VUKIN, No. 153975; Court of Appeals No. 323928.

TWO HUNDRED EIGHTY-FIVE WEST HICKORY GROVE, LLC v HATCHETT, No. 153989; Court of Appeals No. 324300.

PEOPLE v RICHARD PIERSON, No. 153992; Court of Appeals No. 332052.

PEOPLE v MCKENZIE, No. 153995; Court of Appeals No. 325652.

PEOPLE v GERALD DICKERSON, No. 154006; Court of Appeals No. 331635.

PEOPLE v JOHN ALEXANDER, No. 154008; Court of Appeals No. 331574.

PEOPLE v WABANIMKEE, No. 154009; Court of Appeals No. 332752.

PEOPLE v CURTIS ANDERSON, No. 154012; Court of Appeals No. 331804.

PEOPLE v CURTIS FERGUSON, No. 154032; Court of Appeals No. 329950.

PEOPLE v PRINCE, No. 154043; Court of Appeals No. 331823.

PEOPLE v STARNES, No. 154051; Court of Appeals No. 326249.

PEOPLE v GREGORY, No. 154052; Court of Appeals No. 326567.

PEOPLE v RICHARD DAVIS, No. 154053; Court of Appeals No. 332512.

PEOPLE v O'DONNELL, No. 154059; Court of Appeals No. 332701.

PEOPLE v JOHN BURTON, No. 154068; Court of Appeals No. 332281.

Reconsideration Denied December 28, 2016:

PEOPLE v WALTER, No. 152781; Court of Appeals No. 329345. Leave to appeal denied at 500 Mich 853.

BANK OF AMERICA, NA v EL-BEY, No. 153086; Court of Appeals No. 328542. Leave to appeal denied at 500 Mich 854.

HAMMOND v DEPARTMENT OF CORRECTIONS, No. 153190; Court of Appeals No. 322889. Leave to appeal denied at 500 Mich 854.

LORILLARD TOBACCO COMPANY v DEPARTMENT OF TREASURY, No. 153224; Court of Appeals No. 313256. Leave to appeal denied at 500 Mich 854.

Leave to Appeal Denied December 29, 2016:

In re FOWLER, No. 154733; Court of Appeals No. 332259.

In re KNIGHT, No. 154774; Court of Appeals No. 332433.

Summary Disposition January 5, 2017:

PEOPLE v JESSE WILLIAMS, No. 154181; Court of Appeals No. 332367. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's April 6, 2016 delayed application for leave to appeal under the standard applicable to direct appeals. The defendant's former appellate attorney failed to timely file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in MCR 7.205(G)(3). Because appointed counsel died shortly before the time expired for seeking leave to appeal under MCR 7.205(G), the defendant was constructively denied the assistance of counsel altogether. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1209; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). The motion to add additional issue and the motion to remand to the trial court are denied as moot. We do not retain jurisdiction.

Leave to Appeal Denied January 5, 2017:

PEOPLE v WEAVER, No. 154071; Court of Appeals No. 326468.

PEOPLE v COLUMBERT, No. 154072; Court of Appeals No. 331152.

PEOPLE v DIBBLE, No. 154073; Court of Appeals No. 332961.

PEOPLE v PARIS PALMER, No. 154079; Court of Appeals No. 332600.

PEOPLE v BETLEM, No. 154080; Court of Appeals No. 324787.

PEOPLE v ALFRED CAMPBELL, No. 154088; Court of Appeals No. 331913.

PEOPLE v BARNES, No. 154091; Court of Appeals No. 333117.

PEOPLE v CLARENCE HUNTER, No. 154100; Court of Appeals No. 321583.

PEOPLE v PATRICK, No. 154102; Court of Appeals No. 326351.

PEOPLE v EDDIE JAMES, No. 154110; Court of Appeals No. 331262.

PEOPLE v SMILES, No. 154124; Court of Appeals No. 331674.

PEOPLE v DEMING, No. 154125; Court of Appeals No. 332982.

PEOPLE v SEAN YOUNG, No. 154126; Court of Appeals No. 331973.

PEOPLE v MCCAVITT, No. 154133; Court of Appeals No. 332368.

PEOPLE v FARMER, No. 154161; Court of Appeals No. 331917.

PEOPLE v MAURICE CLAY, No. 154162; Court of Appeals No. 333042.

PEOPLE v GATZKE, No. 154168; Court of Appeals No. 332534.

PEOPLE v HIGHTOWER, No. 154169; Court of Appeals No. 325895.

PEOPLE v CHUPP, No. 154174; Court of Appeals No. 332053.

JENKINS v UNIVERSITY OF MICHIGAN CREDIT UNION, No. 154176; Court of Appeals No. 331320.

PEOPLE v ERIC ANDREWS, No. 154179; Court of Appeals No. 331446.

PEOPLE v JOSEPH PALMER, No. 154180; Court of Appeals No. 331160.

PEOPLE v BONNER, No. 154185; Court of Appeals No. 326848.

PEOPLE v DOWTIN-EL, No. 154196; Court of Appeals No. 332186.

PEOPLE v RODRIGUEZ-TORRES, No. 154199; Court of Appeals No. 332666.

PEOPLE v NORTHROP, No. 154201; Court of Appeals No. 331900.

PEOPLE v ANTHONY, No. 154204; Court of Appeals No. 332478.

PEOPLE v ROWLS, No. 154206; Court of Appeals No. 332571.

PEOPLE v VENEGAS, No. 154210; Court of Appeals No. 325380.

PEOPLE v ABRAITIS, No. 154213; Court of Appeals No. 332108.

PEOPLE v THERIOT, No. 154215; Court of Appeals No. 325973.

PEOPLE v ALEXANDER CARRIER, No. 154219; Court of Appeals No. 332880.

PEOPLE v HINDS, No. 154224; Court of Appeals No. 326923.

PEOPLE v THOMAS WASHINGTON, No. 154226; Court of Appeals No. 332097.

PEOPLE v GATICA, No. 154244; Court of Appeals No. 326230.

OKRIE v STATE OF MICHIGAN, No. 154246; Court of Appeals No. 326607.

PEOPLE v BEAUCHAMP, No. 154250; Court of Appeals No. 326683.

PEOPLE v CHRISTOPHER WILSON, No. 154254; Court of Appeals No. 331273.

PEOPLE v TURNER, No. 154257; Court of Appeals No. 332263.

PEOPLE v WYNN, No. 154258; Court of Appeals No. 331918.

PEOPLE v POOCHUAY, No. 154263; Court of Appeals No. 326569.

PEOPLE v RAY, No. 154265; Court of Appeals No. 332265.

PEOPLE v ALBANE, No. 154267; Court of Appeals No. 331207.

PEOPLE v DAVID, No. 154268; Court of Appeals No. 333216.

PEOPLE v TROY BANKS, No. 154271; Court of Appeals No. 326795.

PEOPLE v EDDIE SHELTON, No. 154272; Court of Appeals No. 330754.

PEOPLE v MARQUA MCCOY, No. 154273; Court of Appeals No. 332437.

PEOPLE v LULA SMITH, No. 154274; Court of Appeals No. 325975.

PEOPLE v PEIFFER, No. 154275; Court of Appeals No. 325148.

PEOPLE v WISENBAUGH, No. 154282; Court of Appeals No. 332776.

PEOPLE v JAMARIO MITCHELL, No. 154284; Court of Appeals No. 331801.

PEOPLE v JARRETT, No. 154288; Court of Appeals No. 327068.

PEOPLE v KHALIL, No. 154293; Court of Appeals No. 321744.

PEOPLE v INGRAM, No. 154300; Court of Appeals No. 332098.

PEOPLE v CRUTCHER-BEY, No. 154302; Court of Appeals No. 323975.

PEOPLE v WILLIE WRIGHT, No. 154307; Court of Appeals No. 332750.

PEOPLE v RUSH, No. 154312; Court of Appeals No. 331350.

PEOPLE v HENRY RICHARDSON, No. 154313; Court of Appeals No. 330551.

PEOPLE v GILES, No. 154331; Court of Appeals No. 326535.

PEOPLE v MIDGYETT, No. 154332; Court of Appeals No. 326323.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v CALABRESE, No. 154333; Court of Appeals No. 325220.

PEOPLE v RONALD WILLIAMS, No. 154335; Court of Appeals No. 331938.

PEOPLE v LUNETTA, No. 154339; Court of Appeals No. 331810.

PEOPLE v CARR, No. 154344; Court of Appeals No. 332327.

PEOPLE v WALLACE MOORE, No. 154345; Court of Appeals No. 326755.

PEOPLE v HASSAN, No. 154348; Court of Appeals No. 333251.

PEOPLE v ANTHONY ANDERSON, No. 154349; Court of Appeals No. 333711.

PEOPLE v MCCULLEY, No. 154350; Court of Appeals No. 333526.

PEOPLE v BERTHON, No. 154351; Court of Appeals No. 331205.

PEOPLE v CLYDE JORDAN, No. 154354; Court of Appeals No. 332226.

EMERY v COSTANZO, No. 154357; Court of Appeals No. 327115.

PEOPLE v MICHAEL THOMPSON, No. 154361; Court of Appeals No. 332298.

In re PETITION OF OTTAWA COUNTY TREASURER FOR FORECLOSURE, No. 154365; Court of Appeals No. 326236.

PEOPLE v TOMMIE RICE, No. 154368; Court of Appeals No. 331529.

PEOPLE v RUDOLPH BRADLEY, No. 154378; Court of Appeals No. 323737.

PEOPLE v OUELLETTE, No. 154386; Court of Appeals No. 326219.

PEOPLE v CUMMINGS, No. 154387; Court of Appeals No. 332980.

PEOPLE v BURR, No. 154398; Court of Appeals No. 333267.

PEOPLE v STANLEY RICE, No. 154404; Court of Appeals No. 333433.

JOHNS FAMILY LIMITED PARTNERSHIP v CHESTERFIELD CHARTER TOWNSHIP, No. 154409; Court of Appeals No. 326649.

PEOPLE v DARRYL JONES, No. 154413; Court of Appeals No. 333407.

PEOPLE v DOTSON, No. 154416; Court of Appeals No. 333186.

PEOPLE v JOSHUA ADAMS, No. 154446; Court of Appeals No. 333591.

PEOPLE v RUSSELL SMITH, No. 154458; Court of Appeals No. 333403.

PEOPLE v SALAME, No. 154478; Court of Appeals No. 332556.

PEOPLE v SHEENA, No. 154564; Court of Appeals No. 333921.

PEOPLE v HEXIMER, Nos. 154580 and 154581; Court of Appeals Nos. 332311 and 332724.

CURTIS v NORMAN, No. 154624; Court of Appeals No. 332477.

Leave to Appeal Denied January 13, 2017:

RHODA v PETER E O'DOVERO, INC, No. 153661; Court of Appeals No. 321363.

MARKMAN, C.J. (*dissenting*). I would grant leave to consider whether the Court of Appeals correctly interpreted the Ski Area Safety Act, MCL 408.321 *et seq*. First, I would assess whether MCL 408.326a(d), which requires a ski operator to "[m]ark the top of or entrance to each ski run, slope, and trail which is closed to skiing with an appropriate symbol indicating that the run, slope, or trail is closed, as prescribed by rules promulgated under [MCL 408.340(3)]," applies to the closing of only an individual *feature* along a run, slope, or trail—in this case a snowboarding rail. Second, I would assess whether the correct legal standard was applied in addressing whether the rail constituted a ski hazard that "inhere[s] in the sport" and is thus "obvious and necessary" under MCL 408.342(2). Compare *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20 (2003).

PEOPLE v ANDY BROWN, No. 154040; Court of Appeals No. 323887.

In re HEARD, No. 154945; Court of Appeals No. 331676.

Leave to Appeal Denied January 18, 2017:

PRATT v WRIGHT, No. 155094; Court of Appeals No. 336030.

Reconsideration Denied January 18, 2017:

KUHLGERT v MICHIGAN STATE UNIVERSITY, No. 154499; Court of Appeals No. 332442. Summary disposition order entered at 500 Mich 890.

Leave to Appeal Denied January 20, 2017:

PEOPLE v WHARTON, No. 154301; Court of Appeals No. 326978.

In re DANELUK, No. 154947; Court of Appeals No. 332441.

Summary Disposition January 24, 2017:

In re HOWARD, No. 151515; Court of Appeals No. 324326. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Saginaw Circuit Court for the defendant's June 19, 2013 armed robbery offense, and we remand this case to the trial court for resentencing on that offense. The defendant was improperly assigned ten points on Offense Variable (OV) 9, MCL 777.39, because there was only one victim at the time that the crime was committed. MCL 777.39(1)(d). On remand, the trial court shall rescore this variable at zero points. The resulting change in the defendant's total OV score produces a lower guidelines range, entitling the defendant to resentencing. See *People v Francisco*, 474 Mich 82, 88-90 (2006). In all other respects, leave to appeal is denied.

PEOPLE v ERIC GALLOWAY, No. 153088; Court of Appeals No. 329480. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for an evidentiary hearing is denied.

PEOPLE v CRISTY WILSON, No. 153194; Court of Appeals No. 330799. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WNC HOUSING LP v SHELBOURNE DEVELOPMENT COMPANY LLC, No. 153770; Court of Appeals No. 324249. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that defendant Kathy Makino is personally liable as the guarantor of the mortgage purchase, and we remand this case to that court for reconsideration. The Court of Appeals erred by relying on the testimony of David Shaffer, the executive vice president of WNC Associates, Inc., a managing partner of plaintiff WNC Housing LP, in interpreting the provisions of the partnership agreement, and by reviewing the trial court's interpretation of the partnership agreement for clear error. See, e.g., *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28 (2008) ("issues of contract interpretation are also questions of law reviewed de novo"). On remand, the Court of Appeals shall review this issue de novo as a matter of law.

PEOPLE v ROBERSON, No. 154116; Court of Appeals No. 324668. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the scoring of Offense Variable 7 (OV 7), MCL 777.37. The trial court record does not reveal an assessment of a base level of fear or anxiety associated with the offense of assault with intent to murder, and does not include a determination whether the defendant's conduct was intended to increase the victim's fear or anxiety by a considerable amount. See *People v Hardy*, 494 Mich 430, 442-443 (2015). We remand this case to the Wayne Circuit Court to make the determinations required under *Hardy* for deciding whether points should be assigned for OV 7, using the version of the sentencing guidelines in effect on the date that the sentencing offense was committed. MCL 769.34(2). If, after making the determinations required under *Hardy*, the circuit court determines that OV 7 was correctly scored, it shall implement the relief ordered by the Court of Appeals pursuant to *People v Lockridge*, 498 Mich 358, 398-399 (2015). If the circuit court determines that zero points should have been assigned for OV 7, it shall resentence the defendant. *People v Francisco*, 474 Mich 82 (2006). In all other respects, leave to appeal is denied.

Leave to Appeal Granted January 24, 2017:

PEOPLE v SKINNER, No. 152448; reported below: 312 Mich App 15. The parties shall address whether the decision to sentence a person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt, see *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), in light of *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Hyatt* (Docket No. 153081).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 24, 2017:

PEOPLE v HYATT, No. 153081 and 153345; reported below: 314 Mich App 140 and 316 Mich App 368. We direct the Clerk to schedule oral argument on whether to grant the application for leave to appeal in Docket No. 153081 or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences

imposed under MCL 769.25. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Skinner* (Docket No. 152448).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

The application for leave to appeal in Docket No. 153345 remains pending.

PEOPLE V WAFER, No. 153828; Court of Appeals No. 324018. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the trial court's denial of the defendant's request for a jury instruction on the rebuttable presumption at MCL 780.951(1) of the self-defense act violated the defendant's rights to present a defense and to a properly instructed jury. The parties should not submit mere restatements of their application papers.

PEOPLE V HORACE COLLINS, No. 153952; Court of Appeals No. 327971. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Kent Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel addressing whether a defendant who was sentenced prior to *People v Lockridge*, 498 Mich 358 (2015), sufficiently waived his constitutional rights to notice and jury proof beyond a reasonable doubt of facts used to score offense variables under MCL 777.1 *et seq*., where those facts were not charged in an indictment or information, but where he pleaded guilty or no contest and stipulated under oath to the aggravating facts in the context of a general waiver of his jury trial rights. Compare *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (stating that " 'under the Due Process Clause of the Fifth Amendment and *the notice* and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt' ") (emphasis added), quoting *Jones v United States*, 526 US 227, 243 n 6; 119 S Ct 1215; 143 L Ed 2d 311 (1999), with *United States v Booker*, 543 US 220, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005) (stating that "we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be *admitted by the defendant* or proved to a jury beyond a reasonable doubt") (emphasis added). See also *United States v Yancy*, 725 F3d 596 (CA 6, 2013).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MCNEILL-MARKS V MIDMICHIGAN MEDICAL CENTER-GRATIOT, No. 154159; reported below: 316 Mich App 1. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff's communication with her attorney constitutes a report to a public body within the meaning of MCL 15.361(d) and MCL 15.362 such that it is protected activity under the Whistleblowers' Protection Act, MCL 15.361 *et seq*. The parties should not submit mere restatements of their application papers.

PEOPLE V LAVERE BRYANT, No. 154565; Court of Appeals No. 325569. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the trial court abused its discretion in admitting "other acts" evidence; (2) if so, whether the error was harmless; and (3) whether the testimony of three police officers invaded the province of the jury when they testified as to their observations in viewing video evidence. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 24, 2017:

PEOPLE V SNELL, No. 152444; Court of Appeals No. 319856.

BARKER V HUTZEL WOMEN'S HOSPITAL, No. 153377; Court of Appeals No. 321857.

PEOPLE V TRAVIS HENRY, No. 153732; reported below: 315 Mich App 130.

LABELLE MANAGEMENT, INC V DEPARTMENT OF TREASURY, No. 154016; reported below: 315 Mich App 23.

MAYFIELD TOWNSHIP V DETROIT EDISON COMPANY, No. 154046; Court of Appeals No. 323774.

PEOPLE V WAY, No. 154430; Court of Appeals No. 333645.

Leave to Appeal Denied January 25, 2017:

LAUVE V GOVERNOR, No. 155081; Court of Appeals No. 329985.

Summary Disposition January 27, 2017:

ASPHALT SPECIALISTS, INC V STEVEN ANTHONY DEVELOPMENT COMPANY, Nos. 150100 and 150101; Court of Appeals Nos. 311947 and 314658. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the reasonableness

of the attorney fees awarded by the circuit court, in light of *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389 (2013).

Reconsideration Denied January 27, 2017:

In re HEARD, No. 154945; Court of Appeals No. 331676. Leave to appeal denied at 500 Mich 927.

Summary Disposition January 31, 2017:

PEOPLE V INWOOD, No. 153776; Court of Appeals No. 331373. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Macomb Circuit Court in Case No. 2015-001779-FH, and we remand this case to the trial court for resentencing. The prosecuting attorney has conceded that the trial court erred by assigning 50 points under Offense Variable (OV) 11, MCL 777.41. Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Kimble*, 470 Mich 305 (2004). In all other respects, leave to appeal is denied. The motion to hold the application in abeyance is denied. We do not retain jurisdiction.

YOUNG V DEPARTMENT OF CORRECTIONS, No. 154208; Court of Appeals No. 331352. Pursuant to MCR 7.305(H)(1), we remand this case to the Court of Appeals for consideration as on leave granted. The motion to strike the amicus curiae brief is denied.

PEOPLE V GATLIN, No. 154289; Court of Appeals No. 333238. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for consideration of the defendant's issue regarding the assessment of court costs. In all other respects, leave to appeal is denied.

Order Directing Supplemental Briefing Entered January 31, 2017:

PEOPLE V EDDIE BROWN, No. 153505; Court of Appeals No. 330907. We direct former appellate counsel, Michael A. Faraone, to file a supplemental brief addressing the reason(s) for his failure to file in the Court of Appeals, on direct review, a delayed application for leave to appeal within the deadlines set forth in former MCR 7.205(F), currently MCR 7.205(G). Counsel shall file the supplemental brief within 28 days of the date of this order. The application for leave to appeal remains pending.

Leave to Appeal Denied January 31, 2017:

PEOPLE V WILLIE BROOKS, No. 152988; Court of Appeals No. 328381.

PEOPLE V NGUYEN, No. 153334; Court of Appeals No. 330122.

PEOPLE V KNICKERBOCKER, No. 153352; Court of Appeals No. 328382.

PEOPLE v ANTRELL BROWN, No. 153385; Court of Appeals No. 330823.

PEOPLE v VALENTINO STEWART, No. 153447; Court of Appeals No. 323969.

PEOPLE v NORTON, No. 153698; Court of Appeals No. 324706.

PEOPLE v WILLIAM HALL, No. 153773; Court of Appeals No. 332343.

PEOPLE v FARQUHARSON, No. 153778; Court of Appeals No. 330646.

PEOPLE v HORN, No. 153780; Court of Appeals No. 331919.

PEOPLE v DAJEON FRANKLIN, No. 153849; Court of Appeals No. 325551.

PEOPLE v HODGES, No. 153902; Court of Appeals No. 331786.

PEOPLE v JOVON DAVIS, No. 153924; Court of Appeals No. 320773.

PEOPLE v SAWYER, No. 153948; Court of Appeals No. 332476.

PEOPLE v WHITEHEAD, No. 153966; Court of Appeals No. 331896.

PEOPLE v ALVIN RICHARDSON, No. 153970; Court of Appeals No. 314245.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v THEODORE PRICE, No. 153996; Court of Appeals No. 332805.

PEOPLE v ROOKS, No. 154004; Court of Appeals No. 331634.

HUNTER v CILLUFFO, No. 154042; Court of Appeals No. 326088.

PEOPLE v DUNCAN, Nos. 154044 and 154045; Court of Appeals Nos. 324385 and 324397.

PEOPLE v MANCILL, No. 154055; Court of Appeals No. 325641.

PEOPLE v HOLMAN, No. 154081; Court of Appeals No. 325552.

PEOPLE v GLOVER, No. 154092; Court of Appeals No. 321454.

PEOPLE v GRANT, No. 154148; Court of Appeals No. 330544.

DAVIS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 154189; Court of Appeals No. 326126.

PEOPLE v TONNIEL DAVIS, No. 154202; Court of Appeals No. 332588.

PEOPLE v HOLDEN, No. 154205; Court of Appeals No. 332824.

PEOPLE v COLEMAN, No. 154207; Court of Appeals No. 332791.

PEOPLE v RAPHAEL BELL, No. 154223; Court of Appeals No. 332976.

SAU-TUK INDUSTRIES, INC v ALLEGAN COUNTY and *In re* PETITION OF ALLEGAN COUNTY TREASURER FOR FORECLOSURE, Nos. 154231 and 154232; reported below: 316 Mich App 122.

PEOPLE v LEANDRE CHILDS, No. 154264; Court of Appeals No. 326054.

PEOPLE v CAUSLEY, No. 154295; Court of Appeals No. 332853.

PEOPLE v CHEAVES, No. 154309; Court of Appeals No. 331974.

PEOPLE v MICHAEL MCCOY, No. 154310; Court of Appeals No. 326142.

PEOPLE v TYSON, No. 154311; Court of Appeals No. 325986.

PEOPLE v COREY GREEN, No. 154315; Court of Appeals No. 324673.

PEOPLE v WEBB, No. 154320; Court of Appeals No. 332932.

PEOPLE v BRYANT VAUGHN, No. 154322; Court of Appeals No. 326954.

PEOPLE v TIMOTHY JOHNSON, No. 154324; Court of Appeals No. 325456.

KIRCHER v YPSILANTI CHARTER TOWNSHIP, No. 154329; Court of Appeals No. 325098.

CRIMES v DEPARTMENT OF CORRECTIONS, No. 154336; Court of Appeals No. 333011.

PEOPLE v BABCOCK, No. 154379; Court of Appeals No. 332761.

PEOPLE v POLLARD, No. 154381; Court of Appeals No. 331659.

PEOPLE v SINGLETON, No. 154383; Court of Appeals No. 332630.

PEOPLE v TYRONE MASON, No. 154385; Court of Appeals No. 332284.

PEOPLE v CUMMINGS, No. 154389; Court of Appeals No. 332981.

PEOPLE v MILSPAUGH, No. 154402; Court of Appeals No. 333091.

PEOPLE v GREENE, No. 154403; Court of Appeals No. 333218.

PEOPLE v PEEPLES, No. 154405; Court of Appeals No. 326675.

PEOPLE v HORAK, No. 154406; Court of Appeals No. 334160.

PEOPLE v DOIG, No. 154408; Court of Appeals No. 333145.

PEOPLE v FUNDUNBURKS, No. 154415; Court of Appeals No. 327479.

PEOPLE v WALL, No. 154418; Court of Appeals No. 326979.

PEOPLE v BEZEMEK, No. 154439; Court of Appeals No. 333404.

PEOPLE v BAUSS, No. 154447; Court of Appeals No. 333758.

PEOPLE v HOUSE, No. 154449; Court of Appeals No. 333527.

PEOPLE v BRIDGEMAN, No. 154456; Court of Appeals No. 327102.

PEOPLE v TEQUILA PERRY, No. 154457; Court of Appeals No. 326463.

BUCHMAN v MEMBERSELECT INSURANCE COMPANY, No. 154472; Court of Appeals No. 326838.

PEOPLE v BARGAINEER, No. 154474; Court of Appeals No. 333340.

PEOPLE v THRASHER, No. 154484; Court of Appeals No. 333289.

PEOPLE v WALTER FIELDS, No. 154488; Court of Appeals No. 326702.

PEOPLE v ANTRELL BROWN, No. 154498; Court of Appeals No. 327205.

PEOPLE v MATZEN, No. 154507; Court of Appeals No. 333515.

PEOPLE v VANBUREN, No. 154515; Court of Appeals No. 327622.

LASENBY v BADU, No. 154525; Court of Appeals No. 334059.

PEOPLE v GARTH, No. 154544; Court of Appeals No. 334096.

PEOPLE v GARRY JACKSON, No. 154548; Court of Appeals No. 326341.

PEOPLE v TARIK SCOTT, No. 154567; Court of Appeals No. 323886.

PEOPLE v DONTAE ROBINSON, No. 154578; Court of Appeals No. 327484.

In re WASKUL, *In re* WHITEMAN, *In re* SCHNEIDER, and *In re* WEISNER, Nos. 154671, 154672, 154673, and 154674; Court of Appeals Nos. 333482, 333829, 333830, and 333831.

STOVER v FORD MOTOR COMPANY, No. 154692; Court of Appeals No. 334749.

STOVER v FORD MOTOR COMPANY, No. 154695; Court of Appeals No. 334765.

PEOPLE v VAN ZYL, No. 154696; Court of Appeals No. 334519.

PEOPLE v RONALD SCOTT, No. 154742; Court of Appeals No. 331512.

PEOPLE v DONALD CHRIS-WILLIAM JAMES, No. 154809; Court of Appeals No. 334303.

MEIER v BERGER, No. 154860; Court of Appeals No. 334699.

Leave to Appeal Before Decision by the Court of Appeals Denied January 31, 2017:

BRICKHAVEN CONDOMINIUM ASSOCIATION v HOGAN, No. 155020; Court of Appeals No. 335722.

Reconsideration Denied January 31, 2017:

TERAN v RITTLEY, No. 152927; reported below: 313 Mich App 197. Leave to appeal denied at 500 Mich 877.

MANITOU NORTH AMERICA, INC v MCCORMICK INTERNATIONAL, LLC, No. 153348; Court of Appeals No. 324063. Leave to appeal denied at 500 Mich 855.

PRICE v CALLIS, No. 153387; Court of Appeals No. 329004. Leave to appeal denied at 500 Mich 876.

PEOPLE v DORSEY, No. 153543; Court of Appeals No. 324270. Leave to appeal denied at 500 Mich 866.

PEOPLE v MOLTANE, No. 153648; Court of Appeals No. 325165. Leave to appeal denied at 500 Mich 867.

PEOPLE v REGINALD WALKER, No. 153808; Court of Appeals No. 320559. Leave to appeal denied at 500 Mich 903.

WARD v OAKS CORRECTIONAL FACILITY WARDEN, No. 153898; Court of Appeals No. 330995. Leave to appeal denied at 500 Mich 898.

JONES v PEAKE, No. 153951; Court of Appeals No. 328566. Leave to appeal denied at 500 Mich 878.

PEOPLE v AUDRY REED, No. 153954; Court of Appeals No. 330967. Leave to appeal denied at 500 Mich 898.

PEOPLE v BROSKEY, No. 154014; Court of Appeals No. 330563. Leave to appeal denied at 500 Mich 899.

PEOPLE v TYRONE BELL, No. 154135; Court of Appeals No. 331009. Leave to appeal denied at 500 Mich 900.

Summary Disposition February 1, 2017:

PEOPLE v LIGE, No. 153900; Court of Appeals No. 331511. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to the Court of Appeals for plenary consideration of the defendant's appeal of right. There is no dispute in this case that the trial court did not comply with the version of MCR 6.425(E) in effect at the relevant time in 1991, and failed to advise the defendant at sentencing of his appellate rights, including an appeal of right from his plea-based convictions, and appointment of appellate counsel, if indigent. We further order that the appointment of the State Appellate Defender Office to represent the defendant is continued on remand. We do not retain jurisdiction.

PEOPLE v KRISTOPHER WADE, No. 154047; Court of Appeals No. 324677. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals, and we remand this case to the Branch Circuit Court for reconsideration of the defendant's motion to correct the presentence report. The motion was timely filed; therefore the procedures of MCR 6.425(E)(2) apply. Moreover, the defendant is not precluded from challenging information in the presentence report that had appeared in an earlier presentence report for a different offense but went unchallenged at that time. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered February 1, 2017:

NL VENTURES VI FARMINGTON, LLC v CITY OF LIVONIA, No. 153110; reported below: 314 Mich App 222. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether

1939 PA 178, MCL 123.161 *et seq*., MCL 141.121(3), or any other statute authorized the method by which defendant sought to enforce collection of the disputed liens; and if there was statutory authority (2) whether defendant is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year as required by Livonia Ordinance, § 13.08.350. The parties should not submit mere restatements of their application papers. The application for leave to appeal as cross-appellant remains pending.

PEOPLE v PIPPEN, No. 153324; Court of Appeals No. 321487. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate and present testimony from a res gestae witness. See, e.g., *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Towns v Smith*, 395 F3d 251 (CA 6, 2005). The parties should not submit mere restatements of their application papers.

DILLON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 153936; reported below: 315 Mich App 339. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) the extent to which an injury must be described in order to provide notice of injury under MCL 500.3145; and (2) whether the plaintiff or someone on her behalf provided written notice as required by MCL 500.3145. The parties should not submit mere restatements of their application papers.

MENARD, INC v CITY OF ESCANABA, No. 154062; reported below: 315 Mich App 512. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals exceeded its limited appellate review of a decision of the Michigan Tax Tribunal; and, if so, (2) whether the Michigan Tax Tribunal may utilize a valuation approach similar to that recognized in *Clark Equip Co v Leoni Twp*, 113 Mich App 778 (1982). The parties should not resubmit mere restatements of their application papers.

PEOPLE v LOPEZ, No. 154566; reported below: 316 Mich App 704. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and (2) if some form of intent is required, what standards should apply when determining whether the proponent's actions were intended to cause the declarant to be unavailable. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 1, 2017:

BELL v GALAXY FUEL, INC, No. 153746; Court of Appeals No. 330158.

PEOPLE v GLENN, No. 154029; Court of Appeals No. 325640.

PEOPLE v MISKOVICH, No. 154058; Court of Appeals No. 325727.

PEOPLE v BUTLER, No. 154165; reported below: 315 Mich App 546.

PEOPLE v PEARSON, No. 154175; Court of Appeals No. 332051.

PEOPLE v DUANE CRAIG, No. 154325; Court of Appeals No. 332280.

Summary Disposition February 3, 2017:

SMITH v CITY OF FLINT, No. 152844; reported below: 313 Mich App 141. 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. Namely, we agree with Judge FORT HOOD's dissent that the plaintiff's complaint sufficiently alleged discrimination under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, on the basis of a job reassignment unique to the plaintiff during undesirable hours at an undesirable location. See MCR 2.116(C)(8); *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). Furthermore, we vacate as prematurely decided that part of the Court of Appeals majority opinion ruling sua sponte that the plaintiff's WPA claim should be dismissed for failure to properly plead participation in a protected activity, given that the issue had not been raised by either party or reached by the trial court, and the requirements of MCR 2.116(I)(5) have not been addressed. We remand this case to the Genesee Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

PEOPLE v MICHAEL HAMILTON, No. 153451; Court of Appeals No. 319980. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III of the Court of Appeals opinion (entitled "EXPERT TESTIMONY"), and we remand this case to that court for reconsideration of the defendant's claims regarding the qualification and testimony of Rosemary Heise. The Court of Appeals majority correctly cited *People v Lukity*, 460 Mich 484, 495-496 (1999), for the proposition that a preserved, nonconstitutional error is not a ground for reversal unless it is more probable than not that the error was outcome-determinative. It erred, however, in determining that because Heise's testimony was arguably cumulative, it was harmless. See *People v Smith*, 456 Mich 543, 555 (1998) ("[T]he fact that [a] statement was cumulative, standing alone, does not automatically result in a finding of harmless error."). On remand, the Court of Appeals shall engage in "an examination of the entire cause," *Lukity*, 460 Mich at 495-496, and reconsider whether it is more probable than not that any error was outcome determinative. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v ALGER, No. 154247; Court of Appeals No. 322473. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that a defect in the plea proceeding occurred requiring the trial court to permit the defendant to withdraw his pleas. Where the defendant knowingly pleaded no contest

being aware of the maximum possible prison sentences he was facing, he did not establish that an error occurred in the plea proceeding that would entitle him to have his plea set aside. MCR 6.310(C). We remand this case to the Court of Appeals for consideration of the coercion issue left unaddressed by that court. If the Court of Appeals determines that the issue lacks merit, in light of the prosecutor's concession that the defendant is properly characterized as a third habitual offender, it shall remand this case to the Muskegon Circuit Court and order that the defendant be resentenced as a third habitual offender. In all other respects, leave to appeal is denied.

Leave to Appeal Granted February 3, 2017:

SHELBY TOWNSHIP v COMMAND OFFICERS ASSOCIATION OF MICHIGAN, No. 153074; Court of Appeals No. 323491. The parties shall include among the issues to be briefed: (1) whether the calculation and/or allocation of payments for medical benefit plan costs among employees under the Publicly Funded Health Insurance Contribution Act, 2011 Public Act 152, specifically MCL 15.564, is a mandatory subject of collective bargaining pursuant to the Public Employment Relations Act (PERA), specifically MCL 423.215(1); and (2) whether Public Act 152, alone or in conjunction with PERA, precludes a public employer's use of illustrative insurance rates that include retiree health insurance costs.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered February 3, 2017:

PEOPLE v TRAVER, No. 154494; reported below: 316 Mich App 588. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the trial court erred by providing written instructions to the jury on the elements of the charged offenses but not reading those instructions aloud to the jury; (2) whether the trial court's instructions on the charge of possession of a firearm during the commission of a felony, MCL 750.227b, fairly presented the issues to be tried and adequately protected the defendant's rights; (3) whether the defendant waived any instructional errors when his attorney expressed satisfaction with the instructions as given, see *People v Kowalski*, 489 Mich 488 (2011); (4) what standard of review this Court should employ in reviewing the Court of Appeals decision to order an evidentiary hearing on the ineffective assistance of counsel claim; and (5) whether the Court of Appeals erred under the applicable standard when it ordered an evidentiary hearing for defendant to establish the factual predicate for his claim that his trial counsel was ineffective for failing to properly advise him of the potential consequences of withdrawing his guilty plea. See MCR 7.211(C)(1)(a)(ii) and *People v Ginther*, 390 Mich 436, 445 (1973). The parties should not submit mere restatements of their application papers.

MARIK v MARIK, No. 154549; Court of Appeals No. 333687. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Macomb Circuit Court's June 13, 2016 order denying the defendant-father's motion to change the children's school enrollment and to modify parenting time was "a postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii). The parties should not submit mere restatements of their application papers. We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Ozimek v Rodgers* (Docket No. 154776).

OZIMEK v RODGERS, No. 154776; reported below: 317 Mich App 69. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Wayne Circuit Court's February 8, 2016 order denying the plaintiff-mother's motion to change the school district that her child attends was "a postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii). The parties should not submit mere restatements of their application papers. We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Marik v Marik* (Docket No. 154549).

Order Requiring a Supplemental Report Entered February 3, 2017:

In re IDDINGS, No. 154936. On order of the Court, the Judicial Tenure Commission Decision and Recommendation for Order of Discipline is considered. Pursuant to MCR 9.225, we remand this matter to the Judicial Tenure Commission for further explication. We direct the Commission to file a supplemental report within 28 days of the date of this order. The supplemental report shall be filed under seal. In order to enable the Court to have sufficient information upon which to consider the Commission's recommendation, the supplemental report shall include the May 2, 2016 report on the EEO complaint authored by Priscilla Archangel, Ph.D., and any reports or assessments prepared by Kenneth M. Adams, Ph.D., regarding the respondent. The supplemental report shall also address how often the respondent is seeing or will see his therapist. The supplemental report shall also state the basis for the Commission's conclusion that it is convinced of the respondent's sincerity. We retain jurisdiction.

Leave to Appeal Denied February 3, 2017:

PEOPLE v REAM, No. 153716; Court of Appeals No. 324311. On order of the Court, the application for leave to appeal the March 22, 2016 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 denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR 6.500 *et seq*.

MARKMAN, C.J. (*concurring*). I concur with the majority's decision to deny leave to appeal. Before sentencing, defendant received a *Cobbs* agreement to be sentenced to the lower-third of the applicable guidelines range. See *People v Cobbs*, 443 Mich 276 (1993). The trial court later imposed a sentence at the top of the guidelines range, but did not allow defendant an opportunity to withdraw his plea under MCR 6.310(B)(2)(b). Subsequently, in the Court of Appeals, defendant argued that the trial court failed to abide by *Cobbs*, 443 Mich 276. However, defendant did not preserve this claim by an objection or motion in the trial court, and he failed to raise a claim of ineffective assistance of trial counsel for the failure to preserve his *Cobbs* claim. Defendant now raises a claim of ineffective assistance of trial counsel in this Court, which would excuse the failure to preserve the *Cobbs* claim; however, a claim of ineffective assistance of *appellate* counsel is also necessary in order to excuse the failure to raise a claim of ineffective assistance of *trial* counsel before the Court of Appeals. Because defendant did not raise the latter claim, I concur in the denial order, which expressly does not preclude defendant from filing a motion for relief from judgment pursuant to MCR 6.508 raising an ineffective assistance of trial *and* appellate counsel claim.

BERNSTEIN, J., joins the statement of MARKMAN, C.J.

PEOPLE v BARRY SHAW, No. 154220; reported below: 315 Mich App 668.

ZAHRA, J. (*dissenting*). I would grant leave or, at the least, order oral argument on whether to grant the application or take other action.[1] In this case, the prosecution presented evidence that defendant frequently engaged in acts of sexual abuse with his stepdaughter when she was between 9 and 16 years of age. In August 2011, when she was 23 years old, she reported this lengthy period of abuse to the Lansing Police Department. At the conclusion of a jury trial in September 2012, defendant was convicted of nine counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and acquitted of one count of CSC-I. In October 2012, he was sentenced to a prison term of 180 to 480 months (15 to 40 years) for one count and to concurrent terms of 225 to 480 months in prison (18¾ to 40 years) for the remaining counts.

In April 2013, defendant's appellate counsel moved for a new trial. The trial court held a *Ginther*[2] hearing over a period of ten days from December 6, 2013, to February 21, 2014. After further briefing by the parties, the court issued a detailed 40-page opinion denying the motion for new trial. In a June 14, 2016 published opinion, the Court of Appeals reversed on the ground that defendant did not receive effective assistance of counsel at trial.[3] Judge KATHLEEN JANSEN dissented.[4] The Court of Appeals majority concluded that defense counsel was ineffective for failing to object to hearsay testimony and for failing to present other

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[1] MCR 7.305(H)(1).

[2] *People v Ginther*, 390 Mich 436 (1973).

[3] *People v Shaw*, 315 Mich App 668 (2016).

[4] *Id*. at 690 (JANSEN, J., dissenting).

evidence explaining the source of the victim's injuries.[5]

I have grave concerns that the Court of Appeals impermissibly substituted its judgment for that of the trial judge, who made specific findings rejecting each of defendant's claims of error in a thorough and well-reasoned opinion issued after a lengthy and comprehensive *Ginther* hearing.[6] If the application for leave to appeal raised only this issue, a denial might be in order. Typically, this Court refrains from engaging in error correction. But of great jurisprudential significance is the question whether the Court of Appeals properly interpreted the rape-shield statute when it concluded that trial counsel was ineffective for failing to admit evidence of the victim's adult sexual activity.

In the *Ginther* hearing it was disclosed that defense counsel "did not ask questions about the complainant's [consensual adult] sexual activity with [her boyfriend] because [counsel] believed it to be barred by the rape-shield law."[7] "The trial court agreed, ruling that defense counsel's

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[5] *Id*. at 687-688 (opinion of the Court).

[6] Although the legal framework for reviewing claims of ineffective assistance of counsel is well established in this state, this Court has previously found it necessary to remind the Court of Appeals of its limited role, emphasizing that

> [i]n the real world, defending criminal cases is not for the faint of heart. Lawyers must fulfill ethical obligations to the court, zealously advocate the client's best interests (which includes establishing that they, and not the client, are in charge of making the professional decisions), and protect themselves against grievances and claims of malpractice. Lawyers will inevitably make errors in the process, but, because both cases and attorneys come in an infinite variety of configurations, those errors can only *rarely* be defined "with sufficient precision to inform defense attorneys correctly just what conduct to avoid." [*Strickland v Washington*, 466 US 668, 693 (1984).] Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel. [*People v LeBlanc*, 465 Mich 575, 592 (2002), quoting *People v Mitchell*, 454 Mich 145, 170-171 (1997) (emphasis added).]

A reviewing court must be cognizant that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . , and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 US at 689. "Judicial scrutiny of counsel's performance must be *highly* deferential." *Id*. (emphasis added). In my view, the Court of Appeals majority ignored the above principles. As observed by Judge JANSEN in her dissent, no deference was given to the evidentiary conclusions reached by the learned trial judge, and instead the majority impermissibly substituted its judgment for that of the trial court.

[7] *Shaw*, 315 Mich App at 679 (opinion of the Court).

failure to present this testimony was not of consequence because it would have been barred by the rape shield law."[8] But the Court of Appeals opined that "[b]oth counsel and the [trial] court were mistaken."[9] Relying on *People v Mikula*[10]and *People v Haley*,[11] two nonprecedential cases,[12] the Court of Appeals concluded that "evidence of an alternative explanation for the hymenal changes and source for the chronic anal fissure would have been admissible under the exception to the rape-shield statute, and defense counsel's failure to ask the boyfriend about these issues fell below an objective standard of reasonableness."[13]

Not only did the Court of Appeals fail to accord the proper deference due to defense counsel and the trial court on this sophisticated question of evidentiary law, it also erroneously read into the rape-shield statute an exception that is not supported by the language of the act. MCL 750.520j provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> * * *
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The Court of Appeals in a published and now binding opinion took the "source of disease" exception and expanded it to include a "source of injury" exception. The plain language of MCL 750.520j(1)(b) excepts only evidence pertaining to "source or origin of semen, pregnancy, or disease." "Source of injury" does not fall within any of these explicit exceptions.

Accordingly, I conclude that the instant case presents a jurisprudentially significant issue that ought to be given greater consideration by this Court. I would grant leave or, at the least, order oral argument on whether to grant the application or take other action.

YOUNG, J., joins the statement of ZAHRA, J.

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[8] *Id*.

[9] *Id*.

[10] *People v Mikula*, 84 Mich App 108, 115 (1978).

[11] *People v Haley*, 153 Mich App 400, 405-406 (1986).

[12] MCR 7.215(J)(1).

[13] *Shaw*, 315 Mich App at 680 (opinion of the Court).

Complaint for Superintending Control Dismissed February 14, 2017:

SIMMONS v COURT OF APPEALS, No. 155284. On order of the Court, the complaint for superintending control is considered, and it is dismissed, because the plaintiff could have filed an application for leave to appeal the January 25, 2017 order of the Court of Appeals. MCR 3.302(D)(2); MCR 7.306(A)(1).

Leave to Appeal Denied February 17, 2017:

In re DENG, No. 155148; Court of Appeals No. 333365.

In re MONTGOMERY GUARDIANSHIP, No. 155211; Court of Appeals No. 336450.

Leave to Appeal Denied March 1, 2017:

PEOPLE v TERRILL, No. 155289; Court of Appeals No. 336431.

Summary Disposition March 3, 2017:

KUHLGERT v MICHIGAN STATE UNIVERSITY, No. 155325; Court of Appeals No. 332442. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we order that trial court proceedings are stayed pending the completion of this appeal by the Court of Appeals. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction.

Order Determining Briefing Deadlines Entered March 3, 2017:

CITY OF HUNTINGTON WOODS v CITY OF OAK PARK, No. 152035; reported below: 311 Mich App 96; order requiring settlement proceedings and granting leave to appeal if the settlement proceedings fail entered at 500 Mich 885. On order of the Court, having received the final report of the special mediator, Court of Appeals Chief Judge MICHAEL J. TALBOT, that the parties were unable to reach a settlement agreement, the briefing periods under MCR 7.312(E) and (H) shall begin to run from the date of this order.

Leave to Appeal Denied March 3, 2017:

SHERWOOD VILLAGE ASSOCIATES LIMITED PARTNERSHIP v ZARZYCKI, No. 155322; Court of Appeals No. 335884.

Summary Disposition March 7, 2017:

PEOPLE v RUTH SUTTON, No. 153584; Court of Appeals No. 331246. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BAHAM, No. 153857; Court of Appeals No. 331787. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

SLOCUM v EDWARD W SPARROW HOSPITAL ASSOCIATION, No. 154194; Court of Appeals No. 331055. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WAGNER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 154337; Court of Appeals No. 332400. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v LAWRENCE JENKINS, No. 154546; Court of Appeals No. 334360. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v ROBERT JONES, No. 154593; Court of Appeals No. 333498. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 7, 2017:

PEOPLE v THREAT, Nos. 151347 and 151969; Court of Appeals No. 325069.

PEOPLE v GUZMAN, No. 152930; Court of Appeals No. 329709.

PEOPLE v JERRELL MOORE, No. 153711; Court of Appeals No. 329465.

PEOPLE v DABISH, No. 153730; Court of Appeals No. 330727.

PEOPLE v BOLDEN, No. 153757; Court of Appeals No. 330289.

PEOPLE v ANDREW BAKER, No. 153783; Court of Appeals No. 330453.

PEOPLE v MICHAEL HICKS, No. 153784; Court of Appeals No. 331744.

PEOPLE v ARMSTRONG, No. 153788; Court of Appeals No. 329288.

In re DOYLE ESTATE, No. 153837; Court of Appeals No. 324337.

In re DOYLE ESTATE, No. 153854; Court of Appeals No. 324337.

LONGHORN ESTATES, LLC v SHELBY CHARTER TOWNSHIP, No. 153914; Court of Appeals No. 324769.

BRAZYS v ASHEN, No. 153974; Court of Appeals No. 330391.

In re KHAMI CONSERVATORSHIP and *In re* KHAMI GUARDIANSHIP, Nos. 153977 and 153978; Court of Appeals Nos. 323401 and 326827.

LALIBERTE v BRADBURY, No. 153997; Court of Appeals No. 326203.

DENNIS v WEXFORD COUNTY SHERIFF'S DEPARTMENT, No. 154107; Court of Appeals No. 325574.

PEOPLE v MYSLIWIEC, No. 154112; reported below: 315 Mich App 414.

CIAVONE v SCHULMAN, No. 154136; Court of Appeals No. 331220.

AGUIRRE v STATE OF MICHIGAN, No. 154145; reported below: 315 Mich App 706.

VILLARREAL v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 154200; Court of Appeals No. 331633.

PEOPLE v FISHER, No. 154236; Court of Appeals No. 332193.

PEOPLE v WALMA, No. 154249; Court of Appeals No. 332127.

PEOPLE v NATHAN, Nos. 154260 and 154261; Court of Appeals Nos. 327023 and 327024.

PEOPLE v HAYNES, No. 154262; Court of Appeals No. 326336.

SCUGOZA v METROPOLITAN DIRECT PROPERTY & CASUALTY INSURANCE COMPANY, No. 154269; reported below: 316 Mich App 218.

PEOPLE v TERENCE JOHNSON, No. 154270; Court of Appeals No. 326201.

In re HUTCHINSON LIVING TRUST, No. 154292; Court of Appeals No. 326411.

PEOPLE v WELCH, Nos. 154297 and 154298; Court of Appeals Nos. 326511 and 329812.

PEOPLE v MACLEOD, No. 154305; Court of Appeals No. 326950.

CHRISETHCARE HOME HEALTH CARE SERVICES INCORPORATED v BRISTOL WEST INSURANCE COMPANY, No. 154317; Court of Appeals No. 325186.

In re GRIMM, Nos. 154340 and 154341; Court of Appeals Nos. 326240 and 327012.

PEOPLE v JESSIE LEWIS, No. 154343; Court of Appeals No. 324267.

In re KLEIN ESTATE, No. 154355; reported below: 316 Mich App 329.

PEOPLE v MCLAURIN, No. 154362; Court of Appeals No. 325780.

PEOPLE v AKIDA COLE, No. 154372; Court of Appeals No. 333367.

PEOPLE v DARYL SMITH, No. 154373; Court of Appeals No. 331910.

PEOPLE v DEMARCUS THOMPSON, No. 154377; Court of Appeals No. 332455.

PEOPLE v LAMB, No. 154382; Court of Appeals No. 333105.

PEOPLE v LINDSAY, No. 154393; Court of Appeals No. 333083.

PEOPLE v GREGORY PATTERSON, No. 154423; Court of Appeals No. 327168.

PEOPLE v TENNILLE, No. 154424; Court of Appeals No. 326287.

MCCARTHA v STATE FARM FIRE & CASUALTY COMPANY, No. 154428; Court of Appeals No. 326689.

PEOPLE v HEARD, No. 154429; Court of Appeals No. 327349.

PEOPLE v WILLIAM ROY LEE, No. 154451; Court of Appeals No. 326095.

PEOPLE v WEEKS, No. 154455; Court of Appeals No. 333653.

STURGIS BUILDING, LLC v KIRSCH INDUSTRIAL PARK, LLC, Nos. 154460 and 154461; Court of Appeals Nos. 327454 and 328282.

SALENBIEN v ARROW UNIFORM RENTAL LIMITED PARTNERSHIP, Nos. 154490 and 154491; Court of Appeals Nos. 326957 and 326961.

TAXPAYERS UNITED MICHIGAN FOUNDATION v WASHTENAW COUNTY, No. 154495; Court of Appeals No. 332469.

PEOPLE v DESEANTA THOMPKINS, No. 154496; Court of Appeals No. 326028.

AFSCME COUNCIL 25 LOCAL 3317 v CHARTER COUNTY OF WAYNE, No. 154508; Court of Appeals No. 333981.

PEOPLE v NICHOLS, No. 154514; Court of Appeals No. 333472.

PEOPLE v JOHN BRANDON, No. 154535; Court of Appeals No. 333231.

PEOPLE v MAURICE MITCHELL, No. 154537; Court of Appeals Nos. 333729 and 333730.

PEOPLE v HERRERA, No. 154540; Court of Appeals No. 334206.

PEOPLE v TOMMY BENNETT, No. 154542; Court of Appeals No. 327417.

PEOPLE v MERIWETHER, No. 154543; Court of Appeals No. 326618.

PEOPLE v MARIO JACKSON, No. 154547; Court of Appeals No. 326805.

HARRIS v HARRIS, No. 154550; Court of Appeals No. 327590.

PEOPLE v POTTS, No. 154562; Court of Appeals No. 333412.

PEOPLE v DESHAWN MASON, No. 154569; Court of Appeals No. 332789.

PEOPLE v BEACH, No. 154574; Court of Appeals No. 333771.

STUENKEL v STUENKEL, No. 154630; Court of Appeals No. 332619.

PEOPLE v MARKS, No. 154633; Court of Appeals No. 327039.

PEOPLE v MICHAEL ALEXANDER, No. 154686; Court of Appeals No. 332977.

STURGIS BUILDING, LLC v KIRSCH INDUSTRIAL PARK, LLC, No. 154782; Court of Appeals No. 327454.

In re REINSTATEMENT PETITION OF THOMAS A MENGESHA, No. 154878.

PEOPLE v KASBEN, No. 154898; Court of Appeals No. 333917.

PEOPLE v TODD PICKETT and PEOPLE v KERRY PICKETT, Nos. 154911 and 154912; Court of Appeals Nos. 334000 and 334001.

BOWMAN v BOWMAN, No. 154979; Court of Appeals No. 331870.

Leave to Appeal Before Decision by the Court of Appeals Denied March 7, 2017:

In re GRIMM, No. 154828; Court of Appeals No. 335228.

Reconsideration Denied March 7, 2017:

PEOPLE v WILSHAUN KING, No. 152653; Court of Appeals No. 327239. Leave to appeal denied at 500 Mich 872.

MIDWEST MEMORIAL GROUP, LLC v CITIGROUP GLOBAL MARKETS INC, No. 152810; Court of Appeals No. 322338. Leave to appeal denied at 500 Mich 876.

PEOPLE v GIBBS, No. 152874; Court of Appeals No. 329618. Leave to appeal denied at 500 Mich 864.

PEOPLE v PANNELL, No. 152953; Court of Appeals No. 329250. Leave to appeal denied at 500 Mich 880.

PEOPLE v ISADORE HALL, No. 152986; Court of Appeals No. 329713. Leave to appeal denied at 500 Mich 880.

PEOPLE v DAVID VAUGHN, No. 153146; Court of Appeals No. 329775. Leave to appeal denied at 500 Mich 880.

PEOPLE v DEMARCUS FINLEY, No. 153304; Court of Appeals No. 323661. Leave to appeal denied at 500 Mich 865.

PEOPLE v JOHN GREEN, No. 153393; Court of Appeals No. 329342. Leave to appeal denied at 500 Mich 895.

PEOPLE v CHRISTOPHER FRANKLIN, No. 153446; Court of Appeals No. 330473. Leave to appeal denied at 500 Mich 881.

PEOPLE v PAUL, No. 153448; Court of Appeals No. 330952. Leave to appeal denied at 500 Mich 866.

PEOPLE v NAN JONES, No. 153449; Court of Appeals No. 329378. Leave to appeal denied at 500 Mich 896.

PEOPLE v SOUTHWELL, No. 153482; Court of Appeals No. 330264. Leave to appeal denied at 500 Mich 896.

LAMIMAN v BANK OF NEW YORK MELLON TRUST COMPANY, NA, No. 153483; Court of Appeals No. 322974. Leave to appeal denied at 500 Mich 866.

PEOPLE v CHARLES BENSON, No. 153504; Court of Appeals No. 329308. Leave to appeal denied at 500 Mich 896.

CONSTANT v ATTORNEY GRIEVANCE COMMISSION, No. 153609. Superintending control denied at 500 Mich 890.

PEOPLE v SHERWIN SHELTON, No. 153631; Court of Appeals No. 330858. Leave to appeal denied at 500 Mich 896.

PEOPLE v PAUL, No. 153645; Court of Appeals No. 330953. Leave to appeal denied at 500 Mich 867.

SHINN v MICHIGAN ASSIGNED CLAIMS FACILITY, No. 153691; reported below: 314 Mich App 765. Leave to appeal denied at 500 Mich 892.

PEOPLE v MOREHOUSE, No. 153874; Court of Appeals No. 330832. Leave to appeal denied at 500 Mich 883.

BROOKS v JACKSON, No. 153907; Court of Appeals No. 330102. Leave to appeal denied at 500 Mich 883.

Leave to Appeal Before Decision by the Court of Appeals Denied March 9, 2017:

SUTIKA v ROSCOMMON COUNTY CLERK, No. 155416; Court of Appeals No. 337144.

Summary Disposition March 16, 2017:

HECHT v NATIONAL HERITAGE ACADEMIES, INC, No. 155156; Court of Appeals No. 335763. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the November 3, 2016 order of the Genesee Circuit Court, and we remand this case to that court for entry of an order granting the defendant's motion to define the scope of the trial on remand. In *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 628 (2016), this Court vacated only the jury award of future economic

damages; the special jury verdict finding that the plaintiff would not suffer future emotional-distress damages as a result of his termination was not vacated.

Leave to Appeal Denied March 17, 2017:

PEOPLE v SWIFT, No. 151439; Court of Appeals No. 318680.

POWER PLAY INTERNATIONAL, INC v REDDY, No. 154347; Court of Appeals No. 325805.

Reconsideration Denied March 17, 2017:

SIMPSON v PICKENS, No. 152036; reported below: 311 Mich App 127. Leave to appeal denied at 500 Mich 918.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

Leave to Appeal Granted March 22, 2017:

MARLETTE AUTO WASH, LLC v VAN DYKE SC PROPERTIES, LLC, No. 153979; Court of Appeals No. 326486. The parties shall address whether open, notorious, adverse, and continuous use of property for at least fifteen years creates a prescriptive easement that is an easement appurtenant, without regard to whether the owner of the dominant estate took legal action to claim the easement.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 22, 2017:

PEOPLE v HORACEK, No. 152567; Court of Appeals No. 317527. At oral argument, the parties shall address: (1) whether exigent circumstances authorized the officers' warrantless entry into the defendant's motel room, *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993) ("The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.") (citation omitted); see also *People v Oliver*, 417 Mich 366, 384 (1983); and (2) if a constitutional violation did occur, whether the defendant is entitled to withdraw his plea, compare MCR 6.301(C)(2) with *People v Reid*, 420 Mich 326, 337 (1984). 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.

Leave to Appeal Denied March 22, 2017:

PEOPLE v WIMBERLY, No. 152835; Court of Appeals No. 321490.

PEOPLE v REGINALD WALKER, No. 153145; Court of Appeals No. 329711.

LAWRENCE v BURDI, No. 153299; reported below: 314 Mich App 203.

PEOPLE v DIAZ-BARRIOS, No. 153353; Court of Appeals No. 330969.

PEOPLE v MATHEWS, No. 153793; Court of Appeals No. 325762.

BRONSON HEALTH CARE GROUP, INC v TITAN INSURANCE COMPANY, No. 153850; reported below: 314 Mich App 577.

PEOPLE v JORDAN JOHNSON, No. 153912; reported below: 315 Mich App 163.

PEOPLE v DURHAM, No. 154069; Court of Appeals No. 331567.

PEOPLE v DEGNER, No. 154233; Court of Appeals No. 327025.

PEOPLE v STEVEN COLLINS, No. 154353; Court of Appeals No. 329686.

PEOPLE v GOBER, No. 154388; Court of Appeals No. 332187.

PEOPLE v HOUGH, No. 154925; Court of Appeals No. 326930.

PEOPLE v HOUGH, No. 154954; Court of Appeals No. 326930.

Leave to Appeal Before Decision by the Court of Appeals Denied March 22, 2017:

CICHEWICZ v SALESIN, No. 154290; Court of Appeals No. 330301.

Leave to Appeal Denied March 24, 2017:

TODD v NBC UNIVERSAL, No. 153049; Court of Appeals No. 323235.

BERNSTEIN, J., would reverse Part IV of the Court of Appeals judgment and remand this case to the circuit court to hear the plaintiff's motion to amend.

Leave to Appeal Denied March 29, 2017:

TEDDY 23, LLC v MICHIGAN FILM OFFICE, Nos. 153420 and 153421; reported below: 313 Mich App 557.

YOUNG, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. I would reverse the judgment of the Court of Appeals because I believe the plain text of MCL 600.6419(1) clearly vested the Court of Claims with exclusive jurisdiction over plaintiffs' claim.

Plaintiffs are a film production company and a financer of that company who sought a film tax credit pursuant to the now-repealed MCL 208.1455. Defendant Michigan Film Office (MFO) denied plaintiffs' request for a postproduction certificate of completion—a prerequisite for receiving a film tax credit.

Plaintiffs filed a complaint in the Court of Claims against MFO and the Department of Treasury, the department in which MFO was located at the time of the dispute.[1] Plaintiffs asked the court to overturn the denial, to require that defendants issue the requested tax credit, and to award plaintiffs compensatory damages of $3 million. Defendants moved for summary disposition under MCR 2.116(C)(4), arguing that the Court of Claims lacked subject matter jurisdiction over the claim because the circuit court had exclusive jurisdiction over this appeal from an administrative agency decision. In response to defendants' motions for summary disposition, plaintiffs filed a delayed application for leave to appeal in the Ingham Circuit Court on June 10, 2014. The circuit court denied plaintiffs' delayed application on June 17, 2014.[2] On July 29, 2014, the circuit court denied by order plaintiffs' motion for reconsideration of the denial.

The Court of Claims granted summary disposition to defendants on August 8, 2014, under MCR 2.116(C)(4), concluding that it lacked subject matter jurisdiction over the claim pursuant to MCL 600.6419(5) and MCL 600.631. The Court of Appeals affirmed, holding that the Court of Claims did not have subject matter jurisdiction over plaintiffs' appeal.[3] Although the analysis in the Court of Appeals opinion is sparse, the Court of Appeals apparently believed that, notwithstanding the plain language of MCL 600.6419(1)(a) vesting exclusive jurisdiction in the Court of Claims over claims and demands against the state and its departments, the Court of Claims could have jurisdiction over plaintiffs' claim only if *some other statute* conferred it with jurisdiction.[4] The Court of Appeals committed a significant error of statutory interpretation when it ignored the jurisdictional grant contained in MCL 600.6419(1)(a), and I would take up this case to correct this error.

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[1] The MFO was housed within the Michigan Strategic Fund, MCL 125.2029a(1) ("The Michigan film office is created in the fund."), which was itself located within the Department of Treasury, MCL 125.2005(1) ("There is created by this act a public body corporate and politic to be known as the Michigan strategic fund. The fund shall be within the department of treasury . . . ."). In Executive Order No. 2014-12, Governor Rick Snyder created the Department of Talent and Economic Development and transferred the Michigan Strategic Fund to this new department.

[2] On June 20, 2014, the circuit court entered an order to which the parties had stipulated on June 17, 2014, purportedly abeying the circuit court proceeding until the conclusion of the Court of Claims proceedings. However, the parties agree on appeal that the circuit court did, in fact, deny rather than abey the application.

[3] *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 568; 884 NW2d 799 (2015).

[4] See *id*. at 567-568.

The jurisdiction of the Court of Claims is delineated in MCL 600.6419:

> (1) Except as provided in sections 6421 and 6440,[5] the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. . . . Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.
>
> * * *
>
> (5) This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

MCL 600.6419(1)(a) gives the Court of Claims exclusive jurisdiction over "any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers." Plaintiffs' complaint asked the Court of Claims to overturn the MFO's decision, to order that the Department of Treasury issue the tax credit, and to award plaintiffs $3 million in compensatory damages. Plaintiffs' complaint thus demanded monetary and equitable relief from state agencies.[6] Therefore, MCL 600.6419(1)(a) gave the Court of Claims exclusive jurisdiction "[t]o hear and determine" plaintiffs' claims.

The lower courts implicitly held that MCL 600.6419(5) nonetheless deprived the Court of Claims of this exclusive jurisdiction. This was erroneous. MCL 600.6419(1)(a) grants the Court of Claims exclusive jurisdiction over a broad array of claims and demands "notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(5) provides that if some other law grants exclusive jurisdiction to the circuit court over an appeal from an administrative agency, the circuit court rather than the Court of Claims will have

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[5] MCL 600.6421 preserves jurisdiction in the circuit courts over jury trials; MCL 600.6440 provides that the Court of Claims does not have jurisdiction when a claimant "has an adequate remedy . . . in the federal courts."

[6] A "demand" is "something claimed as due," *Merriam-Webster's Collegiate Dictionary* (11th ed), or "[t]he assertion of a legal or procedural right," *Black's Law Dictionary* (9th ed). See also *Black's Law Dictionary* (9th ed) (defining the verb "demand" as "[t]o claim as one's due; to require; to seek relief"). Plaintiffs' complaint sought equitable and compensatory relief as something due, or as a legal right.

exclusive jurisdiction over that appeal. Accordingly, this statute contemplates that MCL 600.6419(1)(a) will displace *concurrent* jurisdiction with the circuit court but, pursuant to MCL 600.6419(5), will not vest jurisdiction in the Court of Claims if the circuit court has *exclusive* jurisdiction.

The lower courts apparently concluded that MCL 600.631 did give the circuit court exclusive jurisdiction over plaintiffs' claim. Again, this was in error. MCL 600.631 provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

Thus, MCL 600.631 gives circuit courts jurisdiction over appeals from "any . . . decision . . . of any state . . . agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law." Plaintiffs are appealing the MFO's decision to deny a postproduction certificate of completion; the MFO is a state agency authorized to promulgate rules.[7] However, MCL 600.631 divests the exclusive jurisdiction of the Court of Claims only if MCL 600.631 gives the circuit court *exclusive* jurisdiction. MCL 600.631 nowhere uses language suggesting that the circuit court's jurisdiction over appeals from agency decisions is exclusive.[8] It uses mandatory language, suggesting that when the conditions in MCL 600.631 are met, the circuit court *does* have jurisdiction, but it does not make that jurisdiction exclusive. Indeed, MCL 600.631 itself contemplates that it will provide jurisdiction in the circuit court only when "an appeal or other judicial review has not otherwise been provided for by law." MCL 600.6419(1)(a) does otherwise provide for judicial review.

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[7] MCL 125.2029b(6) ("The commissioner may promulgate rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, as the commissioner deems necessary to execute the duties and responsibilities of the office.").

[8] Compare MCL 600.631 ("An appeal shall lie . . . .") with MCL 600.6419(1) ("[T]he jurisdiction of the court of claims, as conferred upon it by this chapter, is *exclusive*.") (emphasis added), MCL 600.6419(1)(a) ("[T]he court has the following power and jurisdiction . . . *notwithstanding another law that confers jurisdiction* of the case in the circuit court.") (emphasis added), and MCL 205.731 ("The [tax] tribunal has *exclusive* and original jurisdiction over all of the following . . . .") (emphasis added).

Accordingly, I believe that MCL 600.6419(1)(a) grants the Court of Claims exclusive jurisdiction over plaintiffs' claim, and I dissent from the order denying leave to appeal. I would instead reverse and remand the case to the Court of Claims for further proceedings.

Summary Disposition March 31, 2017:

PEOPLE v SCHULTZ, No. 151824; Court of Appeals No. 325174. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the November 25, 2014 judgment of the Wayne Circuit Court addressing the defendant's claim of ineffective assistance of counsel. We remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of counsel based on the assertions made in the affidavit of Keeley Heath, the second chair at the defendant's trial, regarding the performance of the defendant's lead counsel. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 31, 2017:

PEOPLE v VELEZ, No. 152778; Court of Appeals No. 315209. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Alger Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Mitchell T. Foster, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing: (1) whether the defendant's claim regarding the preliminary sentence evaluation under *People v Cobbs*, 443 Mich 276 (1993), is properly before this Court, given his failure to file a motion to withdraw his plea in the trial court, see MCR 6.310(D), and notwithstanding the prosecutor's failure to raise and preserve this issue, see *People v Oliver*, 417 Mich 366, 385-386 n 17 (1983); and (2) if so, whether the trial court failed to impose a sentence in accordance with the preliminary evaluation. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 31, 2017:

NEXTEER AUTOMOTIVE CORPORATION v MANDO AMERICA CORPORATION, No. 153413; reported below: 314 Mich App 391.

MARKMAN, C.J. (*dissenting*). The Court of Appeals, in my judgment, correctly held that a party claiming that an opposing party has expressly waived a contractual right to arbitration does not need to show that it will suffer prejudice if the waiver is not enforced. Prejudice is simply not an element of express waiver. *Dahrooge v Rochester German Ins Co*, 177 Mich 442, 451-452 (1913) ("A waiver is a voluntary relinquishment of a known right."); 28 Am Jur 2d, Estoppel and Waiver, § 35, p 502 ("Prejudice to the other party is one of the essential elements of an equitable estoppel whereas a waiver does not necessarily imply that the party asserting it has been misled to his or her prejudice or into an altered position.") (citation omitted).

However, I would not deny leave because I believe the Court of Appeals erred by holding that defendant here expressly waived its right to arbitration by signing a preliminary case management order (CMO) that contained a checked box next to the following statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." A waiver of any type, express or implied, "is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003). It is "express" when it is "[c]learly and unmistakably communicated [or] stated with directness and clarity." *Black's Law Dictionary* (10th ed) (defining "express"). I do not believe that defendant's act of signing a CMO with a checked box next to the language quoted above clearly and unmistakably communicated an intention to abandon a known right, in particular when an adjacent box on the CMO next to the following statement went unchecked: "An agreement to arbitrate this controversy . . . is *waived*." [Emphasis added.] Furthermore, the fact of the waiver is made even more uncertain given that plaintiff at the time of the CMO was seeking injunctive relief and the arbitration agreement between the parties excluded such a claim. I would reverse the Court of Appeals on the finding of express waiver and remand to that court for consideration of whether defendant's conduct alternatively gave rise to an implied waiver, a waiver by estoppel, or no waiver at all.

YOUNG, J., did not participate.

PEOPLE V WESSON, No. 154492; Court of Appeals No. 326389.

MARKMAN, C.J. (*concurring*). Defendant was convicted of "larceny from the person of another." The victim had dropped his money clip on the ground at a casino, and defendant reached past another person's legs to pick up the clip while it was lying at the victim's feet. On appeal, the Court of Appeals held that because another individual was standing between defendant and the victim, defendant was not in the "immediate presence" of the victim, and the Court of Appeals therefore reversed defendant's conviction.

I respectfully believe the Court of Appeals erred. The controlling legal standard for this issue was established in *People v Smith-Anthony*, 494 Mich 669, 681-683 (2013). In that case, this Court said that in order to sustain a "larceny from the person" conviction, the property stolen must have been in the "immediate presence" of the victim. *Id*. In this case, the Court of Appeals majority concluded that, because "there was another person and object intervening between the victim and the

defendant," the defendant was not in the victim's immediate presence and thus the evidence was legally insufficient. *People v Wesson*, unpublished per curiam opinion of the Court of Appeals, issued August 2, 2016 (Docket No. 326389), p 3. However, the relevant legal inquiry is whether "the *property* was in immediate proximity to the victim at the time of the taking." *Smith-Anthony*, 494 Mich at 688 (emphasis added). Here, as noted by the Court of Appeals dissent, the majority erred by not "focusing on the location of the stolen property relative to the victim . . . ." *Wesson* (RIORDAN, J., dissenting), unpub op at 1. The *only* relevant legal inquiry under *Smith-Anthony* is the location of the property stolen in relation to the victim.

That said, I concur in the decision to deny leave to appeal. The trial court instructed the jury that to convict the defendant, the property stolen must have been within the victim's "immediate area of control or immediate presence." The trial court gave that instruction even though this Court expressly rejected the "immediate area of control" standard in *Smith-Anthony*. *Id*. at 682. Were we to reverse and remand to the Court of Appeals for consideration of defendant's allegation of instructional error, at most he would receive a new trial with a properly instructed jury. However, because defendant is already on parole, it is unlikely that the prosecutor would choose to reprosecute. In other words, regardless of whether we deny or reverse and remand, the ultimate outcome will in all likelihood be the same—defendant will not be convicted of "larceny from the person." Therefore, while I believe the Court of Appeals clearly erred in its analysis, I concur in this Court's denial of leave to appeal.

KUHLGERT v MICHIGAN STATE UNIVERSITY, No. 155478; Court of Appeals No. 332442.

Summary Disposition April 4, 2017:

PEOPLE v REUBEN MARTINEZ, No. 153340; Court of Appeals No. 323903. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentences of the Saginaw Circuit Court for the defendant's second-degree criminal sexual conduct convictions, and we remand this case to the trial court for resentencing on those offenses. The defendant was improperly sentenced to 20-year maximum terms. The statutory maximum sentence for second-degree criminal sexual conduct is 15 years. MCL 750.520c(2)(a). The 12-year minimum sentences imposed on the defendant for the second-degree criminal sexual conduct convictions exceed two-thirds of the statutory maximum sentence of 15 years. See MCL 769.34(2)(b). On remand, the trial court shall resentence the defendant to valid sentences for his second-degree criminal sexual conduct convictions. In all other respects, leave to appeal is denied.

SULLIVAN v SULLIVAN, No. 154023; Court of Appeals No. 330543. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CISCO GREEN, No. 154134; Court of Appeals No. 331411. Pursuant to MCR 7.305(H)(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 a timely filed brief on appeal, and this case shall proceed in that court as an appeal of right. The defendant made a timely request for the appointment of appellate counsel, but the Wayne Circuit Court failed to comply with the requirements of MCR 6.425(G)(3). Accordingly, the defendant was deprived of his appeal of right as a result of the trial court's error. We do not retain jurisdiction.

JOHNSON v FARMERS INSURANCE EXCHANGE, No. 154141; Court of Appeals No. 331725. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v EMBRY, No. 154806; Court of Appeals No. 334356. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Clinton Circuit Court, and we remand this case to the trial court for resentencing pursuant to *People v Francisco*, 474 Mich 82 (2006). The trial court erred in assigning 10 points for Offense Variable 4 (OV 4), MCL 777.34, since there was no record support that the victims suffered psychological injury.

SULLIVAN v SULLIVAN, No. 154913; Court of Appeals No. 334273. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied April 4, 2017:

PEOPLE v AQUIRE SIMMONS, No. 153537; Court of Appeals No. 323162.

PEOPLE v FREDERICK YOUNG, No. 153561; Court of Appeals No. 325936.

PEOPLE v RECO SIMMONS, No. 153638; Court of Appeals No. 323081.

PEOPLE v FELANDO HUNTER, No. 153668; Court of Appeals No. 319020.

PEOPLE v FELANDO HUNTER, No. 153671; Court of Appeals No. 326092.

PEOPLE v BRANDON CRAWFORD, No. 153679; Court of Appeals No. 319298.

BOLADIAN v THENNISCH, No. 153787; Court of Appeals No. 324737.

PEOPLE v QUATRINE, No. 153872; Court of Appeals No. 331085.

PEOPLE v DONALD WATKINS, No. 153881; Court of Appeals No. 330568.

LANICA JEEP HELLAS SA v CHRYSLER GROUP INTERNATIONAL LLC, No. 153937; Court of Appeals No. 329481.

PEOPLE v ANTONIO JACKSON, No. 153968; Court of Appeals No. 330695.

PEOPLE v GENTRY, No. 153971; Court of Appeals No. 326228.

PEOPLE v DYE, No. 153994; Court of Appeals No. 330488.

PEOPLE v MURPHY, No. 154001; Court of Appeals No. 330753.

PEOPLE v DARRELL WALKER, No. 154031; Court of Appeals No. 324672.

LAKESIDE RESORT, LLC v CRYSTAL TOWNSHIP, No. 154056; Court of Appeals No. 324799.

HOLT v LEGACY HHH, No. 154061; Court of Appeals No. 325345.

PEOPLE v UPSHAW, No. 154101; Court of Appeals No. 325195.

INTERNATIONAL OUTDOOR, INC v CITY OF LIVONIA, No. 154144; Court of Appeals No. 325243.

PEOPLE v KAMAL BROWN, No. 154146; Court of Appeals No. 328560.

PEOPLE v VELLENGA, No. 154160; Court of Appeals No. 333138.

KOMENDERA v PENINSULA TOWNSHIP, No. 154184; Court of Appeals No. 331453.

BRADY v HOME-OWNERS INSURANCE COMPANY, No. 154186; Court of Appeals No. 324864.

PEOPLE v BAHODA, No. 154212; Court of Appeals No. 316879.

PEOPLE v FITZGERALD, No. 154216; Court of Appeals No. 331793.

WHITE LAKE CHARTER TOWNSHIP v CIURLIK ENTERPRISES, No. 154227; Court of Appeals No. 326514.

PEOPLE v HUBEL, No. 154237; Court of Appeals No. 325901.

PEOPLE v BURLEY, No. 154241; Court of Appeals No. 331939.

PEOPLE v QUATRINE, No. 154255; Court of Appeals No. 332060.

PEOPLE v DONALD HALE, No. 154287; Court of Appeals No. 326661.

PEOPLE v DASHEAN WILLIAMS, No. 154380; Court of Appeals No. 326093.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MARC BERRY, No. 154417; Court of Appeals No. 332324.

WILLIAMS v KENNEDY, No. 154421; reported below: 316 Mich App 612.

PEOPLE v WOODBURN, No. 154436; Court of Appeals No. 320718.

PEOPLE v PAUL WHITE, No. 154440; Court of Appeals No. 327249.

PEOPLE v DANYELL THOMAS, No. 154450; Court of Appeals No. 326232.

ELVIN v GUBERT, Nos. 154462 and 154463; Court of Appeals Nos. 326563 and 326566.

WALDEN v AUTO-OWNERS INSURANCE COMPANY, No. 154469; Court of Appeals No. 331627.

PEOPLE v PETER JONES, No. 154470; Court of Appeals No. 324512.

MCCARTHY v LIPPS-CARBONE, No. 154471; Court of Appeals No. 326715.

JOHNSON v KOLACHALAM, No. 154522; Court of Appeals No. 326615.

PEOPLE v EUGENE MOORE, No. 154545; Court of Appeals No. 326663.

RUGIERO v LUBIENSKI, Nos. 154553 and 154554; Court of Appeals Nos. 325254 and 325257.

PEOPLE v STANLEY HARRISON, No. 154555; Court of Appeals No. 327708.

STATE TREASURER v SWOOPE, No. 154560; Court of Appeals No. 326861.

PEOPLE v GILLAM, No. 154568; Court of Appeals No. 326889.

PEOPLE v BRIAN BANKS, No. 154575; Court of Appeals No. 333054.

AES MANAGEMENT, INC v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, UNEMPLOYMENT INSURANCE AGENCY, No. 154585; Court of Appeals No. 333597.

AES MANAGEMENT, INC v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, UNEMPLOYMENT INSURANCE AGENCY, No. 154587; Court of Appeals No. 334382.

PEOPLE v JAMIL CARTER, No. 154594; Court of Appeals No. 333402.

PEOPLE v BATTIES, No. 154597; Court of Appeals No. 334151.

SELECT COMMERCIAL ASSETS, LLC v CARROTHERS, No. 154606; Court of Appeals No. 326968.

PEOPLE v CEDRIC DAVIS, No. 154608; Court of Appeals No. 333368.

PEOPLE v DENNIS MAINE, No. 154611; Court of Appeals No. 333861.

PEOPLE v JAMES BROOKS, No. 154615; Court of Appeals No. 332856.

PEOPLE v RAYMOND PIERSON, No. 154616; Court of Appeals No. 332500.

JOHNSON v MICHIGAN DEPARTMENT OF TREASURY, No. 154620; Court of Appeals No. 327299.

PEOPLE v RATCLIFF, No. 154621; Court of Appeals No. 326809.

PEOPLE v LEONARD, No. 154628; Court of Appeals No. 332990.

JOHN DOE 11 v DEPARTMENT OF CORRECTIONS, No. 154631; Court of Appeals No. 332260.

PEOPLE v CRESSMAN, No. 154634; Court of Appeals No. 333869.

PEOPLE v BUSCH, No. 154635; Court of Appeals No. 332692.

PEOPLE v VEGA, No. 154636; Court of Appeals No. 327536.

PEOPLE v EASTERLY, No. 154637; Court of Appeals No. 334403.

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 154641; Court of Appeals No. 333371.

PEOPLE v RIVERA, No. 154652; Court of Appeals No. 332468.

PEOPLE v MABREY, No. 154654; Court of Appeals No. 333713.

COSTELLA v CITY OF TAYLOR, No. 154675; Court of Appeals No. 326589.

PEOPLE v MARION, No. 154681; Court of Appeals No. 334006.

PEOPLE v MICKELS, No. 154682; Court of Appeals No. 326849.

PEOPLE v SPITTERS, No. 154683; Court of Appeals No. 334010.

MURPHY-GOODRICH v CITY OF DEARBORN, No. 154685; Court of Appeals No. 332685.

PEOPLE v RUCKES, No. 154687; Court of Appeals No. 328248.

PEOPLE v DIJON SMITH, No. 154691; Court of Appeals No. 334221.

PEOPLE v REID, No. 154699; Court of Appeals No. 324383.

PEOPLE v BURRESS, No. 154703; Court of Appeals No. 333601.

KRUEGER v SPECTRUM HEALTH SYSTEMS, No. 154704; Court of Appeals No. 328787.

PEOPLE v JEROME MATTHEWS, No. 154706; Court of Appeals No. 327632.

PEOPLE v CHRISTOPHER ALEXANDER, No. 154707; Court of Appeals No. 333326.

PEOPLE v BILLY REED, No. 154713; Court of Appeals No. 334005.

PEOPLE v DANQUAL MATTHEWS, No. 154720; Court of Appeals No. 334200.

PEOPLE v PRATT, No. 154724; Court of Appeals No. 333832.

PEOPLE v PATRICK WILSON, No. 154731; Court of Appeals No. 328047.

PEOPLE v MARBLE, No. 154735; Court of Appeals No. 327630.
YOUNG, J., did not participate.

FANNIE MAE v FRANZEL, No. 154744; Court of Appeals No. 333088.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MARVIN WHITE, No. 154746; Court of Appeals No. 334060.

PEOPLE v O'NEAL, No. 154749; Court of Appeals No. 326985.

PEOPLE v ALEC JOHNSON, No. 154750; Court of Appeals No. 333593.

PEOPLE v ORTIZ-REYES, No. 154753; Court of Appeals No. 327258.

PEOPLE v VERSLUYS, No. 154760; Court of Appeals No. 334272.

MCCARTHY v PALLISCO, No. 154763; Court of Appeals No. 327647.

PEOPLE v MCNEAL, No. 154769; Court of Appeals No. 326901.

PEOPLE v ANTHONY WILLIAMS, No. 154775; Court of Appeals No. 333890.

PEOPLE v STOLL, No. 154780; Court of Appeals No. 333328.

PEOPLE v KENNETH ROBERTS, No. 154786; Court of Appeals No. 334298.

PEOPLE v LUNDBERG, No. 154793; Court of Appeals No. 334287.

PEOPLE v CONEY, No. 154794; Court of Appeals No. 334339.

PEOPLE v DORIAN WALKER, No. 154795; Court of Appeals No. 327733.

PEOPLE v TADGERSON, No. 154797; Court of Appeals No. 327187.

PEOPLE v TURN, No. 154799; reported below: 317 Mich App 475.

PEOPLE v LEWIS SMITH, No. 154803; Court of Appeals No. 334391.

PEOPLE v VALLEJO, No. 154813; Court of Appeals No. 334538.

PEOPLE v COLLON, No. 154815; Court of Appeals No. 327282.

PEOPLE v STEVEN THOMPSON, No. 154817; Court of Appeals No. 328306.

CITY OF DEARBORN HEIGHTS v ROCK, No. 154820; Court of Appeals No. 330348.

PEOPLE v ARTHUR BROYLES, No. 154838; Court of Appeals No. 333973.

WEXFORD COUNTY BOARD OF ROAD COMMISSIONERS v FAGERMAN, No. 154856; Court of Appeals No. 333443.

WEXFORD COUNTY BOARD OF ROAD COMMISSIONERS v FAGERMAN, No. 154858; Court of Appeals No. 333551.

MADDEN v AVILA, No. 154859; Court of Appeals No. 326716.

PEOPLE v HOPE, No. 154877; Court of Appeals No. 324703.

PEOPLE v CARLTON, No. 154890; Court of Appeals No. 334461.

PEOPLE v CORDELL JONES, No. 154892; Court of Appeals No. 327731.

PEOPLE v DUBOSE, No. 154914; Court of Appeals No. 328118.

PEOPLE v BUFFORD, No. 154939; Court of Appeals No. 329395.

TOCARCHICK v LUTHERAN ADOPTION SERVICES, No. 154967; Court of Appeals No. 334020.

PEOPLE v MALCOM, No. 155105; Court of Appeals No. 335197.

PEOPLE v DEANGELO MARTEZ JONES, No. 155118; Court of Appeals No. 326988.

GRIEVANCE ADMINISTRATOR v STEPEK, No. 155129.

PEOPLE v SHAUL, No. 155144; Court of Appeals No. 326905.

PEOPLE v WOOD, No. 155192; Court of Appeals No. 334410.

PEOPLE v FREDERICKS, No. 155200; Court of Appeals No. 334719.

In re TJB, No. 155251; Court of Appeals No. 331090.

Leave to Appeal Before Decision by the Court of Appeals Denied April 4, 2017:

SEJASMI INDUSTRIES, INC v A+MOLD, INC, No. 155057; Court of Appeals No. 336205.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Reconsideration Denied April 4, 2017:

PEOPLE v ETHERIDGE, No. 153177; Court of Appeals No. 329488. Leave to appeal denied at 500 Mich 880.

RHODA v PETER E O'DOVERO, INC, No. 153661; Court of Appeals No. 321363. Leave to appeal denied at 500 Mich 922.

PEOPLE v STEGALL, No. 153742; Court of Appeals No. 329479. Leave to appeal denied at 500 Mich 922.

PEOPLE v HAROLD JOHNSON, No. 153774; Court of Appeals No. 331527. Leave to appeal denied at 500 Mich 922.

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 153841; Court of Appeals No. 330795. Summary disposition entered at 500 Mich 902.

YOUNG, J., did not participate.

KOSIS v CITY OF LIVONIA, No. 153976; Court of Appeals No. 326211. Leave to appeal denied at 500 Mich 919.

PEOPLE v GERALD DICKERSON, No. 154006; Court of Appeals No. 331635. Leave to appeal denied at 500 Mich 923.

PEOPLE v JOHN ALEXANDER, No. 154008; Court of Appeals No. 331574. Leave to appeal denied at 500 Mich 923.

PEOPLE v ALEXANDER CARRIER, No. 154219; Court of Appeals No. 332880. Leave to appeal denied at 500 Mich 925.

OKRIE v STATE OF MICHIGAN, No. 154246; Court of Appeals No. 326607. Leave to appeal denied at 500 Mich 925.

PEOPLE v WYNN, No. 154258; Court of Appeals No. 331918. Leave to appeal denied at 500 Mich 925.

PEOPLE v WHARTON, No. 154301; Court of Appeals No. 326978. Leave to appeal denied at 500 Mich 928.

PEOPLE v CALABRESE, No. 154333; Court of Appeals No. 325220. Leave to appeal denied at 500 Mich 926.

PEOPLE v ANTHONY ANDERSON, No. 154349; Court of Appeals No. 333711. Leave to appeal denied at 500 Mich 926.

PEOPLE v CLYDE JORDAN, No. 154354; Court of Appeals No. 332226. Leave to appeal denied at 500 Mich 926.

SIMMONS v COURT OF APPEALS, No. 155284. Complaint for superintending control dismissed at 500 Mich 944.

Summary Disposition April 5, 2017:

CRAMER v VILLAGE OF OAKLEY, No. 154209; reported below: 316 Mich App 60. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate as moot Part III of the Court of Appeals opinion, see 316 Mich App 60, 63 n 1, 69 n 7 (2016), and we remand this case to the Shiawassee Circuit Court for dismissal of the plaintiff's Freedom of Information Act claims. See *Federated Publications, Inc v Lansing*, 467 Mich 98, 101 (2002). In all other respects, leave to appeal is denied. Thus, the award of attorney fees, costs, and disbursements remains vacated.

PEOPLE v BRANDON BENSON, No. 154784; Court of Appeals No. 333084. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals order holding that the investigative subpoena testimony of Bre'Ascia Dixon and Sierra Lattimore was properly admitted under MRE 801, and we remand this case to that court for reconsideration of the issue. The Court of Appeals erred in its analysis of MRE 801(d)(1)(A) by considering whether the witnesses were unavailable, rather than whether their prior statements were inconsistent. The unavailability of a witness is relevant for admission under MRE 804, not MRE 801. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Granted April 5, 2017:

PEOPLE v LONNIE ARNOLD, No. 154764; Court of Appeals No. 325407. The parties shall address: (1) whether MCL 750.335a(2)(c) requires the mandatory imposition of "imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life" for a person who commits the offense of indecent exposure by a sexually delinquent person, or whether the sentencing court may impose a sentence within the applicable guidelines range, see MCL 777.16q; (2)

whether the answer to this question is affected by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), which rendered the sentencing guidelines advisory; and (3) whether *People v Campbell*, 316 Mich App 279 (2016), was correctly decided.

We further order the Monroe Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 5, 2017:

TROWELL v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC, No. 154476; reported below: 316 Mich App 680. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the claims in the plaintiff's complaint sound in ordinary negligence or medical malpractice, *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411 (2004). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied April 5, 2017:

SAHOURI v HARTLAND CONSOLIDATED SCHOOLS, Nos. 153831 and 153832; Court of Appeals Nos. 321349 and 321399.

PEOPLE v CURTIS DICKERSON, No. 154027; Court of Appeals No. 324993.

BANK OF AMERICA, NA v FIDELITY NATIONAL TITLE INSURANCE COMPANY, Nos. 154190, 154191, 154192, and 154193; reported below: 316 Mich App 480.

PEOPLE v HOULE, No. 154253; Court of Appeals No. 332050.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered April 7, 2017:

ILIADES v DIEFFENBACHER NORTH AMERICA INC, No. 154358; Court of Appeals No. 324726. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff Steven Iliades's conduct prior to being injured constituted misuse of the press machine that was reasonably foreseeable. See MCL 600.2945(e) and MCL 600.2947(2). The parties should not submit mere restatements of their application papers.

YOUNG, J., did not participate.

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 154524 and 154526; reported below: 316 Mich App 265. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit that the petitioners are seeking to challenge, and (2) if not, whether the issuance of that permit was a decision of that agency subject to the contested case provisions of the Administrative Procedures Act, such that the time period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104(A). The parties should not submit mere restatements of their application papers.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for petitioners, and 20 minutes for respondent and AK Steel Corporation, to be divided at their discretion. MCR 7.314(B)(2).

Leave to Appeal Denied April 7, 2017:

PEOPLE v VANRHEE, No. 154680; Court of Appeals No. 334003.

MARKMAN, C.J. (*concurring*). For the reasons set forth in my concurring statement in *People v Keefe*, 498 Mich 962 (2015), I believe the trial court erred by accepting a plea agreement between defendant and the prosecutor that purported to allow the court to impose a minimum sentence *below* the 25-year mandatory minimum sentence for a first-degree criminal sexual conduct conviction "committed by an individual 17 years of age or older against an individual less than 13 years of age . . . ." MCL 750.520b(2)(b). I continue to believe that a "plea bargain cannot be allowed to supersede the Legislature's determination that a particular criminal offense is punishable by a mandatory minimum sentence." *Keefe*, 498 Mich at 965. Because MCL 750.520b(2)(b) provides for a mandatory minimum sentence of 25 years for the crime to which defendant pleaded guilty, the trial court did not possess the discretion to impose a minimum sentence less than 25 years, and the trial court erred by concluding that the parties' plea agreement provided it that discretion. See MCL 769.34(2)(a) ("If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court *shall* impose sentence in accordance with that statute.") (emphasis added). However, since the trial court, albeit in an exercise of judicial *discretion*, decided that there were "substantial and compelling" reasons to depart upwardly from the guidelines to sentence defendant to a 25-year minimum sentence, defendant ultimately received the sentence required by MCL 750.520b(2)(b). Accordingly, the trial court's error here was harmless, and I concur with the Court's order denying leave to appeal.

In re MAUTI, No. 155489; Court of Appeals No. 333662.

Leave to Appeal Denied April 12, 2017:

PEOPLE v ELRAY BAKER, No. 155538; Court of Appeals No. 337149.

Summary Disposition April 14, 2017:

RAGNOLI v NORTH OAKLAND-NORTH MACOMB IMAGING, INC, No. 153763; Court of Appeals No. 325206. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The trial court correctly held that, notwithstanding the low lighting in the parking lot, the presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch "open and obvious such that a reasonably prudent person would foresee the danger" of slipping and falling in the parking lot. See *Hoffner v Lanctoe*, 492 Mich 450, 464 (2012). We remand this case to the Oakland Circuit Court for reinstatement of the November 12, 2014 order granting summary disposition to the defendant.

BERNSTEIN, J., would deny leave to appeal.

In re SKIDMORE ESTATE, No. 154030; reported below: 314 Mich App 777 and 315 Mich App 470. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the May 24, 2016 judgment of the Court of Appeals and we reinstate the January 19, 2016 judgment of the Court of Appeals. The May 24, 2016 Court of Appeals opinion erroneously considered questions of fact regarding the plaintiff's decedent's (Catherine Skidmore) reasonableness in concluding that the defendant owed her a duty of reasonable care. As Judge O'CONNELL correctly noted in his concurrence/dissent to the May 24 opinion, "the existence of a disputed question of fact regarding the reasonableness of Catherine's actions did not affect whether Consumers owed Catherine a duty . . . ." 315 Mich App 470, 494 (2016). To the extent the January 19, 2016 opinion was unclear on this point, we clarify that questions of fact regarding the reasonableness of Catherine's actions in response to the downed power line are relevant to comparative negligence, but not duty. In all other respects, leave to appeal is denied.

PEOPLE v MEAD, No. 154584; Court of Appeals No. 327881. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court for consideration of: (1) whether this Court's peremptory order in *People v LaBelle*, 478 Mich 891 (2007), is distinguishable; (2) whether the record demonstrates that the police officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search, see *Illinois v Rodriguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990); and (3) whether there are any other grounds upon which the search may be justified. We do not retain jurisdiction.

Application for Leave to Appeal Dismissed on Stipulation April 14, 2017:

In re KOEHLER ESTATE, Nos. 153669 and 153670; reported below: 314 Mich App 667.

Leave to Appeal Denied April 17, 2017:

In re CLIFFMAN ESTATE, No. 151998; Court of Appeals No. 321174. On December 8, 2016, the Court heard oral argument on the application for leave to appeal the June 9, 2015 judgment of the Court of Appeals. On order of the Court, the application is again considered, MCR 7.305(H)(1), and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

YOUNG, J. (*dissenting*). I respectfully dissent and write to explain why I would reverse the decision rendered by the Court of Appeals panel below.

The Wrongful Death Act (WDA) creates a cause of action for injury and death caused by neglect or wrongful act, and it defines the persons who may collect a share of the proceeds of the claim.[1] At issue in this case is whether children of a decedent's predeceased spouse, Betty Carter, are eligible to share in the proceeds of a WDA claim. The appellants in this matter are the stepsons of the decedent, Gordon Cliffman. They claim to be entitled to a share of the WDA proceeds because their mother, Betty Carter, had been married to Cliffman, on whose behalf a WDA lawsuit had been filed and settled. The Court of Appeals held that the term "spouse" in the statutory phrase "children of the deceased's spouse" referred only to an individual who was married at the time of injury or death. According to the Court of Appeals, Cliffman was not married at the time of his death because his wife had predeceased him, which terminated the marriage. I disagree with this conclusion. I would hold instead, on the basis of the plain language of the statutory text, that children of a predeceased spouse of the decedent may recover a portion of the proceeds from a WDA claim. Therefore, I would reverse the judgment of the Court of Appeals, reverse the trial court's order granting appellees' petition, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 1976, Gordon Cliffman married Betty Carter. The two conceived no children together, but at the time they married, Betty had six biological children from a previous marriage. Cliffman never adopted these children, but he apparently raised them as his own. Betty died in 1996. Cliffman never remarried and fathered no biological children during his life.

On September 22, 2012, Cliffman was badly injured in an automobile accident, eventually succumbing to his injuries on October 2, 2012.[2] He died intestate. Cliffman's estate was opened in the Ottawa County Probate Court, and Phillip Carter, one of Betty's biological sons, was

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[1] See generally MCL 600.2922.

[2] Given this case's procedural posture, the facts underlying Cliffman's accident and death are sparse in the record before the Court, but the parties agree on the limited information I provide here.

appointed the personal representative of Cliffman's estate.[3] After it was discovered that the estate had been opened in the wrong county,[4] the probate proceedings were transferred to the Allegan County Probate Court, the probate court for the county in which Cliffman actually resided.

As personal representative of the estate, Phillip negotiated a WDA settlement related to the accident that caused Cliffman's death. Under the agreement, the estate received $50,000 in settlement of a third-party liability claim with the at-fault driver's insurance company. Phillip also negotiated a $250,000 settlement with Cliffman's insurance company of the estate's underinsured motorist coverage claim. The Allegan County Probate Court approved the gross settlement amount of $300,000. From this pot, the court approved payment of $100,000 in attorney fees, and it allocated $40,000 to the probate estate for Cliffman's conscious pain and suffering, as required by statute.[5] Because Cliffman died intestate, the portion of the settlement related to conscious pain and suffering was distributed to his heirs at law,[6] which did not include his four stepsons.[7] Each of the stepsons claimed a share in the remaining wrongful death settlement of $160,000. Appellees, Cliffman's sisters, objected to the stepsons' claims, and the trial court held, on the basis of *In re Combs Estate*,[8] that the stepsons had no right to wrongful death proceeds under the WDA.

The stepsons appealed the trial court's determination in the Court of Appeals. The Court affirmed the probate court in an unpublished per curiam opinion.[9] Pertinent to the sole issue before us, the panel reasoned:

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[3] Phillip Carter was later replaced as the personal representative of Cliffman's estate. The change in personal representatives is not relevant to the resolution of this case.

[4] It appears that the attorney initially retained to litigate Cliffman's personal injury claims mistakenly believed Cliffman was domiciled in Ottawa County.

[5] See MCL 600.2922(6)(d) ("The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and *to the estate of the deceased for compensation for conscious pain and suffering, if any*, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.") (emphasis added); see also *Mason v Cass Co Bd of Co Rd Comm'rs*, 221 Mich App 1, 6 (1997).

[6] The record is unclear regarding who, beyond his sisters, are Cliffman's heirs at law, eligible to recover from this portion of the proceeds. See MCL 600.2922(6)(d).

[7] Betty's other two children predeceased Cliffman.

[8] *In re Combs Estate*, 257 Mich App 622 (2003).

[9] *In re Cliffman Estate*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2015 (Docket No. 321174).

> [T]he issue of whether a decedent's stepchildren may share in a recovery from a wrongful-death settlement, when their parent who was married to the decedent has predeceased the decedent, was unequivocally settled by this Court in *In re Combs Estate*. There, this Court considered the plain language of MCL 600.2922(3)(b) and succinctly explained that the term "spouse" refers to "a married person." As a matter of law, it is well-settled in Michigan that the death of a spouse terminates a marriage. Given that death terminates a marriage, upon one party's death, the individuals are no longer married and the surviving individual no longer has a "spouse" within the meaning of MCL 600.2922(3)(b). As a result, stepchildren are not entitled to damages under MCL 600.2922(3)(b) when their parent, who was married to the decedent, has predeceased the decedent because these children are not "children of the deceased's *spouse.*"[10]

The stepsons sought leave to appeal the Court of Appeals' decision in this Court. In lieu of granting leave to appeal, this Court granted oral argument on the application to determine whether to grant leave or take other action.[11]

II. STANDARD OF REVIEW

Issues of statutory construction are reviewed de novo.[12] "An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature."[13] This Court also examines the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.[14] If the language of the statute is clear and unambiguous, "we assume that the Legislature intended its plain meaning and we enforce the statute as written."[15]

III. ANALYSIS

The question posed by this case is whether the term "the deceased's spouse" means "the deceased's [surviving] spouse." In *Combs*, the decision on which the panel below relied, the Court of Appeals held that "[a] 'spouse' is a married person" and that a marriage ends upon the

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[10] *Id*. at 2 (citations omitted), quoting *Combs*, 257 Mich App at 625.

[11] *In re Cliffman Estate*, 499 Mich 874 (2016).

[12] *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133 (2014).

[13] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002).

[14] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999).

[15] *People v Gardner*, 482 Mich 41, 50 (2008).

death of either spouse.[16] But this construction of the statute would render entire portions of MCL 600.2922(3) nugatory. If "spouse" were to mean only a married person and marriage truly ends upon death, there would never be a "spouse" in the WDA context because a WDA claim only arises upon someone's death. This would mean that even a living spouse could not recover; the living individual would not be a "spouse" under the WDA because the marriage ended with his or her partner's wrongful death. Instead, the Court of Appeals implicitly read words into the statute, interpreting it to mean "[t]he children of the deceased's [surviving] spouse" or "[t]he children of the deceased's spouse [at the time of the deceased's death]." I would not give the term "spouse" such a limited construction, as that construction is clearly contrary to the Legislature's intent.

The WDA governs actions for damages arising from injuries that result in death. It provides that if the conduct that caused death would have entitled the decedent to maintain a cause of action for damages had he or she lived, that cause of action survives the death of the decedent and can be maintained by the decedent's estate through a duly appointed personal representative.[17] The statute delineates specific persons who may be entitled to benefits.[18] The issue before the Court in this case requires us to determine the meaning of the phrase "[t]he children of the deceased's spouse" in MCL 600.2922(3). This subsection provides, in pertinent part:

> . . . [T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
>
> (a) *The deceased's spouse*, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
>
> (b) *The children of the deceased's spouse*.[19]

The decedent's stepsons claim a right to WDA proceeds based on MCL 600.2922(3)(b). When the language in MCL 600.2922(3) is considered in its entirety, the subsection provides that "[t]he children of the deceased's spouse" "may be entitled to damages" if they "suffer damages and survive the deceased."[20] It is an undisputed fact that the stepsons are Betty's natural children; the parties dispute only whether Betty could be considered Cliffman's "spouse" under the WDA, and thus, whether the stepsons are "children of the deceased's spouse."

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[16] *Combs*, 257 Mich App at 625.

[17] See MCL 600.2922.

[18] See MCL 600.2922(3).

[19] MCL 600.2922(3) (emphasis added).

[20] *Id*.

The WDA does not define "spouse." Therefore, this Court must give the undefined statutory term its plain and ordinary meaning. We may consult a dictionary to ascertain the common meaning of a word.[21] A common word or phrase is to be determined by consulting a lay dictionary,[22] while legal terms of art must be construed according to their peculiar and appropriate meaning.[23] If the definitions of a term are consistent in both lay and legal dictionaries, it is unnecessary for a Court to determine whether the term or phrase is a term of art.[24]

The American Heritage Dictionary (2d College ed) defines "spouse" as "[a] marriage partner; husband or wife."[25] *Black's Law Dictionary* (5th ed) defines "spouse" as simply "[o]ne's wife or husband."[26] This definition has not changed substantially over time. A more modern dictionary copyrighted in 2014, *Merriam-Webster's Collegiate Dictionary* (11th ed), defines "spouse" as "betrothed man, groom & . . . betrothed woman, bride[.]"[27] *Black's* Fifth Edition also has a separate definition for "surviving spouse," which is "[t]he spouse who outlives the other spouse. Term commonly found in statutes dealing with probate, administration of estates and estate and inheritance taxes." Similarly, *Black's Law Dictionary* (6th ed), copyrighted in 1990, shortly after the 1985 amendment of the WDA, defines "spouse" as "[o]ne's husband or wife, and 'surviving spouse' is one of a married pair who outlive[s] the other." This suggests that the term "spouse," absent the adjective "surviving," should also include deceased persons. In short, the ordinary meaning of the term "spouse" does not have an inherent temporal definition relevant to this dispute. And, it is my conclusion that the statutory text and context indicate that "spouse" as used in the WDA is also not temporally limited.

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[21] *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62 (2016), citing *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008).

[22] *Hecht*, 499 Mich at 621 n 62.

[23] MCL 8.3a; *Hecht*, 499 Mich at 621 n 62.

[24] *Hecht*, 499 Mich at 621 n 62.

[25] This dictionary was copyrighted in 1982, and the pertinent phrasing in MCL 600.2922(3) was modified and enacted in 1985. See 1985 PA 93, effective July 10, 1985. (Subsequent amendments of MCL 600.2922 did not alter this language.) Thus, the *American Heritage Dictionary* is enlightening as a contemporary definition of the term chosen by our Legislature. See, e.g., *In re Certified Question from the United States Court of Appeals for the Ninth Circuit*, 499 Mich 477, 484 (2016) ("[I]t is best to consult a dictionary from the era in which the legislation was enacted."); *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247 (2005).

[26] The Fifth Edition was copyrighted in 1979, shortly before the 1985 enactment of the pertinent phrasing in MCL 600.2922(3).

[27] *Merriam-Webster's Collegiate Dictionary* (11th ed) further defines "betrothed" as "the person to whom one is betrothed" and "betroth" as "to promise to marry" or "to give in marriage."

MCL 600.2922(3)(b) is not the only provision of the WDA that uses the term "the deceased's spouse." Specifically, the Legislature refers to "the deceased's spouse" in MCL 600.2922(3)(a), when it describes another set of "persons who may be entitled" to recover WDA damages. This Court has consistently held that we must read related statutory provisions together to create a harmonious whole:

> [I]t is well established that "we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." However, it is equally well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole. "[A]ny attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent."[28]

In MCL 600.2922(3)(a), the Legislature listed a number of persons who may collect WDA proceeds—specifically including "[t]he deceased's spouse":

> *The deceased's spouse*, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.[29]

If, as the Court of Appeals has held in this context, marriage ended upon the death of either spouse, and the term "spouse" meant only a person currently married to another living person, the portion of MCL 600.2922(3)(a) providing that "[t]he deceased's spouse" could take some portion of the WDA proceeds would be rendered nugatory. Quite simply, if spousal status were dependent on an existing marriage, the death of either party to a marriage would eliminate the existence of any spouse. There will always be a death triggering a WDA claim.[30] By expressly providing that "[t]he deceased's spouse" is eligible to recover WDA proceeds if he or she meets the other statutory requirements, it is clear that the Legislature did not intend the narrow reading of the term "[t]he

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[28] *Robinson v City of Lansing*, 486 Mich 1, 15-16 (2010) (citations omitted; second and third alterations in original).

[29] Emphasis added.

[30] MCL 600.2922(1) ("Whenever the death of a person, injuries resulting in death, or death as described in [MCL 600.2922a] 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 . . . .").

deceased's spouse" used by the Court of Appeals. Therefore, I would hold that a deceased's spouse does not cease to be a spouse merely because he or she predeceased the WDA decedent. The status of "spouse" continues after death—limited to this specific context[31]—and the predeceased spouse's children are eligible to recover WDA damages. As long as the stepchildren "survive the deceased,"[32] it should not matter that their parent, i.e., "the deceased's spouse," is already dead. The children maintain the ability to recover WDA proceeds through their relationship to the deceased's spouse regardless of whether that spouse has already passed away.

Betty's death before Cliffman obviously precluded *her* from taking some portion of the WDA proceeds,[33] but the Legislature did not intend Betty's death to preclude *her children* from the opportunity to claim a portion of the WDA proceeds upon the death of her husband, Cliffman. For the purposes of the WDA, Betty remained Cliffman's "spouse" after her death, and her children remained eligible to share the WDA damages upon Cliffman's death.[34] Consequently, I would overrule *Combs* and its declaration that a person's spousal status under the WPA terminates when either spouse dies.

While not strictly necessary to my conclusion, my rejection of a "surviving spouse" construction of MCL 600.2922(3)(b) is also supported

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[31] The Legislature is, of course, free to apply or define the term "spouse" in a contrary fashion in other contexts. See *Kuznar v Raksha Corp*, 481 Mich 169, 176 (2008).

[32] MCL 600.2922(3).

[33] *Id*. ("[T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and *survive the deceased* . . . .") (emphasis added).

[34] While the Court of Appeals below relied in part on this Court's recent decision in *In re Certified Question from the United States Dist Court for the Western Dist of Mich*, 493 Mich 70, 79 (2012), it was error to do so. That decision is distinguishable because the pertinent statutory term at issue was "married woman," not "spouse." *Id*. at 78. Because the plaintiff was not "a married woman" at the time she "utiliz[ed] . . . assisted reproductive technology," given her husband's prior death, the resulting child could not recover from the deceased father in probate. *Id*. at 78-79. The pertinent statutory text at issue in *In re Certified Question* is not before this Court; we are concerned solely with the meaning of the phrase "children of the deceased's spouse" as used in the WDA. MCL 600.2922(3)(b). Additionally, the other cases relied on by the Court of Appeals below or in *Combs*, 257 Mich App at 625 nn 5-6, in coming to a conclusion contrary to my analysis, are similarly distinguishable as arising in the context of divorce proceedings, *Tiedman v Tiedman*, 400 Mich 571 (1977); *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997), or access to social services benefits, *Cornwell v Dep't of Social Servs*, 111 Mich App 68 (1981).

by the statutory history of the WDA. This Court has long held that legislative amendments are presumed to change the meaning of an existing statute.[35] The original version of MCL 600.2922 was enacted in 1961.[36] At that time, the pertinent section provided:

> Every such action [wrongful death lawsuit] shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action for pecuniary injury resulting from such death shall be distributed to the *surviving spouse* and next of kin who suffered such pecuniary injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the total pecuniary loss suffered by the *surviving spouse* and all of the next of kin, and the proportion of such total pecuniary loss suffered by the *surviving spouse* and each of the next of kin of such deceased person, as shown by the evidence introduced upon the trial of such case. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total pecuniary loss suffered by the *surviving spouse* and next of kin shall be distributed, and the proportionate share thereof to be distributed

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[35] See, e.g., *Bush v Shabahang*, 484 Mich 156, 167 (2009) ("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."); *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205 (1944) ("It may be presumed that by the 1941 amendment the legislature intended to change the meaning of the existing law.").

[36] 1961 PA 236, effective January 1, 1963.

> to the *surviving spouse* and the next of kin. The remainder of the proceeds of such judgment shall be distributed according to the intestate laws.[37]

This long and unwieldy paragraph uses the term "spouse" five times, and each use is preceded by the term "surviving." There can be no mistaking the Legislature's intent to preclude recovery by or through a predeceasing spouse in the original version of the WDA.

In 1985, the Legislature undertook extensive efforts to reorganize the WDA. In that amendment, the Legislature mercifully broke the statute down into multiple subsections and, significantly to this case, deleted any mention of the term "surviving spouse," replacing it with simply "spouse."[38] I cannot presume this amendment to have been perfunctory, and the removal of "surviving" must make the term "spouse" distinct from "surviving spouse." Therefore, the 1985 amendment bolsters my textual conclusion that the children of a predeceased spouse can recover WDA proceeds.[39]

While I would hold that the stepsons—as "children of the deceased's spouse"[40]—are among the classes of people who *may* recover WDA proceeds resulting from Cliffman's death, whether they have a *right* to a portion of the settlement remains undetermined. The WDA limits "the person or persons who may be entitled to damages under this section" to individuals "who suffer damages and survive the deceased."[41] Therefore, under my preferred construction of the statutory text, it would

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[37] MCL 600.2922(2), as enacted by 1961 PA 236 (emphasis added).

[38] MCL 600.2922, as amended by 1985 PA 93, effective July 10, 1985.

[39] The intent of the amendment is made clear by reviewing the text of the original version of the WDA. One sentence of the prior version provided: "The amount recovered in every such action for pecuniary injury resulting from such death shall be distributed to the *surviving spouse* and next of kin who suffered such pecuniary injury and in proportion thereto." MCL 600.2922(2), as enacted by 1961 PA 236 (emphasis added). Another sentence noted that, "[a]fter providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total pecuniary loss suffered by the *surviving spouse* and next of kin shall be distributed, and the proportionate share thereof to be distributed to the *surviving spouse* and the next of kin." *Id*. (emphasis added). These particular sentences were aimed at exactly what is at issue before this Court: to whom WDA proceeds can be awarded. Under the 1961 version of the WDA, a predeceasing spouse, and thus her children, were excluded.

[40] MCL 600.2922(3)(b).

[41] MCL 600.2922(3).

remain incumbent on the stepsons in remand proceedings to prove that they have suffered damages as a result of Cliffman's death.

IV. CONCLUSION

Interpreting the plain meaning of "children of the deceased's spouse" in MCL 600.2922(3)(b) in the context of the rest of the WDA, I would conclude that the stepsons are eligible to recover WDA proceeds despite the fact that their mother, the "deceased's spouse," predeceased the decedent in this case. The WDA clearly envisions that a "spouse" may predecease the decedent involved in the WDA action, but still allows that spouse's children to recover damages under the WDA. For these reasons, I would reverse the Court of Appeals' and trial court's determinations to the contrary and remand for further proceedings.

MARKMAN, C.J., and VIVIANO, J., join the statement of YOUNG, J.

BERNSTEIN, J., did not participate.

Reconsideration Granted April 21, 2017:

THOMAS v ATTORNEY GRIEVANCE COMMISSION, No. 155415. On order of the Chief Justice, plaintiff's motion for reconsideration of the Court's April 3, 2017 order closing this file for failure to pay the initial filing fee is granted. Plaintiff has sufficiently shown that he attempted to pay the full filing fee in a timely manner and such fee has since been received by the Court. The Clerk of the Court is hereby directed to reopen this file.

Leave to Appeal Denied April 21, 2017:

PEOPLE v ZOULEK, No. 154266; Court of Appeals No. 332650.

MARKMAN, C.J. (*dissenting*). A defendant is assessed points for Offense Variable 11 if he or she: (a) commits one or more sexual penetrations in *addition* to the sexual penetration that "forms the basis of" the sentencing offense and (b) the additional penetration also "*aris*[*es*] *out of* the sentencing offense." MCL 777.41. There must be a "connective relationship, a cause and effect relationship, of more than an incidental sort" between the additional penetration and the sentencing offense. *People v Johnson*, 474 Mich 96, 101 (2006). Here, while the victim testified that she had been sexually penetrated on multiple occasions, there was no evidence that any of these arose out of the sentencing offense. Because trial counsel clearly rendered ineffective assistance when he incorrectly informed the court that a score of 50 points (rather than 0 points) was proper based on the victim's testimony and appellate counsel was also ineffective for failing to raise this obvious error in the Court of Appeals, I would remand for resentencing. *People v Francisco*, 474 Mich 82 (2006).

Reconsideration Denied April 21, 2017:

PEOPLE v SWIFT, No. 151439; Court of Appeals No. 318680. Leave to appeal denied at 500 Mich 950.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 27, 2017:

PEOPLE v JOHNNY KENNEDY, No. 154445; Court of Appeals No. 323741. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel addressing whether the trial court abused its discretion under MCL 775.15 and/or violated the defendant's constitutional right to present a defense when it denied his request to appoint a DNA expert. See *People v Tanner*, 469 Mich 437 (2003); *Ake v Oklahoma*, 470 US 68, 74 (1985) ("We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."); *Moore v State*, 390 Md 343, 364 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").

Leave to Appeal Denied April 27, 2017:

PEOPLE v BYARS, No. 154121; Court of Appeals No. 332326. By order of November 30, 2016, the prosecuting attorney was directed to answer the application for leave to appeal the July 1, 2016 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. This denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR 6.500 *et seq.* that may include the issue of whether his appellate counsel provided ineffective assistance of counsel when appellate counsel failed to properly notice the defendant's pro se motion for a new trial and/or to seek an adjournment.

PEOPLE v DERRICK WILLIAMS, No. 154203; Court of Appeals No. 332029. On order of the Court, the application for leave to appeal the July 14, 2016 order of the Court of Appeals is considered, and with respect to the nonsentencing issues it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). As to the sentencing issues, leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court. We note that although the defendant alleges errors in the guidelines range under which he was sentenced, by order of September 18, 2015, the Wayne Circuit Court held the sentencing issues in abeyance and it has not yet rendered a final decision

COCKRELL v LOCHER, No. 154438; Court of Appeals No. 327434.

PEEBLES v DEPARTMENT OF TRANSPORTATION, No. 154642; Court of Appeals No. 327649.

Leave to Appeal Granted April 28, 2017:

PUCCI v NINETEENTH JUDICIAL DISTRICT COURT, No. 153893; Court of Appeals No. 325052. The parties shall include among the issues to be briefed: (1) whether the chief judge of a district court possesses the authority to adopt an employee indemnification policy on behalf of the district court, MCL 691.1408(1); MCR 8.110(C); (2) if a chief judge possesses such authority, whether the judge may adopt a policy that indemnifies employees for liability incurred in their individual capacities; and (3) whether the conduct of Judge Somers that gave rise to the judgment against him in the federal district court occurred "while in the course of employment and while acting within the scope of his . . . authority." MCL 691.1408(1).

The Michigan Association of Counties, Michigan Judges Association, Michigan Probate Judges Association, Michigan District Judges Association, Michigan Municipal League, City of Dearborn, and Judge Mark W. Somers 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.

Leave to Appeal Denied April 28, 2017:

In re SPAGNOLA, No. 155526; Court of Appeals No. 335543.

In re CRAWFORD, No. 155559; Court of Appeals No. 334166.

In re RUFFIN, No. 155610; Court of Appeals No. 334126.

PEOPLE v FLY, No. 154791; Court of Appeals No. 329151.

Summary Disposition May 2, 2017:

PEOPLE v THORNHILL, Nos. 154708 and 154709; Court of Appeals Nos. 326865 and 326866. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional restraint on its discretion, it may affirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional restraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Summary Disposition May 2, 2017:

PEOPLE v DAWAYNE JOHNSON, No. 154844; Court of Appeals No. 331164. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. We do not retain jurisdiction.

WILLIAMS v SHAPIRO, No. 154901; Court of Appeals No. 332909. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v RAMSEY, No. 155321; Court of Appeals No. 334614. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied May 2, 2017:

PEOPLE v CHARLES MOORE, No. 153922; Court of Appeals No. 330155.

DOZIER v STATE AUTO PROPERTY & CASUALTY COMPANY, No. 153930; Court of Appeals No. 331004.

PEOPLE v SHAROC RICHARDSON, No. 154108; Court of Appeals No. 322195.

MARROCCO v OAKLAND MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT, Nos. 154166 and 154167; Court of Appeals Nos. 326575 and 327614.

VIVIANO, J., did not participate due to a familial relationship with counsel of record. MCR 2.003(C)(1)(g)(ii).

In re PAYEA ESTATE, No. 154211; Court of Appeals No. 325391.

PEOPLE v SHAHOLLI, No. 154217; Court of Appeals No. 325399.

PEOPLE v LAROSE, No. 154230; Court of Appeals No. 326871.

PEOPLE v LAMPE, No. 154242; Court of Appeals No. 326660.

PEOPLE v PITTMAN, No. 154248; Court of Appeals No. 332883.

PEOPLE v KENYAN BOOKER, No. 154259; Court of Appeals No. 325977.

FRAZIER v UITVLUGT, No. 154277; Court of Appeals No. 325241.

PEOPLE v WILLIAM NEIL LEE, No. 154280; Court of Appeals No. 332878.

PEOPLE v TANK, No. 154294; Court of Appeals No. 330769.

PEOPLE v RODNEY DAVIS, No. 154314; Court of Appeals No. 325626.

SOLIS v THE KROGER COMPANY OF MICHIGAN, No. 154356; Court of Appeals No. 326259.

PEOPLE v BELLOR, No. 154397; Court of Appeals No. 327424.

PEOPLE v ROBERTSON, No. 154410; Court of Appeals No. 332030.

PEOPLE v STEPHENSON, No. 154426; Court of Appeals No. 333718.

In re IRVIN ESTATE, No. 154427; Court of Appeals No. 332163.

PEOPLE v TYRONE FORD, No. 154432; Court of Appeals No. 332628.

PEOPLE v RAAR, No. 154433; Court of Appeals No. 333464.

PEOPLE v RONALD KENNEDY, No. 154448; Court of Appeals No. 333655.

PEOPLE v CONKLIN, No. 154453; Court of Appeals No. 332169.

CAREY v FOLEY & LARDNER, LLP, No. 155464; Court of Appeals No. 321207.

PEOPLE v NEVITT, No. 154480; Court of Appeals No. 333977.

PEOPLE v JOSEPH SUTTON, No. 154481; Court of Appeals No. 331760.

PEOPLE v JAMAL BOWMAN, No. 154482; Court of Appeals No. 332960.

PEOPLE v NEVILLS, No. 154483; Court of Appeals No. 328463.

PEOPLE v LATIMER, No. 154486; Court of Appeals No. 333540.

PEOPLE v WILLIE LOVE, No. 154487; Court of Appeals No. 333736.

INTERNATIONAL OUTDOOR, INC v CITY OF HARPER WOODS, No. 154493; Court of Appeals No. 325469.

PEOPLE v SHELTON CARTER, No. 154497; Court of Appeals No. 333112.

PEOPLE v KARON THOMAS, No. 154503; Court of Appeals No. 323358.

PEOPLE v BEAGLE, No. 154516; Court of Appeals No. 334201.

PEOPLE v PRITCHELL, No. 154523; Court of Appeals No. 333222.

PEOPLE v STEPHEN JOHNSON, No. 154533; Court of Appeals No. 333111.

PEOPLE v JERMAINE JACKSON, No. 154538; Court of Appeals No. 333934.

PEOPLE v PEETE, No. 154561; Court of Appeals No. 333103.

PEOPLE v COCHRAN, No. 154570; Court of Appeals No. 332978.

PEOPLE v FLORES, No. 154572; Court of Appeals No. 326936.

PEOPLE v LOPP, No. 154576; Court of Appeals No. 332119.

PEOPLE v MAYRAND, No. 154582; Court of Appeals No. 333647.

PEOPLE v CHARLES DAVIS, No. 154588; Court of Appeals No. 333542.

PEOPLE v AL-YASIRY, No. 154598; Court of Appeals No. 326677.

PEOPLE v COLEMAN EDWARDS, No. 154617; Court of Appeals No. 334138.

PEOPLE v LAMAR DAVIS, No. 154618; Court of Appeals No. 333277.

PEOPLE v ADORNO, No. 154623; Court of Appeals No. 333274.

PEOPLE v ISAIAH CLARK, No. 154627; Court of Appeals No. 323369.

PEOPLE v MANNING, No. 154629; Court of Appeals No. 332671.

PICKLE v MCCONNELL, Nos. 154638 and 154639; Court of Appeals Nos. 327305 and 327312.

MICHIGAN BATTERY EQUIPMENT, INC v EMCASCO INSURANCE COMPANY, No. 154643; reported below: 317 Mich App 282.

PEOPLE v JASMAN, No. 154645; Court of Appeals No. 333047.

PEOPLE v DIGGS, No. 154646; Court of Appeals No. 334118.

PEOPLE v KAUFMAN, No. 154648; Court of Appeals No. 333676.

ALTMAN MANAGEMENT COMPANY v AON RISK INSURANCE SERVICES WEST, INC, No. 154651; Court of Appeals No. 328593.

PEOPLE v MOELLER, No. 154653; Court of Appeals No. 333982.

PEOPLE v IVORY SMITH, No. 154655; Court of Appeals No. 333296.

PEOPLE v STEFAN SIMPSON, No. 154659; Court of Appeals No. 333233.

PEOPLE v STILES, No. 154660; Court of Appeals No. 332626.

PEOPLE v DELEON JONES, No. 154662; Court of Appeals No. 334038.

PEOPLE v KANERVA, No. 154676; Court of Appeals No. 333838.

PEOPLE v PARKIN, No. 154689; Court of Appeals No. 330534.

PEOPLE v MARSHALL, No. 154715; Court of Appeals No. 327633.

PEOPLE v FULLER, No. 154719; Court of Appeals No. 334170.

PEOPLE v ARMOUR, No. 154725; Court of Appeals No. 332411.

PEOPLE v GROOMS, No. 154732; Court of Appeals No. 334249.

PEOPLE v ANDREW CAMPBELL, No. 154747; Court of Appeals No. 327059.

PEOPLE v JOMO THOMAS, No. 154767; Court of Appeals No. 326806.

MORRIS v SCHNOOR, No. 154785; Court of Appeals No. 321925.

RUBEN v ALLSTATE INSURANCE COMPANY and ALLSTATE INSURANCE COMPANY v RUBEN, No. 154787; Court of Appeals No. 326717.

PEOPLE v BOURLIER, No. 154792; Court of Appeals No. 334534.

PEOPLE v GRIMES, No. 154802; Court of Appeals No. 327489.

PEOPLE v MICHAEL ANDERSON, No. 154812; Court of Appeals No. 333995.

PEOPLE v DAVID JONES, No. 154816; Court of Appeals No. 327602.

PEOPLE v REDUS, No. 154822; Court of Appeals No. 328133.

PEOPLE v MARIA WILLIAMS, No. 154830; Court of Appeals No. 334387.

PEOPLE v COY, No. 154845; Court of Appeals No. 327809.

PEOPLE v DANIEL MOORE, No. 154849; Court of Appeals No. 333674.

PEOPLE v DARRELL SMITH, No. 154855; Court of Appeals No. 327575.

HOPKINS v DENEWETH, DUGAN & PARFITT, PC, No. 154861; Court of Appeals No. 327741.

PEOPLE v SHUMATE, No. 154863; Court of Appeals No. 334932.

PEOPLE v MCINTOSH, No. 154893; Court of Appeals No. 327670.

PEOPLE v MASSENGALE, No. 154895; Court of Appeals No. 334613.

PEOPLE v JESS BOWMAN, No. 154896; Court of Appeals No. 327596.

PEOPLE v REMUS, No. 154903; Court of Appeals No. 327599.

PEOPLE v MCCASKILL, No. 154904; Court of Appeals No. 327600.

PEOPLE v LETT, No. 154909; Court of Appeals No. 328156.

PEOPLE v BERNARD HILL, No. 154916; Court of Appeals No. 328466.

PEOPLE v POPLIN, No. 154921; Court of Appeals No. 334762.

PEOPLE v GLASPIE, No. 154929; Court of Appeals No. 327943.

PEOPLE v DIABO, No. 154932; Court of Appeals No. 330623.

PEOPLE v LASAIL HAMILTON, No. 154934; Court of Appeals No. 324608.

PEOPLE v WILLIAM MILLER, No. 154935; Court of Appeals No. 328502.

PEOPLE v SANDERS, No. 154937; Court of Appeals No. 327060.

PEOPLE v MCCARTHY, No. 154938; Court of Appeals No. 335004.

PEOPLE v LORENZO TOWNSEND, No. 154940; Court of Appeals No. 332991.

PEOPLE v GIBSON, No. 154942; Court of Appeals No. 327748.

PEOPLE v WILBURN, No. 154948; Court of Appeals No. 327061.

PEOPLE v JEFFRIES, No. 154950; Court of Appeals No. 328120.

PEOPLE v DQUAN HAMILTON, No. 154953; Court of Appeals No. 334713.

PEOPLE v GARRETT, No. 154956; Court of Appeals No. 333533.

PEOPLE v AYERS, No. 154963; Court of Appeals No. 334750.

PEOPLE v DEBRUYN, No. 154973; Court of Appeals No. 334820.

PEOPLE v LAVALLEY, No. 154984; Court of Appeals No. 334545.

PEOPLE v WIGGINS, No. 155010; Court of Appeals No. 334909.

PEOPLE v LOTT, No. 155011; Court of Appeals No. 334622.

PEOPLE v MEANS, No. 155015; Court of Appeals No. 334714.

WHITTAKER v OAKLAND COUNTY SHERIFF, No. 155018; Court of Appeals No. 329545.

PEOPLE v NAILS, No. 155028; Court of Appeals No. 334971.

PEOPLE v OTTO, No. 155029; Court of Appeals No. 334414.

SHAW v PISKOROWSKI, No. 155033; Court of Appeals No. 329027.

PEOPLE v HARRY MAINE, No. 155039; Court of Appeals No. 328475.

PEOPLE v THOMAS WHITE, No. 155043; Court of Appeals No. 332486.

PEOPLE v SHEARD, No. 155055; Court of Appeals No. 328514.

BAUBLIS v CITY OF ANN ARBOR, No. 155058; Court of Appeals No. 328320.

PEOPLE v MISTY CLARK, No. 155074; Court of Appeals No. 335176.

PEOPLE v STURGIS, No. 155125; Court of Appeals No. 333606.

STOLL v EMMET CIRCUIT COURT CHIEF JUDGE, No. 155143; Court of Appeals No. 328998.

PEOPLE v DANIEL MOORE, No. 155323; Court of Appeals No. 334702.

PEOPLE v DONALD NELSON, No. 155326; Court of Appeals No. 332115.

PEOPLE v PLIS, No. 155328; Court of Appeals No. 332116.

PEOPLE v AMANDA STEWART, No. 155445; Court of Appeals No. 336237.

Reconsideration Denied May 2, 2017:

PEOPLE v SAGE LEWIS, No. 153792; Court of Appeals No. 330717. Leave to appeal denied at 500 Mich 897.

In re PETITION OF CASS COUNTY TREASURER FOR FORECLOSURE, No. 153797; Court of Appeals No. 324519. Leave to appeal denied at 500 Mich 882.

Motion to Seal Denied May 2, 2017:

LAWRENCE v BOARD OF LAW EXAMINERS, No. 144191.

ZAHRA, J., did not participate for the reasons set forth in his previous statement in this case, 490 Mich 935 (2011).

Summary Disposition May 3, 2017:

CITY OF HUNTINGTON WOODS v CITY OF OAK PARK, No. 152035; reported below: 311 Mich App 96. On order of the Court, the motion to expand the record is granted. In light of the expanded record, on the Court's own motion, we vacate that part of this Court's November 2, 2016 order granting leave to appeal. In addition, we vacate the June 11, 2015 judgment of the Court of Appeals and the April 3, 2014 order of the Oakland Circuit Court, and we remand this case to the Oakland Circuit Court for reconsideration in light of the expanded record. We do not retain jurisdiction.

Leave to Appeal Denied May 5, 2017:

LAKIN v RUND, No. 155103; reported below: 318 Mich App 127.

MARKMAN, C.J. (*concurring*). I concur with this Court's order denying leave to appeal because I agree with the Court of Appeals that words charging an individual with a crime only constitute defamation per se if the crime involves moral turpitude or would subject the person to an infamous punishment, and battery does not fall within either of these categories. Contrary to plaintiffs' contention, MCL 600.2911(1) neither explicitly nor implicitly abrogated the common-law rule for defamation per se relating to an allegation of a crime. In addition, while I agree with the Court of Appeals that defendant Rund's statement can be interpreted as imputing to plaintiff Sanford the criminal offense of battery, I do not believe that is the *best* interpretation of the statement. That is, when defendant, a nun, stated to members of her church that plaintiff, a volunteer church lector, had "put a finger in her chest" during a contentious discussion concerning who should be assigned the reading at a particular mass, I do not believe a battery was necessarily asserted. Instead, it is entirely possible, and indeed more likely, in my opinion, that defendant spoke colloquially and not literally in her descriptions of the encounter and, thus, did not assert that plaintiff battered her, but instead asserted that plaintiff had been overzealous in gesturing while upset in defendant's close proximity. Nevertheless, I agree with the Court of Appeals that we must view the complaint in the light most favorable to plaintiffs, which requires us to assume that defendant did assert that plaintiff battered her.

ZAHRA, J., joins the statement of MARKMAN, C.J.

Application for Leave to Appeal Dismissed on Stipulation May 5, 2017:

PEARSON v CITY OF RIVER ROUGE, No. 154612; Court of Appeals No. 327581.

Summary Disposition May 10, 2017:

EMPLOYERS MUTUAL CASUALTY COMPANY v HELICON ASSOCIATES, INC, No. 152994; reported below: 313 Mich App 401. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, which determined that the plaintiff is entitled to summary disposition on the basis of its insurance policy's "fraud or dishonesty" exclusion. The plaintiff's policy provides coverage for "wrongful act[s]," defined as "[a]ctual or alleged errors," "[m]istatement[s] or misleading statement[s]," and "[a]ct[s] of omission or neglect or breach of duty by an 'insured' . . . [i]n the discharge of 'organizational' duties." The policy excludes from this coverage, *inter alia*, "[a]ny action brought against an 'insured' if by judgment or adjudication such action was based on determination that acts of fraud or dishonesty were committed by the 'insured.' " As the Court of Appeals correctly recognized, this "fraud or dishonesty" exclusion does not eliminate coverage for acts of "[m]ere negligence" by the insured. The Court of Appeals erred, however, by nonetheless concluding that the exclusion barred coverage for the federal consent judgment at issue in this case. The judgment states only that it is "on Plaintiff[s'] claims pursuant to Section 36b-29(a)(2) of the Connecticut Uniform Securities Act," a provision that imposes liability for "untrue statement[s]" and "omission[s]" made both knowingly and negligently. See Conn Gen Stat § 36b-29(a)(2) (imposing liability for, *inter alia*, "offer[ing] or sell[ing] . . . a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading," when the offeror or seller "knew or in the exercise of reasonable care should have known of the untruth or omission"); see also, e.g., *Lehn v Dailey*, 77 Conn App 621, 631 (2003). Consistent with this scope of statutory liability, the "claims" on which the judgment is based comprise allegations of negligent misrepresentations and omissions. Thus, even if this judgment were "based on a determination" for purposes of the "fraud or dishonesty" exclusion, at most it determined that the Connecticut statutory provision had been violated as alleged; it did not determine that any such violation was based on dishonest or fraudulent, rather than merely negligent, misrepresentations or omissions by the insured. Accordingly, the judgment did not amount to "a determination that acts of fraud or dishonesty were committed by the 'insured,' " such that coverage for it was barred by the "fraud or dishonesty" exclusion. We remand this case to the Court of Appeals for consideration of the remaining policy exclusions raised by the defendants but not addressed by that court in its initial review of this case.

WILDER, J., took no part in the decision of this case.

PEOPLE v BARBARA CARTER, No. 153092; Court of Appeals No. 322207. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the Court of Appeals judgment and we remand this case to that court for reconsideration in light of *People v Stevens*, 498 Mich

162 (2015). 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.

WILDER, J., took no part in the decision of this case.

PEOPLE v HAMLIN, No. 153128; Court of Appeals No. 321352. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the Court of Appeals judgment and we remand this case to that court for reconsideration in light of *People v Stevens*, 498 Mich 162 (2015). 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.

WILDER, J., took no part in the decision of this case.

PEOPLE v PERNELLAR HAWKINS, No. 154766; Court of Appeals No. 334270. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence and we remand this case to the Wayne Circuit Court for resentencing. There is no indication in the record that, at sentencing, the trial court considered an updated Sentencing Information Report, or applicable guidelines range, in imposing its sentence following the defendant's probation violations. Sentencing courts must consult the applicable guidelines range and take it into account when imposing a sentence. See *People v Lockridge*, 498 Mich 358, 392 (2015); MCL 771.14(2)(e); MCR 6.445(G) and MCR 6.425(D). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

WILDER, J., took no part in the decision of this case.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 10, 2017:

WALTERS v FALIK, No. 154489; Court of Appeals No. 319016. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in its interpretation of MCL 600.2955(1) and MRE 702; and (2) whether the trial court erred in its application of those evidentiary standards or abused its discretion in granting the defendants' motions to exclude the plaintiff's experts' testimony and for summary disposition. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

WILDER, J., took no part in this decision.

JENDRUSINA v MISHRA, No. 154717; reported below: 316 Mich App 621. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff's complaint was timely filed under MCL 600.5838a(2). *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997). The parties should not submit mere restatements of their application papers.

The Michigan State Medical Society, Michigan Defense Trial Counsel, Inc., Michigan Association for Justice, and Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

WILDER, J., took no part in this decision.

Leave to Appeal Denied May 10, 2017:

MAKOWSKI v GOVERNOR, No. 154502; reported below: 317 Mich App 434.

MCCORMACK, J., did not participate because of her prior involvement in this case.

WILDER, J., took no part in the decision of this case.

PEOPLE v CROSKEY, No. 154762; Court of Appeals No. 327938.

WILDER, J., took no part in the decision of this case.

PEOPLE v AVANTIS PARKER, No. 155130; Court of Appeals No. 328323.

WILDER, J., took no part in the decision of this case.

Summary Disposition May 12, 2017:

In re APPLICATION OF MICHIGAN ELECTRIC TRANSMISSION COMPANY FOR TRANSMISSION LINE, No. 150695; reported below: 309 Mich App 1. 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 affirm the judgment of the Court of Appeals on the basis that appellant Oshtemo Township exercised control over its streets pursuant to clause three of Const 1963, art 7, § 29 when it enacted Zoning Ordinance No. 525 and that § 230.004(b) of such Ordinance—requiring that all new utility "lines, wires, and/or related facilities and equipment" within the Township be constructed underground "within the public road right-of-way and to a point within 250 feet either side of said public right-of-way"—is unconstitutional because it is unreasonable. See *People v McGraw*, 184 Mich 233, 238 (1915). Therefore, the certificate that appellee Michigan Public Service Commission issued to appellee Michigan Electric Transmission Company pursuant to the Electric Transmission Line Certification Act, MCL 460.564 *et seq*., prevails over § 230.004(b) of Ordinance No. 525.

WILDER, J., took no part in the decision of this case.

PEOPLE v BORTHWELL, No. 152906; Court of Appeals No. 328113. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing regarding the defendant's claims for relief. MCR 6.508(C).

WILDER, J., took no part in the decision of this case.

MILLER v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 154591; Court of Appeals No. 326300. Pursuant to MCR 7.305(H)(1), in lieu of granting

leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Washtenaw Circuit Court for entry of an order denying the petitioner's motion for attorney fees and costs. There is no basis in this case to conclude that respondent presented a position that was "grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C). Further, the Court of Appeals erred by equating the circuit court's invalid finding of frivolousness under MCL 600.2591 with a finding of vexatiousness under MCR 7.216(C).

WILDER, J., took no part in the decision of this case.

Leave to Appeal Denied May 12, 2017:

PEOPLE v MALONE, No. 154833; Court of Appeals No. 329989.

MARKMAN, C.J. (*dissenting*). I respectfully dissent and would reverse the judgment of the Court of Appeals for the reasons set forth by the Court of Appeals dissent. In particular, I believe the police officer in this case properly and effectively drew upon his "own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] that might well elude an untrained person." *United States v Arvizu*, 534 US 266, 273 (2002) (quotation marks and citations omitted). Moreover, I agree with the Court of Appeals dissent that the majority's analysis in that Court "places too much emphasis on the sufficiency of each independent reason offered by [the officer] and the trial court, as opposed to the collective value of those reasons." *People v Malone*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2016 (Docket No. 329989) (MURRAY, P.J., dissenting), p 3. See also *Arvizu*, 534 US at 274 ("The [lower] court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase. The court appeared to believe that each observation by [the officer] that was by itself readily susceptible to an innocent explanation was entitled to no weight. *Terry*[*v Ohio*, 392 US 1 (1968)], however, precludes this sort of divide-and-conquer analysis. . . . Although each of the series of acts [in *Terry*] was perhaps innocent in itself, we held that, taken together, they warranted further investigation.") (quotation marks and citations omitted). While reasonable minds may disagree, in my judgment, the factors identified here by the officer and by the trial court (not least of which were conflicting statements made by defendant to the officer concerning the purpose of his trip), "taken together, . . . warranted further investigation" and supplied the officer with a "particularized and objective basis for suspecting legal wrongdoing." *Id*. at 273-274 (citations and quotation marks omitted).

WILDER, J., took no part in the decision of this case.

In re ELLIOTT, Nos. 155617 and 155618; Court of Appeals Nos. 333724 and 333725.

WILDER, J., took no part in the decision of this case.

Reconsideration Denied May 12, 2017:

NEXTEER AUTOMOTIVE CORPORATION v MANDO AMERICA CORPORATION, No. 153413; reported below: 314 Mich App 391. Leave to appeal denied at 500 Mich 955.

WILDER, J., took no part in the decision of this case.

Summary Disposition May 17, 2017:

PEOPLE v SALVADOR GUTIERREZ, No. 154697; Court of Appeals No. 333964. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Leelanau Circuit Court and we remand this case to that court for resentencing. The defendant was improperly assigned ten points on Offense Variable 9 (OV 9), MCL 777.39, because the facts found by the trial court did not establish an evidentiary basis for concluding that any victim of the defendant's crime was placed in danger of physical injury or death or in danger of property loss. MCL 777.39(1)(d); *People v Hardy*, 494 Mich 430, 438 (2013). On remand, the trial court shall rescore this variable at zero points. The resulting change in the defendant's total OV score produces a lower guidelines range, entitling the defendant to resentencing. See *People v Francisco*, 474 Mich 82, 88-90 (2006). In all other respects, leave to appeal is denied.

Leave to Appeal Granted May 17, 2017:

BAZZI v SENTINEL INSURANCE COMPANY, No. 154442; reported below: 315 Mich App 763. The Coalition Protecting Auto No-Fault, the Insurance Alliance of Michigan, and the Michigan Association for Justice, are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 17, 2017:

ATLANTIC CASUALTY INSURANCE COMPANY v GUSTAFSON, No. 154026; reported below: 315 Mich App 533. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the phrase "any property owner" in the insurance policy is ambiguous; (2) whether a property owner must have a commercial interest in the project before the exclusion applies to that property owner, and what constitutes such a "commercial interest"; and (3) what weight, if any, should be given to the title of the exclusion. The parties should not submit mere restatements of their application papers.

PEOPLE v PINKNEY, No. 154374; reported below: 316 Mich App 450. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the trial court abused its discretion when it admitted evidence under MRE 404(b) that related to the defendant's

political and community activities other than the mayoral recall effort for the purpose of showing the defendant's motive to commit the instant crimes, and (2) whether the Court of Appeals erred in determining that MCL 168.937 creates the substantive offense of election forgery and is not merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 17, 2017:

BAYNESAN v WAYNE STATE UNIVERSITY, No. 154435; reported below: 316 Mich App 643.

BERNSTEIN, J., did not participate.

PEOPLE v COMBS, No. 154468; Court of Appeals No. 333060.

COALITION PROTECTING AUTO NO-FAULT v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 154527; reported below: 317 Mich App 1.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v RICKY LEWIS, No. 154599; Court of Appeals No. 322198.

ADAIR v STATE OF MICHIGAN, No. 154664; reported below: 317 Mich App 355.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v ENGLISH and PEOPLE v BRANDON SMITH, Nos. 154923 and 154924; reported below: 317 Mich App 607.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MAHDI, No. 154980; reported below: 317 Mich App 446.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 19, 2017:

MARTIN v MILHAM MEADOWS I LIMITED PARTNERSHIP, No. 154360; Court of Appeals No. 328240. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the stairs at issue were not "fit for the use intended by the parties" and that the defendants did not keep the stairs in "reasonable repair." MCL 554.139(1)(a) and (b). The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MILLAR v CONSTRUCTION CODE AUTHORITY, No. 154437; Court of Appeals No. 326544. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff's claim under the Whistleblowers' Protection Act was barred by the 90-day limitation period set forth in MCL 15.363(1). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 19, 2017:

PEOPLE v DAVID DUNN, No. 153531; Court of Appeals No. 320227. On order of the Court, the motion to add issue is granted. The application for leave to appeal the February 23, 2016 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 denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include the issue whether the prosecution presented sufficient evidence to support the charge of conspiracy to commit perjury. MCL 750.157a and MCL 750.422.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DANCER v CLARK CONSTRUCTION COMPANY, INC, No. 153830; Court of Appeals No. 324314.

MARKMAN, C.J. (*concurring*). I concur in the Court's order denying leave to appeal because I agree with the Court of Appeals that genuine issues of material fact remain at this time that preclude summary disposition in defendant's favor. I write separately to afford whatever guidance I might in this difficult area of the law as to how this Court should define the "danger creating a high degree of risk" for purposes of the "common work area" doctrine.

The "common work area" doctrine constitutes an exception to the common-law rule that a general contractor is not liable for the negligence of its subcontractors. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 55-56 (2004). In order to recover from a general contractor, a plaintiff must show *all* of the following:

> (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. [*Latham v Barton Malow Co*, 480 Mich 105, 109 (2008) (*Latham I*).]

This Court asked the parties in the instant case to brief whether there is a genuine issue of material fact as to element three of the "common work area" doctrine. *Dancer v Clark Constr Co*, 500 Mich 918 (2016).

The threshold question in examining this third element is "[w]hat was the danger creating a high degree of risk that is the focus of the general contractor's responsibility?" *Latham I*, 480 Mich at 113. Only

after properly classifying this relevant "danger" can a court determine whether it posed a risk to "a significant number of workers." The difficulty is in determining how broadly or narrowly to define this "danger." As I previously stated in opposition to an order denying leave to appeal, I believe the Court when making this determination

> must take cognizance of at least the following: (1) the *breadth* of the risk that the plaintiff faced in terms of calculating the number of uninjured workers who were exposed to the *same* risk and (2) the proper level of generality by which to *characterize* and *define* the specific risk incurred by the plaintiff and thereby to calculate the number of uninjured workers who were exposed to that same risk. To overgeneralize the risk and define it in an excessively broad manner is to threaten "strict liability" applications of the exception, and the expansion of the exception to a point at which it displaces the general rule; therefore, the risk must be circumscribed more narrowly than the mere risk posed by heights. However, to define the nature of the risk overly specifically, and in an excessively narrow manner, is to render the exception increasingly irrelevant . . . . [*Latham v Barton Malow Co*, 497 Mich 993, 995-996 (2015) (MARKMAN, J., dissenting) (*Latham II*).]

The principal case addressing this issue is *Latham I*. In *Latham I*, 480 Mich at 108, the plaintiff was injured when he fell 13 to 17 feet off of a mezzanine that lacked perimeter protection. At the time of the injury, the "plaintiff was not wearing a fall-protection harness, contrary to job-site rules of which he was aware," and it was undisputed that the harness would have prevented the plaintiff's fall. *Id*. This Court held that the relevant "danger" was not merely working from a dangerous height, since this is an "unavoidable condition of construction work." *Id*. at 113-114. Rather, the "danger" was properly characterized as "working at heights *without fall-protection equipment*." *Id*. at 114 (emphasis altered).

While not expressly stated in this manner, *Latham I* indicates that the appropriate scope of the "danger" addressed in the third element must encompass the worker's use of—or failure to use—equipment available in seeking to ameliorate an unavoidable danger inherent in the work environment. Such a formulation of the relevant "danger" properly focuses on the steps taken by the contractor to protect the workers from unavoidable dangers inherent at a construction site. See *Funk v Gen Motors Corp*, 392 Mich 91, 104 (1974) ("Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that . . . necessary precautions" will be implemented and "necessary safety equipment" provided.). In *Latham I*, 480 Mich at 114, we explained that "[i]f 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." The Court then concluded that the "danger" was

"working at heights *without fall-protection equipment*." *Id*. (emphasis altered). Accordingly, this Court defined the "danger" to take into consideration the safety equipment available to the worker engaging in the conduct that exposed him or her to an unavoidable danger inherent in a construction site.

In the instant case, plaintiff fell 35-40 feet off of a scaffold that was made with unsecured planks lacking supporting bridges and outriggers. The unavoidable danger that led to plaintiff's injury was working at a dangerous height. The scaffold was the platform provided for the workers to walk on while working at a dangerous height, and there was fall-protection equipment available that plaintiff could have worn, but he did not do so. Therefore, the asserted "danger" here was working at a dangerous height *without* fall-protection equipment on a scaffold that was made with unsecured planks lacking supporting bridges and outriggers. Because there are genuine issues of material fact as to: (a) the number of workers who used the scaffold without fall-protection equipment, (b) whether the general contractor was negligent in constructing the scaffold in that manner, (c) whether the general contractor failed to take reasonable steps to ensure that the fall-protection equipment was, in fact, used, and (d) whether this negligence contributed to plaintiff's injury, summary disposition is inappropriate.

Defendant argues that plaintiff created the relevant "danger" by improperly overlapping the planking in a manner that led to his fall. Defendant reasons that because plaintiff created that danger and no other workers were exposed to that danger—as the improperly overlapped planking fell when plaintiff did—a significant number of workers were not exposed to the "danger" that caused plaintiff's injury.

However, defendant's characterization of the "danger" is "excessively narrow." *Latham II*, 497 Mich at 996 (MARKMAN, J., dissenting). Assuming that plaintiff did improperly overlap the planking in a manner that led to his fall, I do not believe the overlapped planking constitutes the "danger" for the purpose of the third element of the "common work area" doctrine. Characterizing the "danger" to include the worker's negligence, other than the worker's failure to employ available safety precautions, would effectively impose a contributory-negligence regime on "common work area" doctrine claims, contrary to this Court's caselaw. *Funk*, 392 Mich at 113-114 (declining to adopt the doctrine of contributory negligence in claims brought under the doctrine); *Placek v Sterling Heights*, 405 Mich 638, 650 (1979) (replacing contributory negligence with comparative negligence for common-law claims); *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29, 37 (1982) (holding that comparative negligence constitutes a *defense* in a claim based on the doctrine).

This Court addressed a similar issue in *Ghaffari v Turner Constr Co*, 473 Mich 16 (2005). In *Ghaffari*, the issue was whether the "open and obvious" danger doctrine was applicable to "common work area" claims. *Id*. at 17. We concluded it was not, in part because application of the "open and obvious" danger doctrine in this context would "largely nullify the doctrine of comparative negligence in the construction setting, and

effectively restore the complete bar to a contractor's liability abolished when *Hardy* eliminated contributory negligence in that setting." *Id*. at 26. We explained:

> The adoption of the open and obvious doctrine in the general contractor setting would tend to thwart the goals of workplace safety advanced by our decisions in *Funk* and *Hardy.* If we were to adopt the rule set forth below by the Court of Appeals, we would effectively return to a contributory negligence regime. In such a case, no matter how negligent the general contractor was in creating or failing to ameliorate the hazard, the employee would be barred from recovery because the hazard was open and obvious.
>
> *Hardy* recognized that such bars to recovery "provide a strong financial incentive for contractors to breach the duty to undertake reasonable safety precautions." . . . Instead, *Hardy* adopted a comparative negligence rule on the grounds that such a rule retains a strong incentive for general contractors to maintain workplace safety. [*Id*. at 27, quoting *Hardy*, 414 Mich at 41.]

Similarly, if the relevant "danger" for the purpose of the "common work area" doctrine encompasses a plaintiff's negligent conduct other than his or her failure to use available safety equipment, "we would effectively return to a contributory negligence regime." *Id*. Any time a plaintiff has been negligent in performing his or her work, the plaintiff could reasonably be characterized as creating a "new danger" to which only the plaintiff was exposed. As a result, a plaintiff could only recover if he or she did not contribute at all to the danger that caused the injury—giving rise to the functional equivalent of a contributory-negligence regime. Accordingly, a plaintiff's negligence, other than his or her failure to use available safety equipment, should be evaluated in determining whether plaintiff was *comparatively negligent*, but not in the course of defining the precise "danger" to which a "significant number of workers" must have been exposed.

In sum, the "danger" in the present context should be defined in terms of the equipment available to the worker when confronting an unavoidable danger inherent on a construction site that caused the injury. This standard is consistent with this Court's holding in *Latham I* and properly focuses on the contractor's duty to implement necessary precautions and to provide necessary safety equipment to protect workers from unavoidable dangers inherent in the workplace. *Funk*, 392 Mich at 104; *Latham I*, 480 Mich at 114. Additionally, a plaintiff's negligence that is unrelated to his or her failure to use available safety equipment should not be included in defining this "danger" but should only be assessed in the context of evaluating the comparative negligence of the employee. In this case, the "danger" was working at a dangerous height without fall-protection equipment on a scaffold with unsecured planks absent supporting bridges and outriggers. Because there remains, in my judgment, a genuine issue of material fact as to whether this constituted a "danger" that created a high degree of risk and whether a significant number of workers were exposed to that "danger,"

summary disposition is inappropriate at this time. Accordingly, I agree with the judgment of the Court of Appeals and concur in this Court's order denying leave to appeal.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DANCER v CLARK CONSTRUCTION COMPANY, INC, No. 153889; Court of Appeals No. 324314.

MARKMAN, C.J., concurs in the Court's order denying leave to appeal for the reasons set forth in his concurring statement in *Dancer v Clark Constr Co, Inc*, 500 Mich 992.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied May 23, 2017:

PEOPLE v GOLDMAN, No. 155433; Court of Appeals No. 336184.

Summary Disposition May 24, 2017:

PEOPLE v SHERRON DAVIS, No. 154710; Court of Appeals No. 326932. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. As the prosecutor concedes, the trial court erred in scoring Offense Variable (OV) 13, MCL 777.43, at 25 points, because the sentencing offense was not part of a pattern of felonious criminal activity involving three or more crimes against a person. The defendant did not commit three crimes against a person within a five-year period, and no points should have been scored. Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). In all other respects, leave to appeal is denied.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ANTHONY WILKINS, No. 155688; Court of Appeals No. 337397. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the February 24, 2017 orders of the Kent Circuit Court denying the defendant's motion for reduction of his jail sentence, and we remand this case to the circuit court for reconsideration of the motion. Pursuant to MCL 801.257, "a county jail prisoner may receive, if approved by the court, a reduction of one-fourth of his term if his conduct, diligence, and general attitude merit such reduction." *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718, 736 n 25 (1986). This statute does apply to the defendant, who is a county jail prisoner. The statute's application is not limited to prisoners who have already requested and been granted work release pursuant to other sections of the day parole act. On remand, the trial court shall consider whether to grant the requested relief and issue a ruling within 14 days of the date of this order. We do not retain jurisdiction.

MARKMAN, C.J. I would deny leave to appeal. Although MCL 801.257 does not expressly state its exclusive application to "day parolees," the "day parole of prisoners" act of 1962, MCL 801.251 *et seq.*, of which MCL 801.257 is a part, contained a total of eight sections, and each of its seven other sections pertains only to "day parolees." 1962 PA 60. From this context, I conclude that § 7 of the act, MCL 801.257, is similarly focused.

Leave to Appeal Denied May 24, 2017:

ENBRIDGE ENERGY LIMITED PARTNERSHIP v UPPER PENINSULA POWER COMPANY, Nos. 153116 and 153118; reported below: 313 Mich App 669.

PEOPLE v AUVIL, No. 154067; Court of Appeals No. 326216.

PEOPLE v KIOGIMA, No. 154240; Court of Appeals No. 326159.

PEOPLE v MILT, No. 154276; Court of Appeals No. 325836.

PEOPLE v SOLLOWAY, No. 154308; reported below: 316 Mich App 174.

PEOPLE v DAVID SHAW, No. 154376; Court of Appeals No. 323273.

WILDER, J., did not participate because he was on the Court of Appeals panel.

MILLER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 154420; Court of Appeals No. 325885.

SHOREPOINT NURSING CENTER v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 154521; Court of Appeals No. 332047.

DENNEY v KENT COUNTY ROAD COMMISSION, No. 155019; reported below: 317 Mich App 727.

Reconsideration Denied May 24, 2017:

STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS, No. 154034; reported below: 315 Mich App 449. Leave to appeal denied at 500 Mich 919.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 26, 2017:

PEOPLE v WILDER, No. 154814; Court of Appeals No. 327491. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the trial court erred by allowing the prosecutor to cross-examine the defendant's wife about his prior firearms-related convictions; (2) whether the prosecutor improperly raised a collateral issue to admit evidence of the defendant's prior felonies through impeachment, compare *People v Stanaway*, 446 Mich 643 (1994), with *People v Kilbourn*, 454 Mich 677 (1997); see also *People*

v Vasher, 449 Mich 494 (1995); and (3) whether any error was harmless. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and 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.

In re HILL, No. 155152; Court of Appeals No. 332923. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether this Court's opinion in *In re Hatcher*, 443 Mich 426 (1993), correctly held that the collateral attack rule applied to bar the respondent parent from challenging the court's initial exercise of jurisdiction over her on appeal from an order terminating parental rights in that same proceeding; (2) if not, (a) by what standard should courts review respondent's challenge to the initial adjudication, in light of respondent's failure to appeal the first dispositional order appealable of right, see MCR 3.993(A)(1), and (b) what must a respondent do to preserve for appeal any alleged errors in the adjudication, see, e.g., *In re Hudson*, 483 Mich 928 (2009); and (3) if *Hatcher* was correctly decided, whether due process concerns may override the collateral bar rule. See *In re Sanders*, 495 Mich 394 (2014); *In re Wangler*, 498 Mich 911 (2015). The parties should not submit mere restatements of their application papers.

The Family Law Section and Children's Law Section of the State Bar of Michigan, UDM Juvenile Appellate Practice Clinic, University of Michigan Law School Child Advocacy Law Clinic, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The motion to appoint counsel is denied as moot.

Reconsideration Denied May 26, 2017:

In re CLIFFMAN, No. 151998; Court of Appeals No. 321174. Leave to appeal denied at 500 Mich 968.

BERNSTEIN, J., did not participate.

Summary Disposition May 31, 2017:

PEOPLE v TIMOTHY RICE, No. 155021; Court of Appeals No. 333634. Pursuant to MCR 7.305(H)(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 for leave to appeal as a timely filed brief on appeal, and this case shall proceed in that court as an appeal of right. The defendant made a timely request for the appointment of appellate counsel, but his request was not processed by the Wayne Circuit Court

until nearly four months later. Defendant was deprived of his appeal of right due to circumstances beyond his control.

Leave to Appeal Granted May 31, 2017:

AFT MICHIGAN v STATE OF MICHIGAN, JOHNSON v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, and MCMILLAN v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, Nos. 154117, 154118, and 154119; reported below: 315 Mich App 602. 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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 31, 2017:

PEOPLE v RANDOLPH, No. 153309; Court of Appeals No. 321551. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of trial counsel; and, in particular, (2) whether the prejudice standard under the third prong of plain error, *People v Carines*, 460 Mich 750, 763-764 (1999) ("affecting substantial rights"), is the same as the *Strickland* prejudice standard, *Strickland v Washington*, 466 US 668, 694 (1984) ("reasonable probability" of a different outcome). See *United States v Dominguez Benitez*, 542 US 74, 83 (2004); *People v Fackelman*, 489 Mich 515, 537 n 16 (2011); *People v Kowalski*, 489 Mich 488, 510 n 38 (2011). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 31, 2017:

PEOPLE v ROARK, No. 152562; Court of Appeals No. 316467.

SHERMAN v SHERROD, No. 153652; Court of Appeals No. 320689.

WILDER, J., did not participate because he was on the Court of Appeals panel.

ROBINSON v MUNGER & ASSOCIATES, PLLC, No. 153759; Court of Appeals No. 325080.

AGRI-SCIENCE TECHNOLOGIES, LLC v GREINER'S GREEN ACRES, INC, No. 153838; Court of Appeals No. 325182.

PEOPLE v LONDON HARRIS, No. 153875; Court of Appeals No. 324987.

PEOPLE v DAWYNE ANDREWS, No. 153917; Court of Appeals No. 325356.

FOUNTAIN v DEPARTMENT OF CORRECTIONS, No. 154020; Court of Appeals No. 325699.

PEOPLE v STALLING, No. 154163; Court of Appeals No. 325282.

PEOPLE v MORRISON, No. 154281; Court of Appeals No. 325896.

PEOPLE v DARIUS LEWIS, No. 154321; Court of Appeals No. 326141.

PEOPLE v GRZESIK, No. 154330; Court of Appeals No. 332999.

PEOPLE v LARRY SHELTON, No. 154367; Court of Appeals No. 324191.

PEOPLE v AARON DAVIS, No. 154400; Court of Appeals No. 326501.

PEOPLE v GEORGE ALEXANDER, No. 154401; Court of Appeals No. 326466.

PEOPLE v HOOVER, No. 154411; Court of Appeals No. 331914.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v VILLENEUVE, No. 154454; Court of Appeals No. 331464.
WILDER, J., did not participate because he was on the Court of Appeals panel.

O'KEEFE v LANDGRAFF, No. 154506; Court of Appeals No. 327455.

PEOPLE v RILEY, No. 154517; Court of Appeals No. 332840.

PEOPLE v SHANNON, No. 154528; Court of Appeals No. 333764.

HOWARD v CIVIL SERVICE COMMISSION, Nos. 154600 and 154601; Court of Appeals Nos. 326543 and 328099.

PEOPLE v GREGORY YOUNG, No. 154607; Court of Appeals No. 334116.

PEOPLE v HOWE, No. 154625; Court of Appeals No. 332572.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v O'BRIEN, No. 154626; Court of Appeals No. 333327.

PEOPLE v KEVIN CRAIG, No. 154661; Court of Appeals No. 333561.

PEOPLE v ALFONSO MARTINEZ, No. 154677; Court of Appeals No. 332456.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DOUGLAS BROWN, No. 154711; Court of Appeals No. 333649.

PEOPLE v TORRES, No. 154727; Court of Appeals No. 332527.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TREVINO, No. 154728; Court of Appeals No. 333908.

PEOPLE v GEETER, No. 154730; Court of Appeals No. 333170.

TULLAR v FLINT HOUSING COMMISSION, No. 154737; Court of Appeals No. 327093.

PEOPLE v EDWARD ROBINSON, No. 154738; Court of Appeals No. 334223.

PEOPLE v LANG, No. 154740; Court of Appeals No. 333444.

PEOPLE v JULIAN, No. 154751; Court of Appeals No. 332575.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ANTHONY JONES, No. 154755; Court of Appeals No. 334041.

PEOPLE v JESSIE PERRY, No. 154757; Court of Appeals No. 327834.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BASS, No. 154759; Court of Appeals No. 328003.

PEOPLE v RAAR, No. 154765; Court of Appeals No. 333930.

PEOPLE v GRAYS, No. 154771; Court of Appeals No. 332790.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RILEY, No. 154772; Court of Appeals No. 333462.

PEOPLE v HEFT, No. 154781; Court of Appeals No. 334384.

HUDSON v KLEUESSENDORF, No. 154789; Court of Appeals No. 327878.

PEOPLE v ALLEN, No. 154804; Court of Appeals No. 333276.

PEOPLE v GREER, No. 154807; Court of Appeals No. 333199.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v NICHOLAS PENA, No. 154825; Court of Appeals No. 333928.

PEOPLE v JUSTICE, No. 154826; Court of Appeals No. 332660.
WILDER, J., did not participate because he was on the Court of Appeals panel.

BROTHER CONSTRUCTION, LLC v RATHOD, No. 154834; Court of Appeals No. 323380.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FAHER, No. 154840; Court of Appeals No. 328285.

PEOPLE v MACKEY, No. 154850; Court of Appeals No. 328235.

PEOPLE v FLINN, No. 154875; Court of Appeals No. 334529.

PEOPLE v MENGEL, No. 154879; Court of Appeals No. 334224.

PEOPLE v FAIRGOOD, No. 154880; Court of Appeals No. 328578.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RELERFORD, No. 154906; Court of Appeals No. 327040.

PEOPLE v WILDY, No. 154927; Court of Appeals No. 334912.

PEOPLE v TRAHUAN ROBINSON, No. 154964; Court of Appeals No. 327268.

PEOPLE v CANTRELL, No. 154972; Court of Appeals No. 326931.

QUICK v RYAN, No. 154983; Court of Appeals No. 328006.

CHEWNING v MICHIGAN COLON & RECTAL SURGEONS, PC, No. 154997; Court of Appeals No. 333052.

MONACO v HOME-OWNERS INSURANCE COMPANY, No. 155000; reported below: 317 Mich App 738.

NEEDHAM v OAKWOOD HEALTHCARE, INC, No. 155023; Court of Appeals No. 328293.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TERRY HENRY, No. 155030; Court of Appeals No. 327414.

PULLEY v CONSUMERS ENERGY COMPANY, No. 155032; Court of Appeals No. 328202.

PEOPLE v JHAL SMITH, No. 155038; Court of Appeals No. 328642.

KOZFKAY v COUNTY OF SANILAC, No. 155044; Court of Appeals No. 329116.

BRITTAIN v HUNTINGTON NATIONAL BANK, No. 155046; Court of Appeals No. 328365.

PEOPLE v JAVONTAY REED, No. 155050; Court of Appeals No. 327502.

PEOPLE v TY-RON ANDERSON, No. 155056; Court of Appeals No. 327732.

PEOPLE v DAMIAN JONES, No. 155061; Court of Appeals No. 327813.

PEOPLE v PARSONS, No. 155063; Court of Appeals No. 328430.

PEOPLE v MOSBY, No. 155065; Court of Appeals No. 328134.

PEOPLE v CASTON, No. 155066; Court of Appeals No. 327623.

PEOPLE v TODD JENKINS, No. 155067; Court of Appeals No. 334984.

PEOPLE v FORTENBERRY, No. 155070; Court of Appeals No. 328356.

PEOPLE v BUFORD, No. 155071; Court of Appeals No. 333768.

PEOPLE v STEELE, No. 155076; Court of Appeals No. 328874.

PEOPLE v DELEON, No. 155077; reported below: 317 Mich App 714.

PEOPLE v MASTERS, No. 155078; Court of Appeals No. 335230.

PEOPLE v DANIEL HUGHES, No. 155079; Court of Appeals No. 328530.

PEOPLE v KENYATTE BROWN, No. 155083; Court of Appeals No. 335063.

ALLEN PARK RETIREES ASSOCIATION, INC v STATE OF MICHIGAN, Nos. 155087 and 155088; Court of Appeals Nos. 327470 and 329593.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REYNOLDS, No. 155090; Court of Appeals No. 335151.

MUELLER v BOUIS, No. 155092; Court of Appeals No. 327945.

PEOPLE v ISIAH SPEARS, No. 155096; Court of Appeals No. 335277.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TIMOTHY BROWN, No. 155098; Court of Appeals No. 329034.

PEOPLE v LANGENBURG, No. 155099; Court of Appeals No. 329156.

NICKENS v THOMAS, No. 155100; Court of Appeals No. 328302.

PEOPLE v WITHERS, No. 155119; Court of Appeals No. 331060.

PEOPLE v LACEY, No. 155121; Court of Appeals No. 327728.

PEOPLE v MACK, No. 155124; Court of Appeals No. 328258.

PEOPLE v JUSTIN BURTON, No. 155134; Court of Appeals No. 328551.

PEOPLE v DOUGLAS BROWN, No. 155142; Court of Appeals No. 335188.

DEVASHIER v WILLIAM BEAUMONT HOSPITAL, No. 155145; Court of Appeals No. 335367.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Firm.

PEOPLE v DORIAN JONES, No. 155155; Court of Appeals No. 329164.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ALEXIS PENA, No. 155163; Court of Appeals No. 335464.

PEOPLE v JENNIFER FORD, No. 155165; Court of Appeals No. 334649.

PEOPLE v STOCKS, No. 155179; Court of Appeals No. 335352.

PEOPLE v BOOZER, No. 155183; Court of Appeals No. 335312.

STONE v BARAGA CORRECTIONAL FACILITY WARDEN, No. 155205; Court of Appeals No. 334364.

PEOPLE v TUPPER, No. 155218; Court of Appeals No. 335455.

TIPTON v DEPARTMENT OF TRANSPORTATION, No. 155222; Court of Appeals No. 329747.

LAMKIN v BARRETT, No. 155362; Court of Appeals No. 329630.

PEOPLE v JESSE WILLIAMS, No. 155383; Court of Appeals No. 332367.

PEOPLE v DAVID PRICE, No. 155459; Court of Appeals No. 336214.

HARRINGTON v COOPER STREET CORRECTIONAL FACILITY WARDEN, No. 155476; Court of Appeals No. 335420.

In re LOUIS G BASSO REVOCABLE TRUST, No. 155812; Court of Appeals No. 338066.

Superintending Control Denied May 31, 2017:

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 155013.

ASHARE v ATTORNEY GRIEVANCE COMMISSION, No. 155059.

Reconsideration Denied May 31, 2017:

PEOPLE v THREAT, No. 151969; Court of Appeals No. 325069. Leave to appeal denied at 500 Mich 945.

PEOPLE v ANTRELL BROWN, No. 153385; Court of Appeals No. 330823. Leave to appeal denied at 500 Mich 933.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TRAVIS HENRY, No. 153732; reported below: 315 Mich App 130. Leave to appeal denied at 500 Mich 931.

WILLIAM P FROLING REVOCABLE LIVING TRUST v PELICAN PROPERTY, LLC, Nos. 153855 and 153856; Court of Appeals Nos. 322019 and 323074. Leave to appeal denied at 500 Mich 898.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOVON DAVIS, No. 153924; Court of Appeals No. 320773. Leave to appeal denied at 500 Mich 933.

BRAZYS v ASHEN, No. 153974; Court of Appeals No. 330391. Leave to appeal denied at 500 Mich 946.

PEOPLE v DARRELL WALKER, No. 154031; Court of Appeals No. 324672. Leave to appeal denied at 500 Mich 959.

PEOPLE v DURHAM, No. 154069; Court of Appeals No. 331567. Leave to appeal denied at 500 Mich 951.

PEOPLE v GLOVER, No. 154092; Court of Appeals No. 321454. Leave to appeal denied at 500 Mich 933.

PEOPLE v UPSHAW, No. 154101; Court of Appeals No. 325195. Leave to appeal denied at 500 Mich 959.

CRAMER v VILLAGE OF OAKLEY, No. 154209; reported below: 316 Mich App 60. Summary disposition entered at 500 Mich 964.

MCCARTHA v STATE FARM FIRE & CASUALTY COMPANY, No. 154428; Court of Appeals No. 326689. Leave to appeal denied at 500 Mich 947.

PEOPLE v RAKESK WHITE, No. 154452; Court of Appeals No. 326701. Leave to appeal denied at 500 Mich 901.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TEQUILA PERRY, No. 154457; Court of Appeals No. 326463. Leave to appeal denied at 500 Mich 934.

WILDER, J., did not participate because he was on the Court of Appeals panel.

SALENBIEN v ARROW UNIFORM RENTAL LIMITED PARTNERSHIP, Nos. 154490 and 154491; Court of Appeals Nos. 326957 and 326961. Leave to appeal denied at 500 Mich 947.

PEOPLE v ANTRELL BROWN, No. 154498; Court of Appeals No. 327205. Leave to appeal denied at 500 Mich 935.

PEOPLE v NICHOLS, No. 154514; Court of Appeals No. 333472. Leave to appeal denied at 500 Mich 947.

PEOPLE v HEXIMER, Nos. 154580 and 154581; Court of Appeals Nos. 332311 and 332724. Leave to appeal denied at 500 Mich 927.

PEOPLE v BATTIES, No. 154597; Court of Appeals No. 334151. Leave to appeal denied at 500 Mich 960.

KRUEGER v SPECTRUM HEALTH SYSTEMS, No. 154704; Court of Appeals No. 328787. Leave to appeal denied at 500 Mich 961.

MEIER v BERGER, No. 154860; Court of Appeals No. 334699. Leave to appeal denied at 500 Mich 935.

Summary Disposition June 2, 2017:

PEOPLE v HOBSON, No. 154371; Court of Appeals No. 331921. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). The trial court shall determine whether trial counsel was ineffective because he misunderstood the law of aiding and abetting and felony murder, and erroneously advised the defendant to reject a plea offer to second-degree murder. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

MARKMAN, C.J. (*concurring*). Defendant, along with a group of people, stormed a house and attacked its occupants. One occupant of the house was killed, two others were shot, and another person was beaten. Before trial, defendant allegedly rejected an agreement to plead guilty to a charge of second-degree murder on the basis of inaccurate advice she

had received from her legal counsel. At trial, she was convicted of felony murder. Now, 25 years after rejecting the prosecutor's plea offer, she has raised a claim of ineffective assistance of counsel during the plea-bargaining process.

This Court has not specifically assessed the retroactivity of *Lafler v Cooper*, 566 US 156, 164 (2012). However, other courts have predominantly concluded that *Lafler* creates a retroactive rule. See, e.g., *In re Liddell*, 722 F3d 737, 738 (CA 6, 2013). But there are courts that have reached a contrary conclusion. See *Winward v State*, 355 P3d 1022, 1028 (Utah, 2015), cert den 136 S Ct 1495 (2016), reh den 136 S Ct 2480 (2016). Without deciding at this time which of these conclusions is correct, I write separately to discuss two issues relevant to the Court's consideration of a *Lafler* claim on collateral review more than two decades after a defendant's direct appeal has concluded.

First, this case should prompt a careful review of this Court's procedural rules, particularly as to whether there is merit in limiting the time within which a defendant may bring a motion for relief from judgment. A reasonable time limitation would alleviate the considerable problems that are associated with the review of long-delayed claims and the current lack of finality in the judicial process. Consider, for example, that under federal law such motions are not only time-limited, but cannot be brought more than one year following the entry of judgment, 28 USC 2244(d), let alone 21 years after judgment, as in the present case. A shortened time frame for the filing of a motion for relief from judgment, while allowing exceptions from such a deadline for a defendant who presents a colorable claim of innocence, would maintain fundamental protections for the criminal offender while ensuring that any process of reconciliation and rehabilitation to be derived from the finality of the criminal appeal can begin earlier rather than later.

Second, the trial court in this case should carefully consider how defendant's delay in raising her claim affects its evaluation of the claim on remand. I believe it is this Court's responsibility to provide guidance to the lower courts regarding how to approach claims of the present nature. There may be some alleged constitutional violations that are easy to recreate and evaluate after significant passages of time, but, in my view, this is not one of them.

A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and that the defendant was prejudiced by such performance. *People v Walker*, 497 Mich 894, 895 (2014). More specifically, a defendant alleging ineffective assistance of counsel within the context of plea negotiations " 'must show that counsel's representation fell below an objective standard of reasonableness,' " *Hill v Lockhart*, 474 US 52, 57 (1985), quoting *Strickland v Washington*, 466 US 668, 687-688 (1984), *and* that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact

were imposed," *Lafler*, 566 US at 164. Worthy of particular emphasis, the defendant bears the burden of proving these elements by a reasonable probability. See *Strickland*, 466 US at 694; *People v Hoag*, 460 Mich 1, 6 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]").

In assessing, on collateral review, the merits of a long-delayed claim of ineffective assistance of counsel during plea bargaining, such as the claim alleged by defendant here, the court should look closely at the prejudice requirement of an ineffective-assistance-of-counsel claim. In weighing whether the defendant has met his or her burden to show prejudice, the court should consider that the prosecutor and/or defense counsel may no longer remember the plea discussions, they may no longer have written records of the case, and they may not even be alive anymore. Given such facts, a defendant may be unable to meet his or her burden to show that counsel provided ineffective advice, that the defendant would have accepted the plea, that the prosecutor would not have withdrawn the plea, and that the court would have accepted its terms. In other words, the court should be cognizant that the defendant will often have a difficult time showing that his or her counsel's alleged deficient performance caused the defendant to suffer prejudice when the defendant waits decades to raise, on collateral review, a claim of ineffective assistance of counsel during plea bargaining. In such circumstances, it would be proper for the court to deny the defendant relief for failure to meet his or her burden.

That the burden to show prejudice must be borne by the defendant, and that the effect of *unnecessary* delay or gamesmanship in bringing a claim must not be borne by the prosecutor, are, in my judgment, critical premises of a long-delayed appellate process. Consider, for example, a defendant convicted of two separate crimes who is serving concurrent sentences of 7 years and 10 years. If that defendant has a claim of ineffective assistance of counsel regarding the *latter* conviction, he should not be permitted to advantage himself by waiting to bring the ineffective-assistance-of-counsel claim until after the *former* sentence has expired. It cannot be that the defendant—who cannot be released before the completion of his shorter sentence—can advantage himself by the fading memory of the prosecutor, the passing of witnesses, or the loss or destruction of court records by waiting to bring the claim until his shorter sentence has expired.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied June 2, 2017:

PNC BANK v DISTEFANO, No. 155047; Court of Appeals No. 333441.

MARKMAN, C.J. (*concurring*). I concur in the Court's order of denial. Plaintiff here relies heavily on *Cordes v Great Lakes Excavating & Equip Rental, Inc*, unpublished per curiam opinion of the Court of Appeals, decided June 7, 2012 (Docket No. 304003), in which that Court held that a mortgagor's affidavit stating that an earlier mortgage on the property had been improperly discharged placed a subsequent pur-

chaser on notice of the first mortgagee's interest and the subsequent mortgagee's interest was thus subordinate. Without determining whether *Cordes* was rightly decided, I write separately only to note that *Cordes* is clearly distinguishable from the instant case. In *Cordes*, the affidavit of erroneous discharge was recorded *before* the execution and recording of the second mortgage. Here, the affidavit of erroneous discharge was recorded *after* the second mortgage had been executed and recorded. Only the assignment of the second mortgage occurred *after* the affidavit of erroneous discharge had been recorded. Thus, whether unpublished or published, *Cordes* is distinguishable and does not, in my judgment, support plaintiff's claim.

GIHARD v PEREZ-CRUET, No. 155615; Court of Appeals No. 336559.

Order Rejecting the Order Of Discipline Recommended by the Judicial Tenure Commission Entered June 5, 2017:

In re IDDINGS, No. 154936. On December 13, 2016, the Judicial Tenure Commission filed a Decision and Recommendation. It was accompanied by a Settlement Agreement with the respondent judge, the Honorable Gregg P. Iddings, who consented to the Commission's findings of fact and conclusions of law, and to the Commission's recommendation that the "sanction, if any, shall be a public censure and a 60-day suspension without pay." On February 3, 2017, this Court entered an order remanding the matter to the Commission for further explication. We retained jurisdiction. The Commission filed a supplemental report under seal on February 28, 2017. Respondent filed a motion to expand the record on May 12, 2017. That motion is granted. On order of the Court, having reviewed the record before the Court, we reject the order of discipline recommended by the Commission. Given the facts stated in the stipulation and supplemental report, the proposed discipline is insufficient. The Court would accept a suspension, without pay, for a period of six months, as an appropriate order of discipline. Such an order will be entered on July 5, 2017, unless Judge Iddings notifies the Commission and this Court in writing by 5:00 p.m. on July 3, 2017, that, pursuant to MCR 9.225, he withdraws his consent to an order of discipline.

If Judge Iddings withdraws his consent, then, by operation of MCR 9.225, the Commission shall conduct further proceedings, during which this Court shall retain jurisdiction. This Court shall not be bound by its current determination, and upon review of the record developed at subsequent proceedings shall retain its power under MCR 9.225 to impose a greater, lesser, or entirely different sanction.

We further order that this order be and remain confidential until entry of an order of discipline or until further order of the Court.

Summary Disposition June 7, 2017:

PEOPLE v COWHY, No. 154810; Court of Appeals No. 334140. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we 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 Entered June 7, 2017:

PEOPLE v ELISAH THOMAS, No. 155245; Court of Appeals No. 326311. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the single photographic identification method used in this case was so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification; and (2) if so, whether the complainant's in-court identification had an independent basis so that it was not subject to suppression. The parties 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.

Leave to Appeal Denied June 7, 2017:

PEOPLE v HOLOMAN and PEOPLE v WELLS, Nos. 153155 and 153156; Court of Appeals Nos. 319993 and 319994.

PEOPLE v ARNOLD and PEOPLE v GEER, Nos. 153157 and 153158; Court of Appeals Nos. 319995 and 319996.

PEOPLE v CARRUTHERS, No. 153173; Court of Appeals No. 319991.

PEOPLE v OVERHOLT, No. 154082; reported below: 315 Mich App 363.

PEOPLE v BYLSMA, No. 154084; reported below: 315 Mich App 363.

CITIZENS FOR A BETTER ALGONAC COMMUNITY SCHOOLS v ALGONAC COMMUNITY SCHOOLS, No. 154604; reported below: 317 Mich App 171.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOHN PORTER, No. 154748; Court of Appeals No. 333163.

PEOPLE v WILLIAMS-JOHNSON, No. 154848; Court of Appeals No. 334544.

ANDERSONS ALBION ETHANOL, LLC v DEPARTMENT OF TREASURY, No. 154907; reported below: 317 Mich App 208.

PEOPLE v RONALD NORFLEET, No. 154943; reported below: 317 Mich App 649.

SPEICHER v COLUMBIA TOWNSHIP BOARD OF ELECTION COMMISSIONERS, Nos. 154970 and 154971; Court of Appeals Nos. 328609 and 328611.

PEOPLE v RODNEY PERRY, No. 154996; reported below: 317 Mich App 589.

PEOPLE v FUTURA WADE, No. 155329; Court of Appeals No. 328298.

PEOPLE v CANFIELD, No. 155465; Court of Appeals No. 335542.

Summary Disposition June 9, 2017:

LYON CHARTER TOWNSHIP v PETTY and LYON CHARTER TOWNSHIP v HOSKINS, Nos. 155024 and 155025; reported below: 317 Mich App 482. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate those parts of the Court of Appeals judgment stating, "Moreover, as a matter of law, $7,000 worth of additions to a storage barn falls short of the 'substantial change in position' or 'extensive obligations and expenses' necessary for equity to overcome a township's zoning authority[,] 83 Am Jur 2d § 937, p 984," and stating that "[c]ourts have also held that the property owner must establish 'a financial loss . . . so great as practically to destroy or greatly to decrease the value of the . . . premises for any permitted use[,]' *Carini v Zoning Bd of Appeals*, 164 Conn 169, 173; 319 A2d 390 (1972)," because neither statement is necessary to the disposition of this case or well grounded in Michigan jurisprudence. 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.

Order for Reargument Entered June 9, 2017:

PEOPLE v TEMELKOWSKI, No. 150643; reported below: 307 Mich App 241. Leave to appeal entered at 498 Mich 942. On the Court's own motion, we direct the Clerk of the Court to set this case for reargument and resubmission at the October 2017 session. We direct the parties to file supplemental briefs within 56 days of the date of this order addressing: (1) whether this case should be held in abeyance pending final action by the United States Supreme Court in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016); (2) whether a criminal defendant is denied due process of law if a statute offers a benefit in exchange for pleading guilty, the defendant's plea is induced by the expectation of that benefit, but the benefit is vitiated in whole or in part, see *Santobello v New York*, 404 US 257, 261 (1971); *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660 (2005); and (3) whether the Wayne Circuit Court had jurisdiction over the defendant's claim in light of MCL 28.728c(4).

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 9, 2017:

ALLY FINANCIAL, INC v STATE TREASURER and SANTANDER CONSUMER USA, INC v STATE TREASURER, Nos. 154668, 154669, and 154670; Court of Appeals Nos. 327815, 327832, and 327833. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property; (2) whether the Court of Appeals erred in giving the Department of Treasury's interpretation of MCL 205.54i respectful consideration in light of MCL 24.232(5); (3) how this Court should review the Department's decision to require RD-108 forms pursuant to MCL 205.54i(4) and, under that standard,

whether the decision was appropriate; and (4) whether the Court of Appeals erred in holding that Ally Financial's election forms did not apply to accounts written off prior to the retailers' execution of the forms. The parties should not submit mere restatements of their application papers.

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST v CITY OF PONTIAC, No. 154745; reported below: 317 Mich App 570. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals correctly concluded that the principles from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), apply to the analysis of the Emergency Manager's Executive Order 225; and that (2) the retroactive application of EO 225 to extinguish the defendant city's accrued but unpaid contribution to the trust for the 2011-2012 fiscal year was impermissible under *LaFontaine*; and (3) if not, whether EO 225 constitutes an impermissible retroactive modification of the 2011–2012 fiscal year contribution under Const 1963, art 9, § 24. The parties should not submit mere restatements of their application papers.

PEOPLE v TREMEL ANDERSON, No. 155172; Court of Appeals No. 327905. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) the manner in which a magistrate judge may consider the credibility of witnesses at a preliminary examination when determining whether to bind over a defendant, in light of our instruction that a magistrate should not refuse to bind a defendant over when the evidence conflicts or raises reasonable doubt; see *People v Yost*, 468 Mich 122, 128 n 8 (2003); and (2) whether the Wayne Circuit Court abused its discretion in dismissing the charges in this instance. The parties should not submit mere restatements of their application papers.

PEOPLE v RYAN CHATMAN, No. 155184; Court of Appeals No. 328246. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party. See *People v Stevens*, 498 Mich 162 (2015). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied June 9, 2017:

PEOPLE v BARBARA AGRO, No. 154077; Court of Appeals No. 331778.

PEOPLE v ANTHONY AGRO, No. 154097; Court of Appeals No. 331902.

PEOPLE v BARBARA JOHNSON, No. 154103; Court of Appeals No. 331966.

PEOPLE v RICHMOND, No. 154105; Court of Appeals No. 331822.

PEOPLE v BARBARA AGRO, No. 154788; Court of Appeals No. 334865.

Leave to Appeal Denied June 16, 2017:

PEOPLE v MELVIN HOWARD, No. 153651; Court of Appeals No. 324388.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from denial of leave to appeal. I write separately to explain the standard I believe should be applied by this Court in determining whether a defendant has consented to a mistrial and why I would vacate the judgment of the Court of Appeals and remand to the trial court to make a factual finding in the first instance on whether defendant consented to the mistrial.

The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." US Const, Am V.[1] Jeopardy "attaches" when a jury is selected and sworn. *People v Lett*, 466 Mich 206, 215 (2002). "Where the trial ends before a verdict—where a mistrial is declared—the Double Jeopardy Clause may bar a retrial." *People v Dawson*, 431 Mich 234, 251 (1988). However, the "Double Jeopardy Clause does not bar all retrials." *Id*. at 252. Specifically, a retrial is not barred if the defendant has consented to the mistrial or the mistrial is justified by "manifest necessity." *Lett*, 466 Mich at 215-216. The Court of Appeals in this case held that defendant consented to the mistrial and therefore he could be retried. *People v Howard*, unpublished per curiam opinion of the Court of Appeals, issued March 8, 2016 (Docket No. 324388), p 6.

This Court last extensively considered the issue of a defendant's consent to a mistrial in *People v Johnson*, 396 Mich 424 (1976). In *Johnson*, the prosecutor requested a mistrial. *Id*. at 429. The trial court adjourned and the next day decided to declare a mistrial. *Id*. During this time, defendant's counsel "never directly commented one way or another on whether he would consent to a mistrial." *Id*. This Court on review held that "[m]ere silence or failure to object . . . is not [consent to a mistrial.]" *Id*. at 432. We added that "in the absence of an affirmative showing on the record, this Court will not presume to find such consent." *Id*. at 433. Finally, we concluded that defendant had not consented because "[t]here was no such affirmative showing in this case. At best, defense counsel may be said to have been silent. At worst, he did not protest, but he did not assent." *Id*.

In so holding, the Court relied on the United States Supreme Court's opinion in *United States v Dinitz*, 424 US 600 (1976). In *Dinitz*, the United States Court of Appeals for the Fifth Circuit concluded that because defendant was left with "no choice" but to request a mistrial, his

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[1] The Michigan Constitution similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. Neither party has argued that the Michigan Constitution's double jeopardy provision provides a defendant greater protections than the federal constitution. Cf. *People v Thompson*, 424 Mich 118, 130 (1985) ("[W]e hold that reprosecution after a mistrial caused by the failure of a jury to reach a verdict does not violate . . . the Michigan Constitution.").

choice to do so was involuntary, and therefore his second trial was barred by double jeopardy. *Id*. at 608-609. The Supreme Court rejected that argument:

> The Court of Appeals viewed the doctrine that permits a retrial following a mistrial sought by the defendant as resting on a waiver theory. The court concluded, therefore, that "something more substantial than a Hobson's choice" is required before a defendant can "be said to have relinquished voluntarily his right to proceed before the first jury." The court thus held that no waiver could be imputed to the respondent because the trial judge's action . . . left the respondent with "no choice but to move for or accept a mistrial." But traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error. In such circumstances, the defendant generally *does* face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. *The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.* [*Id*. (emphasis added; citations omitted).]

On the basis of the italicized sentence above, *Johnson* held that "the defendant must therefore do something positively in order to indicate he or she is exercising that primary control." *Johnson*, 396 Mich at 432-433.

I agree with *Johnson* to the extent that it held that "[m]ere silence or failure to object," *by itself*, is insufficient to indicate consent to a mistrial. Such a standard is consistent with the Supreme Court's requirement in *Dinitz* that a defendant must exercise "primary control over the course to be followed" and the Supreme Court's characterization of consent to a mistrial as "a deliberate election on [a defendant's] part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v Scott*, 437 US 82, 93 (1978). Mere silence or failure to object, by itself, is insufficient to ensure that the defendant "retain[s] primary control over the course to be followed" and that he or she made "a deliberate election" to consent to the mistrial.

However, to the extent that *Johnson* stands for the proposition that silence or failure to object is *never* sufficient to indicate consent and that a defendant must expressly consent to a mistrial declaration, I believe such a standard to be overly restrictive under the Constitution.[2] While

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[2] This narrow reading of *Johnson* is in tension with this Court's statement in *People v McGee* that "[t]he record in this case reveals circumstances from which consent to the circuit court's declaration of a mistrial can be *inferred*." *People v McGee*, 469 Mich 956 (2003) (emphasis added). Moreover, such a narrow approach is contrary to the standard applied in other jurisdictions that have similarly held that silence *alone* does not indicate consent. See *Cardine v Commonwealth*,

the express consent of a defendant is the most certain method of ensuring that a defendant "retains control" over the proceeding, when a defendant otherwise takes actions that under the totality of the circumstances indicate consent to the mistrial, he or she is still retaining "primary control" over the course of the proceeding. Thus, an approach holding that a defendant who remains silent may nonetheless have consented to a mistrial, when assessed under the totality of the circumstances, is fully compatible with United States Supreme Court caselaw. Moreover, a contrary approach may encourage unacceptable gamesmanship, as a defendant may deliberately remain silent in the knowledge that if a mistrial is declared, then a subsequent retrial may be barred. Thus, I do not believe that the express consent of a defendant is necessary to permit a retrial of a defendant if the mistrial has not been justified by manifest necessity.

I believe the test enunciated by the United States Court of Appeals for the Sixth Circuit in *United States v Gantley* provides the proper balance between requiring express consent and holding that silence or failure to object by itself necessarily constitutes consent to a mistrial. *United States v Gantley*, 172 F3d 422, 428 (CA 6, 1999). That court has explained:

> [T]his Circuit . . . insists on an especially careful examination of the totality of circumstances, to ensure a defendant's consent is not implied when there is a substantial question of whether the defendant did, in fact, consent. Because there are drastic consequences attached to a finding of consent to a mistrial, we have refused to infer consent merely because a defendant did not object to the declaration of a mistrial. Rather, a defendant's failure to object to a mistrial implies consent thereto *only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent*. [*Id*. at 428-429 (emphasis added; quotation marks and citations omitted).]

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283 SW3d 641, 651 (Ky, 2009) (holding that a defendant is not required to object to a mistrial, but silence can be considered consent only if "the surrounding circumstances *positively indicate*[] this silence was tantamount to consent") (quotation marks and citation omitted); *State v Bertrand*, 133 NH 843, 852 (1991) (holding that "a defendant *generally* cannot consent to a mistrial by silence") (emphasis added); *State v Stevens*, 126 Idaho 822, 828 (1995) ("While something *more than* mere silence on the defendant's part must be shown to establish his consent to being placed in double jeopardy, the consent need not be express; rather it may be implied from a totality of circumstances.") (emphasis added; quotation marks and citation omitted); *Stanley v Superior Court of Los Angeles Co*, 206 Cal App 4th 265, 269 (2012) (holding that consent to a mistrial can be inferred if "counsel's conduct goes beyond 'mere silence,' and his words and actions reasonably lead the court to believe he consents").

I would adopt this test in Michigan and hold that silence or failure to object constitutes consent to a mistrial "only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent." *Id*. at 429. Such an approach is consistent with United States Supreme Court caselaw on the issue and ensures that a defendant will not rest on his or her rights in the hope of establishing an appellate parachute.

Because this Court has never clarified what constitutes the proper standard under *Johnson* for determining whether a defendant has consented to a mistrial, I would vacate the decision of the Court of Appeals and remand for a determination of whether defendant consented under the proper legal standard. Whether a defendant has consented to a mistrial poses a question of fact that is reviewed for clear error. See, e.g., *People v Camp*, 486 Mich 914 (2010) ("[T]he trial court did not clearly err in finding that the defendant consented to the mistrial declared by the court."). However, the trial court here never made a finding that defendant consented to the mistrial. Accordingly, rather than remand to the Court of Appeals, I would remand to the trial court to undertake a factual finding in the first instance under the proper legal standard as to whether defendant impliedly consented to the mistrial. After the trial court undertakes such a finding, either party could appeal that ruling, and the prosecutor could also then argue that the mistrial was justified by manifest necessity.[3]

BERNSTEIN, J., joins the statement of MARKMAN, C.J.

In re MORFORD, No. 155399; Court of Appeals No. 332541.

In re BINYARD, No. 155719; Court of Appeals No. 333485.

Summary Disposition June 21, 2017:

PEOPLE v WINGARD, No. 153290; Court of Appeals No. 323316. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the defendant's claims under *Miranda v Arizona*, 384 US 436 (1966), and we remand this case to the Wayne Circuit Court. The circuit court shall, in accordance with Administrative Order 2003-03, determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant at an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), at which the circuit court shall determine whether trial counsel was ineffective for failing to move to suppress the defendant's

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[3] Judge O'BRIEN issued a concurring opinion in which she concluded that the trial court's declaration of a mistrial was also justified by manifest necessity. *Howard* (O'BRIEN, J., concurring), unpub op at 2. However, the Court of Appeals majority declined to address that issue, concluding only that defendant had consented to the mistrial. *Id*. (opinion of the Court) at 6 n 3. Accordingly, I would not address this issue until after it has been considered by the Court of Appeals.

confession under *Miranda v Arizona*, 384 US 436 (1966), and *Missouri v Seibert*, 542 US 600 (2004). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v BRIAN ALEXANDER, No. 154857; Court of Appeals No. 332700. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that reversed the Ingham Circuit Court's November 20, 2015 order granting the defendant's motion for a new trial. Although the Court of Appeals correctly concluded that the trial court applied an improper standard in granting a new trial based on newly discovered evidence, it erred in further determining that the new evidence would not justify the grant of a new trial. The evidence—the discovery of the complainant's cell phone records—was newly discovered, was not cumulative, and could not have been discovered with reasonable diligence and produced at trial. Whether this evidence "makes a different result probable on retrial," *People v Cress*, 468 Mich 678, 692 (2003), should first be determined by the trial court. We remand this case to the Ingham Circuit Court to determine, applying the *Cress* standard, whether the newly discovered evidence justifies a new trial. We do not retain jurisdiction.

PEOPLE v FELIX WASHINGTON, No. 154959; Court of Appeals No. 335247. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 21, 2017:

GRASS LAKE IMPROVEMENT BOARD v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 154364; reported below: 316 Mich App 356. The parties may file supplemental briefs within 42 days of the date of this order. They should not submit mere restatements of their application papers.

WILDER, J., did not participate because he was on the Court of Appeals panel.

HARMONY MONTESSORI CENTER v CITY OF OAK PARK, No. 154819; Court of Appeals No. 326870. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 (1980), and *David Walcott Kendall Mem Sch v Grand Rapids*, 11 Mich App 231 (1968), continue to provide the

appropriate test of what constitutes a "nonprofit . . . educational . . . institution[]" under MCL 211.7n. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

BROWN v CITY OF SAULT STE MARIE, No. 154851; Court of Appeals No. 330508. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals properly applied MCL 691.1404(1) ("[t]he notice shall specify . . . the injury sustained . . .") when it concluded that the plaintiff's notice, "when read as a whole," was adequate because the notice "referenced documents" that more fully described the plaintiff's injuries. The parties should not submit mere restatements of their application papers.

WELLS FARGO BANK, NA v SBC IV REO, LLC, No. 155089; reported below: 318 Mich App 72. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether defendant SBC IV REO, LLC is a bona fide purchaser for value such that the doctrine of equitable subrogation cannot be applied in this case; (2) whether defendant SBC will be prejudiced by application of equitable subrogation; and (3) whether the limitation period of MCL 600.5801(4) applies to the plaintiff's claim for equitable subrogation. The parties should not submit mere restatements of their application papers.

PEOPLE v SHAMI, No. 155273; reported below: 318 Mich App 316. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the defendant's activities of mixing different flavors of tobacco to create different flavor combinations to offer customers and repackaging tobacco under his own label rendered him a "manufacturer" of tobacco under MCL 205.422(m) of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*.; and, if so, (2) whether the TPTA's definition of "manufacturer" satisfied due process by putting the defendant on fair notice of the conduct that would subject him to punishment. See *People v Hall*, 499 Mich 446, 461 (2016). The parties should not submit mere restatements of their application papers.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied June 21, 2017:

PEOPLE v RAYMOND CHEATHAM, No. 154414; Court of Appeals No. 327197.

THE GROSSE POINTE LAW FIRM, PC v JAGUAR LAND ROVER NORTH AMERICA, LLC, No. 154694; reported below: 317 Mich App 395.

PEOPLE v LIONEL WRIGHT, No. 154831; Court of Appeals No. 319724. The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include the issue of whether, in light of the affidavit of Allan Rogers, he is entitled to an evidentiary hearing or some other relief.

PEOPLE v JOSHUA BURNS, No. 154944; Court of Appeals No. 327179.

PIETILA v WISOTZKE, No. 155086; Court of Appeals No. 321652.

SUMMIT DIAMOND BRIDGE LENDERS, LLC v PHILIP R SEAVER TITLE COMPANY, INC, No. 155240; Court of Appeals No. 326679.

LAMKIN v HAMBURG TOWNSHIP BOARD OF TRUSTEES, No. 155381; reported below: 318 Mich App 546.

PEOPLE v BAILEY, No. 155515; Court of Appeals No. 329620.

PEOPLE v NICHOLAS AGRO, No. 155761; Court of Appeals No. 337215.

PEOPLE v BARBARA JOHNSON, No. 155763; Court of Appeals No. 337206.

PEOPLE v ANTHONY AGRO, No. 155765; Court of Appeals No. 337209.

PEOPLE v BARBARA AGRO, No. 155767; Court of Appeals No. 337210.

PEOPLE v RICHMOND, No. 155769; Court of Appeals No. 337211.

Leave to Appeal Denied June 23, 2017:

In re GIDLEY, No. 155905; Court of Appeals No. 335642.

EVANS v WILLIAM BEAUMONT HOSPITAL, No. 155921; Court of Appeals No. 337361.

Summary Disposition June 27, 2017:

PEOPLE v EDDIE BROWN, No. 153505; Court of Appeals No. 330907. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for reissuance of the defendant's judgment of conviction and sentence. It is unclear from the record whether the failure to perfect an appeal of right was solely the fault of the defendant's trial counsel, who promised in open court to file the necessary paperwork to begin the appellate process, but failed to fulfill that promise, see *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999), or whether trial counsel filed the paperwork and the trial court failed to process it. Regardless, it is clear that the failure to perfect an appeal of right is not attributable to the defendant.

We further order the Oakland Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in the Court of Appeals. We do not retain jurisdiction.

PEOPLE v DUNCAN ALEXANDER, No. 154425; Court of Appeals No. 331774. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the December 17, 2015 opinion and order of the Macomb Circuit Court, which denied relief from judgment under MCR 6.502(G),

and we remand this case to the circuit court for reconsideration. The defendant's motion for a new trial and DNA testing sought relief under MCL 770.16 rather than under MCR 6.508(D). Moreover, the motion was filed with regard to case 2009-005130-FC only, as shown on the circuit court's March 2, 2015 opinion and order denying relief. Under the circumstances, the defendant's subsequent motion for relief from judgment, filed with regard to cases 2009-005130-FC, 2009-005132-FC, and 2009-005135-FC, is not barred by MCR 6.502(G). On remand, the trial court shall review the defendant's motion for relief from judgment under the standard set forth in MCR 6.508(D). We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GILMORE, No. 154534; Court of Appeals No. 334205. Pursuant to MCR 7.305(H)(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 waived the question of his entitlement to an evidentiary hearing regarding the amount of restitution; and if not, (2) whether the Wayne Circuit Court erred in denying him such a hearing. See *People v McKinley*, 496 Mich 410 (2014). In all other respects, leave to appeal is denied.

We further direct the Court of Appeals to remand this case first to the Wayne Circuit Court, in accordance with Administrative Order 2003-03, 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.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JASON BALL, No. 155012; Court of Appeals No. 334845. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee Circuit Court, which shall direct the probation officer to delete from the PSIR the challenged information that the court had determined would not be taken into account in imposing sentence. The circuit court shall ensure that a corrected copy of the report is transmitted to the Michigan Department of Corrections. MCL 771.14(6); MCR 6.425(E)(2)(a). In all other respects, leave to appeal is denied.

ALTMAN v PAROLE BOARD, No. 155203; Court of Appeals No. 334371. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v JUSTIN JOHNSON, No. 155287; Court of Appeals No. 335014. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied June 27, 2017:

BROOKS v STARR INDEMNITY & LIABILITY COMPANY, No. 152834; Court of Appeals No. 322024.

PEOPLE v VICTOR WILSON, No. 154002; Court of Appeals No. 331573.

WALKER v ALERITAS CAPITAL CORPORATION, No. 154319; Court of Appeals No. 326354.

SARAFA v LEVI, No. 154392; Court of Appeals No. 324636.

PEOPLE v ROBERT BRUCE WHITE, No. 154422; Court of Appeals No. 331814.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v VICKERY MCCRAY, No. 154441; Court of Appeals No. 325362.

PEOPLE v OLIVER-MCCLUNG, No. 154443; Court of Appeals No. 325107.

PEOPLE v RAY-EL, No. 154479; Court of Appeals No. 326808.

BROOKFIELD EAST LANSING, LLC v 125 N HAGADORN, LLC, No. 154513 Court of Appeals No. 325956.

PEASE v PEASE, No. 154520; Court of Appeals No. 332282.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DENORIA SMITH, No. 154531; Court of Appeals No. 326462.

PEOPLE v LAWRENCE WAGNER, No. 154541; Court of Appeals No. 333744.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v COATES, No. 154586; Court of Appeals No. 327501.

PEOPLE v TORIAL BROWN, No. 154609; Court of Appeals No. 332987.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FLAGG, No. 154613; Court of Appeals No. 332808.

PEOPLE v METTS, No. 154632; Court of Appeals No. 333792.

PEOPLE v MCINTYRE, No. 154678; Court of Appeals No. 333751.

PEOPLE v THOMAS JONES, No. 154679; Court of Appeals No. 333036.

PEOPLE v MONTGOMERY, No. 154688; Court of Appeals No. 333659.

PEOPLE v ZACKARY WILLIAMS, No. 154690; Court of Appeals No. 332937.

PEOPLE v JONATHAN WILLIAMS, No. 154698; Court of Appeals No. 333960.

PEOPLE v GEORGE WASHINGTON, No. 154700; Court of Appeals No. 334311.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v GEORGE WASHINGTON, No. 154702; Court of Appeals No. 334314.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v HORTON, No. 154705; Court of Appeals No. 333762.

PEOPLE v LEDFORD, No. 154714; Court of Appeals No. 334017.

PEOPLE v ROBERT REEVES, No. 154761; Court of Appeals No. 332224.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SURLES, No. 154798; Court of Appeals No. 334043.

PEOPLE v SWANIGAN, No. 154839; Court of Appeals No. 327456.

SARDO v HAYMOUR, No. 154841; Court of Appeals No. 332951.

PEOPLE v ASHWORTH, No. 154846; Court of Appeals No. 334602.

REFFITT v BACHI-REFFITT, No. 154876; Court of Appeals No. 333149.

PEOPLE v LENERO THOMAS, No. 154883; Court of Appeals No. 325388.

PEARCE v EATON COUNTY ROAD COMMISSION, No. 154885; Court of Appeals No. 333387.

PEOPLE v ALZUBAIDY, No. 154889; Court of Appeals No. 334508.

PEOPLE v LOYD, No. 154891; Court of Appeals No. 334101.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LONNIE PARKER, No. 154894; Court of Appeals No. 334717.

PEOPLE v MICHAEL WALTON, No. 154902; Court of Appeals No. 334199.

PEOPLE v LOUIS, No. 154917; Court of Appeals No. 333226.

PEOPLE v JOHNS, No. 154922; Court of Appeals No. 334730.

PEOPLE v MARVIN FRITZ, No. 154926; Court of Appeals No. 333562.

PEOPLE v KINNEY, No. 154933; Court of Appeals No. 333372.

MCKENNETT v KOLAILAT, No. 154946; Court of Appeals No. 335134.

NATURIPE FOODS, LLC v SIEGEL EGG COMPANY, INC, No. 154969; Court of Appeals No. 327172.

PEOPLE v MICHAEL THOMAS, No. 155042; Court of Appeals No. 328486.

PEOPLE v CLIFTON JONES, No. 155054; Court of Appeals No. 332425.

PEOPLE v TOUGH, No. 155075; Court of Appeals No. 328043.

PEOPLE v DEWBERRY, No. 155122; Court of Appeals No. 335139.

PEOPLE v MARTINNEZE MOORE, No. 155123; Court of Appeals No. 334109.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FONTYN, No. 155137; Court of Appeals No. 335264.

PEOPLE v WALTER GREEN, No. 155138; Court of Appeals No. 328840.

PEOPLE v NICHOLAS THOMAS, No. 155146; Court of Appeals No. 326956.

PEOPLE v ROBERT EARL WHITE, No. 155150; Court of Appeals No. 327419.

In re DEMPS, No. 155151; Court of Appeals No. 333508.

PEOPLE v JEFFREY ALLISON, No. 155157; Court of Appeals No. 328523.

PEOPLE v JUNIOR PORTER, No. 155158; Court of Appeals No. 334191.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DANFORTH, No. 155160; Court of Appeals No. 329106.

PEOPLE v WHEELER, No. 155164; Court of Appeals No. 329524.

PEOPLE v MARY WHITE, No. 155166; Court of Appeals No. 327418.

PEOPLE v ROSTON, No. 155169; Court of Appeals No. 328726.

PEOPLE v KEITH WAGNER, No. 155174; Court of Appeals No. 335187.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MARVIN NOBLE, No. 155178; Court of Appeals No. 324885.

PORT SHELDON BEACH ASSOCIATION v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 155182; reported below: 318 Mich App 300.

NIEDOLIWKA v INGLIN, No. 155195; Court of Appeals No. 327576.

PEOPLE v MANSFIELD, No. 155202; Court of Appeals No. 329252.

GAINES v YUNG, No. 155212; Court of Appeals No. 335514.

PEOPLE v CLEMONS, No. 155214; Court of Appeals No. 334078.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DONALD SCOTT, No. 155223; Court of Appeals No. 335500.

BACON v ST CLAIR COUNTY, No. 155225; Court of Appeals No. 328337.

BEACH FOREST SUBDIVISION ASSOCIATION, INC v OMRAN, No. 155226; Court of Appeals No. 326976.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LINDSEY, No. 155234; Court of Appeals No. 335434.

BUNCH v AUTO CLUB GROUP INSURANCE COMPANY, No. 155238; Court of Appeals No. 330166.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DIEPENHORST, No. 155244; Court of Appeals No. 329411.

PEOPLE v BEASLEY, No. 155246; Court of Appeals No. 330469.

PEOPLE v WATTS, No. 155249; Court of Appeals No. 335637.

PEOPLE v KARLTON LEWIS, No. 155259; Court of Appeals No. 329383.

LAUVE v GOVERNOR, No. 155263; Court of Appeals No. 329985.

PEOPLE v ANTHONY MYERS, No. 155265; Court of Appeals No. 328605.

ZATKOVIC v TRAVERSE AREA PUBLIC SCHOOLS, No. 155271; Court of Appeals No. 333912.

SPECKIN FORENSICS, LLC v BERNSTEIN, No. 155278; Court of Appeals No. 334374.

PEOPLE v ELLERY BENNETT, No. 155280; Court of Appeals No. 334181.

PEOPLE v ANDREW JACKSON, No. 155281; Court of Appeals No. 328580.

PEOPLE v SELONKE, Nos. 155282 and 155283; Court of Appeals Nos. 327934 and 330247.

PEOPLE v BOUCHER, No. 155288; Court of Appeals No. 335466.

PEOPLE v SELLS, No. 155291; Court of Appeals No. 335578.

PEOPLE v MAURICE WILLIAMS, No. 155293; Court of Appeals No. 328717.

PEOPLE v KEATHLEY-MITCHELL, No. 155296; Court of Appeals No. 328579.

PEOPLE v LINTON, No. 155297; Court of Appeals No. 328930.

WILDER, J., did not participate because he was on the Court of Appeals panel.

KINNEY v DEPARTMENT OF CORRECTIONS, No. 155299; Court of Appeals No. 329588.

PEOPLE v BRUNN, No. 155300; Court of Appeals No. 329359.

PEOPLE v MEDEMA, No. 155303; Court of Appeals No. 335314.

PEOPLE v FELIX, No. 155304; Court of Appeals No. 334846.

PEOPLE v SPIVEY, No. 155306; Court of Appeals No. 335612.

PEOPLE v RUNNELS-KARSIOTIS, No. 155310; Court of Appeals No. 328377.

PEOPLE v KACZANOWSKI-GONZALEZ, No. 155314; Court of Appeals No. 335686.

PEOPLE v BRADY, No. 155316; Court of Appeals No. 329037.

PEOPLE v SALYERS, No. 155317; Court of Appeals No. 335503.

PEOPLE v ETROY WILLIAMS, No. 155333; Court of Appeals No. 335728.

PEOPLE v JERRY STEWART, No. 155336; Court of Appeals No. 335617.

PEOPLE v GRAFTON, No. 155345; Court of Appeals No. 329088.

PEOPLE v WIKTOR, No. 155348; Court of Appeals No. 333524.

PEOPLE v CORTEZ BROOKS, No. 155386; Court of Appeals No. 328839.

PEOPLE v BOZEMAN, No. 155461; Court of Appeals No. 327604.

PEOPLE v BISHOP, No. 155486; Court of Appeals No. 336168.

PEOPLE v BUXENSTEIN, No. 155669; Court of Appeals No. 337033.

PEOPLE v MALLETT-RATHELL, No. 155698; Court of Appeals No. 330327.

PIEPER v PIEPER, No. 155700; Court of Appeals No. 334685.

BLANCHARD v DIVINE-COVELL, No. 155728; Court of Appeals No. 334495.

PEOPLE v MACKENZIE, No. 155737; Court of Appeals No. 324893.

Superintending Control Denied June 27, 2017:

LYONS v ATTORNEY GRIEVANCE COMMISSION, No. 155363.

Summary Disposition June 30, 2017:

BRONSON METHODIST HOSPITAL v MICHIGAN ASSIGNED CLAIMS FACILITY, Nos. 151343 and 151344; Court of Appeals Nos. 317864 and 317866. By order of October 12, 2016, the application for leave to appeal the February 19, 2015 judgment of the Court of Appeals was held in abeyance pending the decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co* (Docket No. 152758). On order of the Court, the case having been decided on May 25, 2017, 500 Mich 191 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court for reconsideration in light of *Covenant*. We do not retain jurisdiction.

SPECTRUM HEALTH HOSPITALS v WESTFIELD INSURANCE COMPANY, No. 151419; Court of Appeals No. 323804. In lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light

of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (Docket No. 152758, decided May 25, 2017). We do not retain jurisdiction.

Leave to Appeal Denied June 30, 2017:

FOWLER v MENARD, INC, No. 152519; Court of Appeals No. 310890.

WILDER, J., did not participate because he was on the Court of Appeals panel.

In re ROBERDEAUX ESTATE, No. 154832; Court of Appeals No. 323802.

MARKMAN, C.J. (*dissenting*). I would reverse for the reasons set forth by Judge SERVITTO in her Court of Appeals dissent. *In re Roberdeaux Estate*, unpublished opinion of the Court of Appeals, issued October 18, 2016 (Docket No. 323802) (SERVITTO, J., dissenting). A "standard of care" expert in a medical malpractice action must have "devoted a majority of his or her professional time to . . . [t]he active clinical practice of the same health profession in which the party . . . on whose behalf the testimony is offered" practices. MCL 600.2169(1)(b)(*i*). In *Woodard v Custer*, 476 Mich 545, 560 (2006), this Court held that an expert "must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice . . . ." And in *Woodard*'s companion case, *Hamilton v Kuligowski*, we struck plaintiff's expert's testimony when defendant was a specialist in internal medicine and plaintiff's expert specialized in infectious diseases, a subspecialty of internal medicine. *Id*. at 577-578. Largely the same reasoning applies here. Defendant practiced general internal medicine, while her expert practiced geriatrics, a subspecialty of internal medicine. Under *Woodard* and *Hamilton*, the testimony of defendant's expert should not have been admitted.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

WILDER, J., did not participate because he was on the Court of Appeals panel.

In re ROBERDEAUX ESTATE, No. 154836; Court of Appeals No. 323802.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

WILDER, J., did not participate because he was on the Court of Appeals panel.

GARDNER v ANDERSON EYE ASSOCIATES, PLC, No. 155969; Court of Appeals No. 336707.

Rehearing Denied June 30, 2017:

PEOPLE v DARIUS FRANKLIN, No. 152840; opinion at 500 Mich 92.

WILDER, J., took no part in this decision.

PEOPLE v CALLOWAY, Nos. 153636 and 153751; opinion at 500 Mich 180.

Order of Public Censure and Suspension Without Pay Entered July 6, 2017:

In re IDDINGS, No. 154936. On December 12, 2016, the Judicial Tenure Commission issued a Decision and Recommendation to which the respondent, Honorable Gregg P. Iddings, Lenawee County Probate Court Judge, consented. It was accompanied by a settlement agreement, in which the respondent waived his rights, stipulated to findings of fact and conclusions of law, and consented to a sanction of a public censure and a 60-day suspension without pay. On February 3, 2017, this Court entered an order remanding the matter to the Commission for further explication, retaining jurisdiction. The Commission filed a supplemental report under seal on February 28, 2017. The respondent filed a motion to expand the record on May 12, 2017. On June 5, 2017, this Court entered an order under seal granting the motion to expand the record, and rejecting the order of discipline recommended by the Commission as being insufficient, given the facts stated in the stipulation and supplemental report. The order provided that the Court would impose a six-month suspension without pay on July 5, 2017, unless, pursuant to MCR 9.225, the respondent withdrew his consent to discipline by July 3, 2017. The respondent has not withdrawn his consent.

In resolving 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; [and]
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion [is] more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. Ms. [*****][1] was Respondent's judicial secretary from July 2010 to November 2015.
>
> 2. Between 2012 and 2015, Respondent engaged in a series of acts that constituted sexual harassment of Ms. [*****].
>
> 3. Respondent's conduct included,
>
> a. Sending after-hour[s] text messages to Ms. [*****], in which he discussed his marital problems and his personal feelings.
>
> b. Making an offer to purchase expensive items for Ms. [*****] as Christmas gifts and inviting her to Rhianna/Eminem and other high-priced concerts.
>
> c. Suggesting that Ms. [*****] accompany him to exotic locations for court-related conferences where they could share a hotel room.
>
> d. Showing Ms. [*****] a sexually suggestive YouTube video of a high-priced lingerie website, Agent Provacateur.
>
> e. Making comments which he admits Ms. [*****] could have reasonably interpreted as an invitation to have an affair with him.
>
> f. In a letter of recommendation, while referring to Ms. [*****]'s professionalism and dependability, writing "besides, she is sexy as hell." Respondent deleted the language at the request of Ms. [*****].
>
> g. Writing "Seduce [*****]" on the court computerized calendar and then directing Ms. [*****] to look at that particular date on the calendar. Respondent deleted the language at the request of Ms. [*****].
>
> h. Telling Ms. [*****] that the outfits she wore to work were "too sexy."
>
> i. Telling Ms. [*****] that she "owed him" for allowing her to leave work early to attend her son's after-school activities.
>
> j. Reaching over her to edit documents which would have put him in physical contact with Ms. [*****].
>
> k. Staring down the front of Ms. [*****]'s blouse.
>
> l. While discussing his [t]riathlon training, sitting on Ms. [*****]'s desk and laying on it while she was sitting at her desk.
>
> 4. Shortly after she was hired, Ms. [*****] made it clear to Respondent that she had "no sexual attraction towards him."
>
> 5. On several occasions, Ms. [*****] told Respondent that his wife would not appreciate his comments and actions.
>
> 6. On several occasions, Respondent told Ms. [*****] that he was "sorry and should stop" making some of the comments.

---

[1] The victim's name is redacted to protect her privacy.

7. Ms. [*****] was very upset when she learned about a rumor at the courthouse that she was having an affair with Respondent and requested that he "shut it down."

8. His court officer told Respondent to "watch" how he spoke to Ms. [*****].

9. Respondent admitted that he had received a written copy of the county's policy prohibiting harassment shortly after taking the bench.

10. Respondent admitted that he is well aware of, and familiar with, both Michigan and [f]ederal sexual harassment laws.

11. On March 18, 2016, Ms. [****] filed an EEO [Equal Employment Opportunity] complaint against Respondent in which she alleged that Respondent's harassment caused "an enormous amount of stress, anxiety, discomfort, nervousness, mental breakdowns, mood swings and disruptive sleep."

12. Lenawee County hired Priscilla Archangel, Ph.D., President, Archangel and Associates, LLC[,] to conduct an investigation of the EEO complaint. Ms. Archangel filed a report of the investigation dated May 2, 2016.

13. The summary findings of the report included that Respondent's behavior toward Ms. [*****],

> does constitute "harassment" in the context of "Sexual harassment includes: . . . unwanted sexual advances . . . visual conduct that includes . . . a display of sexually suggestive objects or pictures, . . . verbal conduct such as making or using derogatory comments based on sex or sexual comments, . . . verbal sexual advances or propositions; . . . suggestive/obscene letters, . . ." as listed in the Lenawee County Statement Prohibiting Harassment. Specifically, he admits showing [*****] a video by Agent Provacateur depicting scantily clad women in lingerie; writing "Besides, she's sexy as hell" in a reference letter; writing "seduce [*****]" on his electronic calendar and showing it to her; and telling her "you owe me one" when she took vacation time to attend events for her son.

14. The report also stated that it was the "belief of the Investigator that [Respondent's behavior] constituted, at a minimum, an offensive, and more probably a hostile working environment."

15. On June 20, 2016, Ms. [*****] signed a "Resignation Agreement and Release of All Claims" between herself and Lenawee County, Lenawee County Probate Court, and Respondent which provided that Ms. [*****] [would] receive monetary compensation to release all claims related to Respondent['s] conduct.

16. Respondent self-reported the EEO complaint to the Judicial Tenure Commission. On May 5, 2016, the Judicial Tenure Commission received RFI 2016-22112 from Respondent. Respondent attached his prepared statement and Ms. [*****]'s EEO complaint.

17. Respondent is extremely remorseful over these matters, he has co-operated throughout the investigation, and he is desirous of resolving these grievances.

The standards set forth in *Brown* are also being applied to the Judicial Tenure Commission's legal conclusions, to which the respondent stipulated and which we adopt as our own. The Commission concludes, and we agree, that the respondent's conduct constitutes:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 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 6, Section 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 Code of Judicial Conduct, Canon 1;

(d) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

(f) Failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(g) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);

(h) Lack of personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presides, contrary to MCR 9.205(A); and

(i) Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

Applying these criteria to the present case, while mindful of the agreement between the Commission and the respondent, we have concluded that the recommended public censure and 60-day suspension without pay is insufficient in light of the stipulated facts and supplemental report. Certain of the *Brown* standards are particularly relevant here: a pattern or practice of misconduct is more serious than an isolated instance of misconduct, misconduct prejudicial to the actual

administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety, misconduct implicating the actual administration of justice is more serious than conduct that does not, and deliberate misconduct is more serious than spontaneous misconduct. Here, the respondent, as found by the Commission, engaged in a course of conduct constituting sexual harassment from 2012 to 2015. Although his misconduct occurred while off the bench, it was serious and related to his administrative duties as a judge. The respondent's misconduct created an offensive and hostile work environment that directly affected the job performance of his judicial secretary in her dealings with the public and the court's business and affected the administration of justice. His actions implicated the appearance of impropriety and had a negative impact on the actual administration of justice. Further, his conduct was deliberate.

For the reasons set forth in this order, we order that the Honorable Gregg P. Iddings be publicly censured and suspended without pay from the performance of his judicial duties for a period of six months, effective July 5, 2017. This order further stands as our public censure.

In addition, we observe that the recommendation of the Commission is premised in part on the respondent's acceptance of three additional provisions, which have been agreed upon by the Commission and the respondent. These are not encompassed within our order, because they are not judicial discipline as described in Const 1963, art 6, § 30(2). The respondent has provided proof of fulfilling one of the provisions. In accordance with the rules governing judicial discipline, the Commission may recommend further discipline if the respondent fails to comply with the remaining terms:

(1) the respondent shall continue counseling with his current therapist for one year at his own expense.

(2) the respondent will provide proof of his completion of the counseling to the Commission.

Leave to Appeal Granted July 7, 2017:

In re MARDIGIAN ESTATE, No. 152655; reported below: 312 Mich App 553. The parties shall include among the issues to be briefed: (1) whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c); (2) whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*; and (3) if *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument; and if so, how?

The Attorney Grievance Commission, the Probate Section and the Elder Law and Disability Rights Section of the State Bar of Michigan are invited to file briefs amicus curiae. In addition, the State Bar of Michigan, or an appropriate committee of the State Bar authorized in accordance with the State Bar's bylaws, 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.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 7, 2017:

PEOPLE v BRUNER, No. 154779; Court of Appeals No. 325730. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Michael J. McCarthy, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel, addressing: (1) whether the admission of Westley Webb's preliminary-examination testimony at the defendant's joint trial with Michael Lawson violated the defendant's constitutional right to confrontation, despite the trial court's redaction of that testimony and limiting instruction to the jury, see *Gray v Maryland*, 523 US 185 (1998); *Bruton v United States*, 391 US 123 (1968); and (2) if so, whether the error in admitting the testimony was harmless, see *People v Carines*, 460 Mich 750, 774 (1999). The parties should not submit mere restatements of their application papers.

Order Requiring Supplemental Briefing Entered July 7, 2017:

MCNEILL-MARKS v MIDMICHIGAN MEDICAL CENTER-GRATIOT, No. 154159; reported below: 316 Mich App 1 . We direct the parties to file additional supplemental briefs within 42 days of the date of this order addressing whether the communication from the plaintiff to her attorney regarding Marcia Fields's presence at MidMichigan Medical Center-Gratiot amounted to a "report," as that word is used in Section 2 of the Whistleblowers Protection Act (WPA), MCL 15.362. In answering this question, the parties shall, at a minimum, address whether: (1) the plaintiff's communication must be to an individual with the authority to address the alleged violation of law; (2) the WPA requires that a plaintiff employee specifically intend to make a charge of a violation or suspected violation of law against another; and (3) privileged communications between a client and his or her attorney can constitute a report under the WPA. The application for leave to appeal remains pending.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied July 7, 2017:

PEOPLE v MICHAEL LAWSON, No. 154871; Court of Appeals No. 326542.

In re JERNAGIN, No. 155971; Court of Appeals No. 335590.

Leave to Appeal Denied July 12, 2017:

FILAS v SALISBURY, No. 156055; Court of Appeals No. 331458.

Leave to Appeal Denied July 14, 2017:

NAYYAR v OAKWOOD HEALTHCARE, INC, No. 154603; Court of Appeals No. 329135.

WILDER, J., did not participate because he was on the Court of Appeals panel.

KUHLGERT v MICHIGAN STATE UNIVERSITY, No. 156017; Court of Appeals No. 338363.

MARKMAN, C.J., and ZAHRA and WILDER, JJ., would stay the trial court proceedings.

Order Requiring the Circuit Court to Consider the Defendant's Motion for Bond Entered July 19, 2017:

PEOPLE v CARLOS LOVE, No. 155545; Court of Appeals No. 329217. On order of the Court, the defendant's motion for bond pending the prosecutor's application for leave to appeal in the Supreme Court is considered. We order the Wayne Circuit Court to consider the defendant's motion for bond pending disposition of the prosecutor's application for leave to appeal. A trial court has authority to consider a motion for bond upon an appeal or application for leave to appeal by the People. See MCL 765.7, 770.12 and 770.9a. The prosecutor's application for leave to appeal the February 7, 2017 judgment of the Court of Appeals remains pending.

Application for Leave to Appeal Dismissed on Stipulation July 21, 2017:

PEOPLE v VELEZ, No. 152778; Court of Appeals No. 315209.

Leave to Appeal Denied July 21, 2017:

DOAN v DOAN, No. 156079; Court of Appeals No. 339044.

Summary Disposition July 24, 2017:

PEOPLE v TODD WHEELER, No. 154577; Court of Appeals No. 327634. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal,

we remand this case to the Court of Appeals to address the defendant's claim, raised for the first time in this Court, that his appellate counsel was ineffective for failing to challenge on appeal: (1) the joinder of his and Hooper Jackson Parsley's trials; and (2) his trial counsel's ineffectiveness for failing to oppose that joinder. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Kent Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of trial and appellate counsel. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then address these issues. In all other respects, the application for leave to appeal is denied.

We note that by order dated July 24, 2017, we remanded *People v Parsley* (Docket No. 154734) to the Court of Appeals for consideration of whether the error in joining Parsley's case with the defendant's was harmless. We do not retain jurisdiction.

PEOPLE v PARSLEY, No. 154734; Court of Appeals No. 327924. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals reversing, without a showing of prejudice, the defendant's convictions because the trial court erred by joining his case with Todd Allen Wheeler's case for trial. We remand this case to the Court of Appeals for consideration of whether the error in joining the defendant's and Wheeler's trials was harmless. See MCL 769.26. We note that by order dated July 24, 2017, we remanded *People v Wheeler* (Docket No. 154577) to the Court of Appeals for consideration of Wheeler's joinder challenge. We do not retain jurisdiction.

LARSEN, J. (*concurring*). I concur fully in the Court's orders remanding this case and its companion, *People v Wheeler*, 500 Mich 1032 (2017), to the Court of Appeals. I write separately to highlight the counterintuitive result dictated by our law: because of our interpretation of MCL 769.26 in *People v Lukity*, 460 Mich 484 (1999), a defendant is better off on appeal for not having raised a claim in the lower courts than for having raised it.

The defendant in this case raised his misjoinder claim in the trial court, in the Court of Appeals, and in our Court. To succeed under the applicable *Lukity* harmless-error standard, defendant will have the burden to show by a preponderance of the evidence that the error more likely than not affected the outcome of his trial. *Id*. at 495-496. His codefendant, on the other hand, did not object to the joinder in the trial court and did not raise the claim in the Court of Appeals. See *Wheeler*, 500 Mich at 1033. Now, for the first time in our Court, the codefendant raises the misjoinder claim, casting it as ineffective assistance of counsel. Yet the codefendant, who waited until this Court to raise the misjoinder claim, faces a lower prejudice burden than defendant, needing to show only a reasonable probability of a different outcome. See *Strickland v Washington*, 466 US 668, 694 (1984).

As these cases illustrate, a defendant is better off on appeal for *not* having preserved an error in the trial court than the defendant would be if he had preserved it all along. That seems precisely the opposite of the

incentive scheme we would expect the law to create. Nonetheless, that is the result dictated by *Lukity*, which neither party has asked us to revisit. Accordingly, I concur fully in the Court's order remanding this case to the Court of Appeals to apply *Lukity*'s harmless-error standard.

VIVIANO, J., joins the statement of LARSEN, J.

Summary Disposition July 25, 2017:

PEOPLE v TIMOTHY HORTON, No. 150815; Court of Appeals No. 324071. 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 remand this case to the Court of Appeals for consideration as on leave granted. We overrule *People v Vonins (After Remand)*, 203 Mich App 173, 175-176 (1993), and *People v Bordash*, 208 Mich App 1 (1994), to the extent that they are inconsistent with *Hill v Lockhart*, 474 US 52, 56-57 (1985). A defendant who has entered a plea does not waive his opportunity to attack the voluntary and intelligent character of the plea by arguing that his or her counsel provided ineffective assistance during the plea bargaining process. *Hill*, 474 US at 56-57. On remand, the Court of Appeals shall consider: (1) whether a speedy-trial claim is "nonjurisdictional" as defined by *People v New*, 427 Mich 482 (1986); (2) if not, whether, by entering a plea of no-contest, the defendant waived his right to argue that his counsel was ineffective for failing to assert his constitutional right to a speedy trial before he entered his plea, see, e.g., *Washington v Sobina*, 475 F3d 162, 166 (CA 3, 2007); *United States v Pickett*, 941 F2d 411, 416-417 (CA 6, 1991); and (3) whether the defendant's no-contest plea was involuntarily entered based on his claim that his counsel provided ineffective assistance when counsel failed to advise the defendant during the plea proceedings that he would waive his right to raise his speedy-trial claim on appeal, see *Hill*, 474 US at 58-59 (holding that *Strickland v Washington*, 466 US 668 (1984), applies to a claim alleging ineffective assistance of counsel during the plea-bargaining process); *Lee v United States*, 582 US ___ (2017) (Docket No. 16-327) (holding that a defendant was prejudiced by his counsel's failure to advise him of the deportation consequences of his plea, despite his failure to identify a meritorious defense that he would have raised at trial).

LOWERY v ENBRIDGE ENERGY LIMITED PARTNERSHIP, No. 151600; Court of Appeals No. 319199. 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 reverse the April 2, 2015 judgment of the Court of Appeals and reinstate the November 8, 2013 order of the Calhoun Circuit Court granting the defendants' motion for summary disposition. A plaintiff may show "cause in fact" through circumstantial evidence and "reasonable inferences" therefrom, but not through "mere speculation" or "conjecture," *Skinner v Square D Co*, 445 Mich 153, 164 (1994), such as reasoning *post hoc ergo propter hoc*, see *Genesee Merchants Bank & Trust Co v Payne*, 381 Mich 234, 248 (1968) (opinion by KELLY, J.) ("But fact-finders, be they jury or court, may not indulge in

conjecture. They are constrained to draw reasonable inferences from established facts. Reasoning '*post hoc ergo propter hoc*' does not meet this test.") (citation omitted). The plaintiff's expert opined that the defendants' oil spill was the cause in fact of the plaintiff's injury, reasoning that the plaintiff "wasn't having the problems before [the oil spill] and he was having the problems afterwards." Contrary to the Court of Appeals' conclusion that the plaintiff's evidence reflects a "logical sequence of cause and effect," we conclude that the plaintiff's evidence reflects the logical fallacy of *post hoc* reasoning. Cf. *West v Gen Motors Corp*, 469 Mich 177, 186 n 12 (2003) ("Relying merely on a temporal relationship is a form of engaging in the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this) reasoning.") (quotation marks omitted). We, therefore, conclude that the plaintiff has failed to show a genuine dispute of material fact as to causation. We do not retain jurisdiction.

MARKMAN, C.J. (*concurring*). I concur in this Court's decision to reverse the judgment of the Court of Appeals and write separately to provide counsel to the bench and bar concerning toxic tort litigation. This Court granted leave to appeal to consider: (a) the role of expert testimony in toxic tort cases; (b) the applicability of the general-and-specific-causation framework in toxic tort cases; and (c) the sufficiency of plaintiff's evidence of causation in the instant toxic tort case. *Lowery v Enbridge Energy Ltd Partnership*, 499 Mich 886 (2016). The importance of these issues is evinced, in part, by the fact that of the 54 cases heard by this Court during the present term, only 13 involved, as did this case, full grants. Today, the Court does not address these issues but instead resolves this case in an order of reversal. Uncertainty continues to characterize our toxic tort jurisprudence despite the fact that the general-and-specific-causation framework has proven uncontroversial in contemporary toxic tort law outside Michigan. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook L Rev 51, 52 (2008) ("American courts have reached a broad consensus on what a plaintiff must show to prove causation in a toxic tort case. First, a plaintiff must show that the substance in question is capable of causing the injury in question. This is known as 'general causation.' Second, a plaintiff must show that this substance caused *his* injury. This is known as 'specific causation.' ") (citations omitted). I write separately only to provide some semblance of guidance to litigants in this and future cases—to those pursuing and those defending toxic tort claims—as well as similar guidance to the lower courts of our state in presiding over and in reviewing these claims. Such guidance is critical because in Michigan there is a paucity of law concerning toxic torts, much of what law exists is confusing and contradictory, and all this is occurring at a time when it appears that toxic tort litigation is on the upturn here as in other jurisdictions. I respectfully offer the following analysis to better clarify our toxic tort jurisprudence.

* * *

First, I would clarify that Michigan's long-held general rules regarding the necessity of expert testimony apply to toxic torts, i.e., expert testimony on causation is necessary in a toxic tort case when the legal proposition is beyond the common knowledge of an ordinary juror. Second, I agree with the vast majority of other jurisdictions that the general-and-specific-causation framework may be utilized to analyze the cause-in-fact element of a toxic tort claim. At a minimum, this framework should apply when a plaintiff seeks to prove factual causation employing group-based statistical evidence. In this case, plaintiff submitted such evidence to prove cause in fact. Accordingly, applying the framework, I would hold that plaintiff failed to present adequate evidence of cause in fact, specifically evidence establishing *either* general or specific causation. Therefore, I concur with the Court's reversal of the judgment of the Court of Appeals and remand to the trial court for reinstatement of its order granting summary disposition in defendants' favor.

A review of the facts that led to this litigation is helpful to understanding my analysis that follows. This case concerns a large and severe oil spill into a Michigan woodland and river. On July 26, 2010, a pipeline belonging to defendants, Enbridge Energy Limited Partnership and Enbridge Energy Partners, LP, ruptured and released 840,000 gallons of crude oil into a woodland area. The oil eventually migrated into Talmadge Creek and the Kalamazoo River and further spread nearly 40 miles throughout Calhoun and Kalamazoo counties. The federal Environmental Protection Agency (EPA) eventually intervened, ordering a cleanup and conducting air monitoring and sampling to measure the level of volatile organic compounds (VOCs) in the air.[1] A voluntary evacuation was issued for the immediate geographic area of the spill.

Plaintiff, Chance Lowery, lived roughly 250 feet from the banks of the Kalamazoo River and approximately 11 to 13 miles downstream from the spill's source. He claimed to have smelled chemicals shortly after the spill and to have become sick as a result—coughing and vomiting for several days, and then proceeding to the hospital.[2] A scan performed at the hospital indicated that plaintiff had a stomach hemorrhage. Dr. John Koziarski, a general and vascular surgeon who is board certified in general surgery and vein diseases, performed a

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[1] VOCs are an aggregation of chemicals that may be found in crude oil and can be harmful to humans at certain exposure levels. See generally Wallace, *Personal Exposures, Indoor and Outdoor Air Concentrations, and Exhaled Breath Concentrations of Selected Volatile Organic Compounds Measured for 600 Residents of New Jersey, North Dakota, North Carolina and California*, 12 Toxicological & Envtl Chemistry 215 (1986).

[2] Despite the uncertain timeline to which plaintiff testified—describing symptoms manifested over the course of approximately five to seven days immediately following the spill—his medical records show that he was admitted to the hospital on August 18, 2010, which was 23 days after the initial spill.

successful operation to repair the hemorrhage, which revealed that "a short gastric vessel midway down the stomach . . . had avulsed off of the spleen."

On the basis of these injuries and damage to his property, plaintiff filed a complaint alleging defendants' negligence. Regarding causation, the complaint alleged that plaintiff was exposed to "hazardous substances" that constituted "a proximate cause" of plaintiff's injuries. Those injuries included "nausea, a severe cough and violent vomiting, which caused a rupture of his short gastric artery, which required subsequent surgical repair and resulted in a disfiguring prominent surgical scar." Expert testimony on the matter of causation[3] consisted of deposition testimony by the treating physician, Dr. Koziarski, and deposition testimony and a report from Dr. Jerry Nosanchuk, a general physician who is board certified in family medicine. The former testified that plaintiff stated that he had taken Vicodin for a migraine, began vomiting, and then developed severe abdominal pain. Dr. Koziarski testified that Vicodin could cause vomiting but that he had no medical opinion whether Vicodin was what specifically caused plaintiff's vomiting. He also had no opinion concerning whether plaintiff's antidepression medication, Lamictal, could also cause migraines. Plaintiff never indicated to Dr. Koziarski that fumes wafting from the Kalamazoo River had caused or contributed to his vomiting or his headaches. Dr. Koziarski concluded that he could not opine as to whether plaintiff had exposure to the fumes or whether that exposure accounted for the "rupture or avulsion of the gastric artery[.]" He also could not determine the avulsion's medical cause.

Given that Dr. Koziarski did not opine as to whether the fumes caused plaintiff's condition, expert testimony on causation before the trial court was limited to Dr. Nosanchuk's testimony. He reviewed plaintiff's hospital records, a Michigan Department of Community Health document about the spill, a newspaper report concerning the spill, plaintiff's deposition testimony as well as his interrogatory answers, and photographs of plaintiff's backyard displaying its proximity to the river. He did not physically examine plaintiff. Dr. Nosanchuk was "of the opinion that the fumes from the oil spill caused [plaintiff] to have the migraine headaches, extreme coughing and nausea as well as vomiting. Ultimately, these problems caused a tear of the short gastric artery resulting in hemorrhage within the [stomach]."

Plaintiff also presented deposition testimony from his roommate, a neighbor, and a friend regarding the noticeable smell[4] near and within his apartment as well as information regarding VOCs exposure from the

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[3] The trial court granted summary judgment in plaintiff's favor regarding defendants' breach of duty—i.e., that defendants acted negligently. That order has not been challenged here.

[4] Plaintiff's roommate compared the smell to "asphalt . . . like burning, rubber, tar . . . ." Plaintiff's friend explained, "[I]t smelled like you tipped over fuel oil in your driveway." Plaintiff's neighbor testified that the smell was "like rubber burning."

Centers for Disease Control and Prevention (CDC).[5] After discovery, defendants moved for partial summary disposition under MCR 2.116(C)(10). Following arguments, the trial court granted defendants' motion for summary disposition, limited only to plaintiff's ailments beyond vomiting and headaches. The court determined that there was nothing to link the cause of the ruptured artery to the oil spill. In response, plaintiff's counsel stated that he would rather the court grant summary disposition in its entirety because this "whole case is all about the surgery" and plaintiff would prefer to appeal the ruling immediately. The trial court concurred, and an order was entered by the court affirming its ruling on the record.

In a split opinion, the Court of Appeals reversed the grant of summary disposition and remanded for further proceedings. *Lowery v Enbridge Energy Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2015 (Docket No. 319199), p 1. The majority held that expert testimony showing that the toxin, VOCs, was capable of causing the injuries alleged and that it actually did cause such injuries was not required in light of the Court's earlier decision in *Genna v Jackson*, 286 Mich App 413 (2009). *Lowery*, unpub op at 2-3. The Court found it sufficient that the circumstantial evidence plaintiff had presented established "a strong enough logical sequence of cause and effect for a jury to reasonably conclude that plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture." *Id*. at 3. In dissent, Judge JANSEN would have affirmed the trial court's grant of summary disposition. She reasoned that "[p]laintiff's theory of causation was attenuated" and that a jury comprised of lay people would be unable to determine whether the oil fumes could have caused vomiting and the resulting arterial tear absent the aid of expert testimony. *Id*. at 1 (JANSEN, J., dissenting). She further noted that Dr. Nosanchuk was unqualified to give such testimony and therefore that the jury was left on its own to speculate concerning the issue of causation. *Id*.

Defendants subsequently filed an application seeking leave to appeal in this Court, and we granted its application, requesting that the parties address "(1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation." *Lowery*, 499 Mich 886.

I. ANALYSIS

In a typical tort claim grounded in negligence, plaintiffs "must prove (1) that defendant owed them a duty of care, (2) that defendant breached

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[5] Plaintiff attached the CDC documents to his response to defendants' motion for summary disposition. I make no determination as to whether these documents were properly in the record or would have been deemed admissible absent expert testimony; I assume they are properly part of plaintiff's proofs for purposes of my analysis.

that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72 (2005). "Proof of causation requires both cause in fact and legal, or proximate, cause." *Haliw v Sterling Heights*, 464 Mich 297, 310 (2001). "[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163 (1994). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. A plaintiff must demonstrate as a threshold matter that there is "more than a mere possibility" that the defendant caused the injury, *id*. at 166 (citation and quotation marks omitted), and must then present "substantial evidence" from which a jury could conclude that, more likely than not, "but for the defendant's conduct, the plaintiff's injuries would not have occurred," *Weymers v Khera*, 454 Mich 639, 647-648 (1997) (citation and quotation marks omitted). That substantial evidence "must exclude other reasonable hypotheses with a fair amount of certainty," *Skinner*, 445 Mich at 166 (citation and quotation marks omitted), because a jury cannot be permitted to merely guess about causation, *id*. at 174.

This Court has defined "an ordinary 'toxic tort' cause of action" as one in which "a plaintiff alleges he has developed a disease [or other injury] because of exposure to a toxic substance negligently released by the defendant." *Henry*, 473 Mich at 67. Toxic torts are thus a specific type of negligence claim. In order to establish a claim under a toxic tort theory, a plaintiff must prove an injury arising from exposure to a toxic substance. *Id*. at 72-73 (holding that plaintiffs could not maintain a toxic tort claim to recover damages for the cost of medical monitoring for potential *future* injuries), citing *Larson v Johns-Manville Sales Corp*, 427 Mich 301 (1986). This Court has not yet addressed whether the causation element of a toxic tort claim differs in any meaningful way from that of a traditional negligence claim. Indeed this case implicates several issues regarding causation in toxic tort cases in Michigan: namely, whether the cause-in-fact element of a toxic tort claim includes separate analyses of general and specific causation; if so, what evidence a plaintiff must provide on those issues to survive a summary disposition motion; and whether such evidence must include expert testimony. To address these questions, I begin with an analysis of the unique challenges posed by the cause-in-fact element of a toxic tort claim, i.e., those challenges that arise in addressing the general-and-specific-causation inquiries subsumed within.

A. CAUSE IN FACT

The great majority of jurisdictions have bifurcated the cause-in-fact element in toxic tort cases into separate and distinctive analyses of

"general causation" and "specific causation."[6] This analytical approach for determining causation in toxic tort cases also finds support in the secondary literature.[7] Therefore, application of the general-and-specific-causation framework in toxic tort cases has been far from untested. The Restatement (Third) of Torts provides a lengthy discussion of the bifurcated general-and-specific-causation framework in its comments, noting in particular that

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[6] See, e.g., *CW ex rel Wood v Textron, Inc*, 807 F3d 827, 831 (CA 7, 2015) (applying Indiana substantive law, which required "evidence of general and specific causation"); *Knight v Kirby Inland Marine Inc*, 482 F3d 347, 351 (CA 5, 2007) ("General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury.") (citation and quotation marks omitted); *Mattis v Carlon Electrical Prod*, 295 F3d 856, 860 (CA 8, 2002) ("To prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like that suffered by the plaintiff in human beings subjected to the same level of exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury.") (citation and quotation marks omitted); *Mitchell v Gencorp Inc*, 165 F3d 778, 781 (CA 10, 1999) ("[A] plaintiff must demonstrate the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover.") (citation and quotation marks omitted); *Ranes v Adams Laboratories, Inc*, 778 NW2d 677, 687-688 (Iowa, 2010) ("Courts have commonly bifurcated toxic-tort-causation analysis into two separate but related parts: general causation and specific causation. . . . The Third Restatement of Torts has recognized this relatively recent common practice as a device to organize a court's analysis and not as additional elements of the tort. The Restatement authors supplement their explanation by asserting factual causation is a necessary element in every tort case; the general and specific language has simply become more prevalent in toxic-tort cases. . . . This bifurcated analysis has not been explicitly used as the standard in Iowa. However, due to its general acceptance among scholars and courts of other jurisdictions, as well as the relative ease of application the analysis offers to courts examining complex issues of causation, we believe it is appropriate for courts to use the bifurcated causation language in toxic-tort cases.") (citations, quotation marks, and brackets omitted).

[7] See, e.g., Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 Harv L Rev 2256, 2261-2262 (2015); Sanders, *The Controversial Comment C: Factual Causation in Toxic-Substance and Disease Cases*, 44 Wake Forest L Rev 1029, 1031 (2009); Stout & Valberg, *Bayes' Law, Sequential Uncertainties, and Evidence of Causation in Toxic Tort Cases*, 38 U Mich J L Reform 781, 784 (2005).

> [c]ases involving toxic substances often pose difficult problems of proof of factual causation. . . . Sometimes it is difficult to prove which defendant was connected to the toxic agent or whether an adequate warning would have prevented the plaintiff's harm. The special problem in these cases, however, is proving the connection between a substance and development of a specific disease. [Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 28, comment *c*, p 402 (citations omitted).]

After noting that most causation issues in this context are resolved under the "but for" standard of factual causation, the Restatement provides that when a plaintiff presents "group-based statistical evidence" concerning a toxin, a plaintiff must prove that "the substance must be capable of causing the disease ('general causation') and that the substance must have caused the plaintiff's disease ('specific causation')." *Id*. at 404.

This is not a novel concept. General causation is implicit in all negligence claims, but in negligence claims that do not involve toxic torts, the plaintiff typically does not need to present separate proof of each type of causation because the relationship between general and specific causation is sufficiently direct and straightforward such that both types of causation are effectively proven together. By analogy, imagine a simple negligence claim in which the defendant drove his car over the plaintiff's foot, breaking it. Evidence proving that the car broke the plaintiff's foot practically proves both the "general" causation requirement of proof (that the car was *capable* of causing the injury) and the "specific" causation requirement (that the car *did in fact* break the foot). In other words, in a typical negligence claim, the same evidence will often prove that exposure to the harm produced by the defendant's negligence *could* and *did* cause the injury in dispute. See Restatement, § 28, comment *c*, p 402 ("In most traumatic-injury cases, the plaintiff can prove the causal role of the defendant's tortious conduct by observation, based upon reasonable inferences drawn from everyday experience and a close temporal and spatial connection between that conduct and the harm. Often, no other potential causes of injury exist. When a passenger in an automobile collision suffers a broken limb, potential causal explanations other than the collision are easily ruled out; common experience reveals that the forces generated in a serious automobile collision are capable of causing a fracture.").

But in a toxic tort claim, this relationship may be considerably less clear. See *Landrigan v Celotex Corp*, 127 NJ 404, 413 (1992) (noting that in the toxic tort context, "proof that a defendant's conduct caused decedent's injuries is more subtle and sophisticated than proof in cases concerned with more traditional torts"). For example, an injury such as cancer has many suspected causes, including exposure to various toxins in various quantities and durations. See Farber, *Toxic Causation*, 71 Minn L Rev 1219, 1227 (1987) ("One [issue] is the problem of establishing that the chemical involved is capable of causing the type of harm from which the plaintiff suffers. This is often difficult because the causation of diseases like cancer is so poorly understood."). In such

cases, proof of cause in fact *may* need to take the form of separate proofs that the toxin *can* cause the harm and that it *did*. See, e.g., *Mattis v Carlon Electrical Prod*, 295 F3d 856, 860 (CA 8, 2002) ("To prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like that suffered by the plaintiff in human beings subjected to the same level of exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury.") (citation and quotation marks omitted). Absent evidence regarding each inquiry, a jury could be left improperly to speculate as to the nature of the relationship between the toxin and the plaintiff's injury. *Skinner*, 445 Mich at 164 ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). For these reasons, the general-and-specific-causation framework is helpful in toxic tort cases to ensure that the cause-in-fact element is properly proven; at a minimum, this is true when the plaintiff avails himself or herself of the framework by presenting group-based statistical evidence or similar scientific evidence[8] because such evidence[9] by its nature can only speak to whether the substance is *capable* of causing the alleged injury (general causation) and does not address whether the substance, in fact, caused the plaintiff's injury (specific causation).

In other instances, the general-and-specific-causation framework may be unnecessary to establish cause in fact, such as those instances in which the causal link between an injury and a toxin is as direct and apparent as it is in the case in which the car breaks the plaintiff's foot. Sometimes the "mechanism of causation is well understood . . . [or] the causal relationship is well established," such as when the resulting injury is immediate and traumatic rather than gradual and disease-based. Green et al, *Reference Guide on Epidemiology*, in Reference Manual on Scientific Evidence (3d ed), p 609 n 180. In such cases, the general-and-specific-causation framework might be unnecessary. Con-

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[8] The application of the general-and-specific-causation framework should not be *limited* to instances in which the plaintiff presents group-based statistical evidence. As the Restatement further asserts: "In toxic-substances cases, the causal inquiry is modified by the limits of and available forms of scientific evidence. That inquiry *often* must address whether the [toxic] agent for which the actor is responsible is capable of causing the disease from which another suffers (known as general causation). In addition, the question whether the [toxic] agent caused the specific plaintiff's disease (known as specific causation) is confronted." Restatement, § 26, comment *g*, p 351 (emphasis added).

[9] This less-direct evidence might not always consist of group-based statistical studies. See, e.g., *King v Burlington N Santa Fe R Co*, 277 Neb 203, 215-221 (2009) (explaining the value of epidemiological studies in evidencing general causation and providing that in the absence of epidemiological studies, an expert may refer alternatively to the United States Surgeon General's "Bradford Hill" factors for evidence of general causation).

sider, for example, a plaintiff who suffers a severe chemical burn immediately after toxic acid has been spilled onto his skin. There might well be no need for the application of this analytical framework when the causal link is so clear and straightforward.[10]

Michigan has little authority on this topic, and this Court has yet to provide significant guidance. I take this opportunity to begin to rectify this.

B. GENERAL CAUSATION

General causation pertains to whether a toxin is capable of causing the harm alleged. A necessary predicate to this inquiry is identifying the asserted exposure level of the toxin. "A number of courts have required plaintiffs to prove the level of exposure (dose) in order to establish causation." *Goeb v Tharaldson*, 615 NW2d 800, 815 (Minn, 2000). "[T]he mere existence of a toxin in the environment is insufficient to establish causation without proof that the [particular] level of exposure could cause the plaintiff's symptoms." *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 679 (CA 6, 2011). Put another way, causation "requires not simply proof of exposure to the substance, but proof of enough exposure to cause the plaintiff's specific illness." *McClain v Metabolife Int'l, Inc*, 401 F3d 1233, 1242 (CA 11, 2005).

Knowledge of the exposure level is crucial to determining whether the toxin can cause the harm because many substances are harmful in certain quantities but are safe at lower levels; carbon monoxide, for instance, is constantly in the air, but it only causes adverse health symptoms in certain higher concentrations. See *Zuchowicz v United States*, 140 F3d 381, 391 (CA 2, 1998) ("[A]ll drugs involve risks of untoward side effects. . . . At the approved dosages, the benefits of the particular drug have presumably been deemed worth the risks it entails. At greater than approved dosages, . . . the risks of tragic side effects (known and unknown) increase . . . ."); Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J L

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[10] Because I recognize that not *every* toxic tort claim requires separate proof of general and specific causation in order to establish cause in fact, I also recognize that the absence of separate proofs regarding general and specific causation does not prevent a plaintiff from establishing a prima facie case of negligence in every toxic tort case. See *Christian v Gray*, 65 P3d 591, 604 (Okla, 2003) ("[G]eneral causation should be shown unless the particular controversy is inappropriate for general causation. We decline to list hypothetical controversies where general causation need not be shown."). It should be emphasized that these concepts "are not 'elements' of a plaintiff's cause of action" but rather "function as devices to *organize* a court's analysis . . . . So long as the plaintiff introduces admissible and sufficient evidence of factual causation, the burden of production is satisfied." Restatement, § 28, comment *c*, p 405 (emphasis added).

& Pol'y 5, 11 (2003) (" 'All substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy.' ") (citation and emphasis omitted). Moreover, a substance may cause different harmful effects in different doses. See Goldstein, *Toxic Torts: The Devil is in the Dose*, 16 J L & Pol'y 551, 554 (2008) ("Dose is defined as concentration multiplied by frequency or duration—it is not just the exposure level at any one point in time."). As a result, a substance may be harmful at a certain level of exposure but may not be sufficient to cause a particular adverse health effect. *In re Agent Orange*, 570 F Supp 693, 695 (ED NY, 1983) (stating that general causation "is addressed to the common question of whether exposure to [the toxin] *in the manner that it was used* in [plaintiff's location] could cause the kinds of injuries that plaintiffs claim to have suffered") (emphasis added). Accordingly, a plaintiff's evidence of general causation should be tailored to the *estimated* amount and duration of exposure at issue to enable the fact-finder to reasonably conclude that exposure to the defendant's toxin in the amount and duration alleged is capable of causing the alleged injury. See *Wright v Willamette Indus, Inc*, 91 F3d 1105, 1107 (CA 8, 1996) ("[T]here must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered.").

C. SPECIFIC CAUSATION

Evidence of specific causation consists of proof that exposure to the toxin more likely than not caused *the plaintiff's* injury. Specific causation requires at minimum an approximate estimate of the plaintiff's exposure level as well as an evaluation and elimination of other reasonable potential causes. It is well accepted that "a plaintiff in a toxic tort case must prove . . . the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover." *Id*. at 1106. I recognize that "it is often . . . particularly difficult . . . to establish [exposure levels] in a [toxic] tort suit" given "the adventitious, often accidental, and even unknown (at the time) exposures typical of toxic tort cases . . . ." Cranor, *Toxic Torts: Science, Law, and the Possibility of Justice* (New York: Cambridge University Press, 2d ed, 2016), at 252. Therefore, as in ordinary negligence claims, circumstantial evidence of causation *may* be sufficient to establish exposure adequate to prove specific causation. See *Skinner*, 445 Mich at 164 (stating that a plaintiff can satisfy his or her burden to prove causation in a negligence claim by providing circumstantial proof that facilitates reasonable inferences of causation). This position is also in accordance with that of other jurisdictions that have held that exposure levels in a toxic tort case can be "roughly established through reliable circumstantial evidence." See, e.g., *Blanchard v Goodyear Tire & Rubber Co*, 190 Vt 577, 578-579 (2011) (citation and quotation marks omitted). Federal courts likewise have concluded that "exact details pertaining to the plaintiff's exposure are beneficial" but "not always available, or necessary," *Westberry v Gislaved Gummi AB*, 178 F3d 257, 264 (CA 4, 1999), and that

"precise data on the exact degree of exposure to each chemical" is not always required, see *Harper v Illinois Cent Gulf R*, 808 F2d 1139, 1141 (CA 5, 1987).

Nevertheless, to avoid leaving the jury to speculate, a plaintiff should set forth at least some evidence that he or she was exposed to the toxin at issue, including the estimated amount and duration of exposure. *Skinner*, 445 Mich at 164 ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). While toxic tort plaintiffs are not required to provide "a mathematically precise table equating levels of exposure with levels of harm, . . . there must [nonetheless] be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains before there can be a recovery." *Wright*, 91 F3d at 1107. A plaintiff should not rely "merely on a temporal relationship [to establish causation because this] is a form of engaging in 'the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this)' reasoning." See *West v Gen Motors Corp*, 469 Mich 177, 186 n 12 (2003) (citation omitted); *McClain*, 401 F3d at 1243 ("[S]imply because a person takes drugs and then suffers an injury does not show causation. Drawing such a conclusion from temporal relationships leads to the blunder of the *post hoc ergo propter hoc* fallacy.").

Instead, the plaintiff's exposure level should be shown, at minimum, by circumstantial evidence that facilitates reasonable inferences.[11] See *Mitchell v Gencorp Inc*, 165 F3d 778, 781 (CA 10, 1999) ("Guesses, even if educated, are insufficient to prove the level of exposure in a toxic tort case."). "In cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that she was, in fact, exposed to harmful levels of such substances." *Abuan v Gen Electric Co*, 3 F3d 329, 333 (CA 9, 1993) (citation, quotation marks, and emphasis omitted). Evidence of the plaintiff's exposure level should encompass proof that the plaintiff was *actually* exposed to the defendant's toxin as well as the *estimated* amount and duration of exposure. See *Allen v Pennsylvania Engineering Corp*, 102 F3d 194, 199 (CA 5, 1996) (stating that a toxic tort plaintiff must show that he or she was exposed to harmful quantities of a chemical to sustain his or her burden); *Wintz ex rel Wintz v Northrop Corp*, 110 F3d 508, 513 (CA 7, 1997) (holding that the plaintiff's expert testimony failed to establish exposure to a chemical when the expert did not address "how frequently, in what quantity, or in what form" the plaintiff was exposed to the chemical or the plaintiff's "specific dose").

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[11] For instance, in *Curtis*, the Fifth Circuit held that the plaintiff's expert gave rise to a genuine issue of fact regarding specific causation when he opined that the plaintiff had been exposed to a toxin at levels of at least 200 to 300 parts per million based on results of lower level exposure tests, work practices at the exposure site, and the nature of his symptoms. *Curtis v M&S Petroleum, Inc*, 174 F3d 661, 671 (CA 5, 1999).

Another significant component of specific causation in a toxic tort case pertains to the evaluation and elimination of other reasonably relevant potential causes of a plaintiff's symptoms.[12] In order to demonstrate specific causation, a plaintiff's " 'evidence must exclude other reasonable hypotheses with a fair amount of certainty.' " *Skinner*, 445 Mich at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442. One common method for excluding reasonably relevant potential causes of a plaintiff's injury may be a "differential etiology," sometimes characterized as a "differential diagnosis." *Myers v Illinois Cent R Co*, 629 F3d 639, 644 (CA 7, 2010) (explaining that the former term is the more accurate in referring to causation because it focuses on identifying the cause of the ailment from which plaintiff suffers, whereas the latter term focuses on the identification of that ailment). Differential etiology is "a method by which all [reasonably relevant] possible causes of a condition are listed and then the various causes are ruled out so as to leave the most likely cause or causes of a particular patient's problem." *Dengler v State Farm Mut Ins Co*, 135 Mich App 645, 649 (1984); see also *Attorney General v Beno*, 422 Mich 293, 312-313 (1985) (differential diagnosis describes "the process of elimination of other possible maladies" as the cause of a plaintiff's symptoms); *Westberry*, 178 F3d at 262 ("[D]ifferential etiology is a standard scientific technique of identifying the cause of a medical problem by eliminating the *likely* causes until the most probable one is isolated.") (emphasis added; punctuation omitted).

Without the performance of a differential etiology,[13] " '[t]here may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only [and are insufficient to establish causation].' " *Skinner*, 445 Mich at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). As explained earlier, specific causation is subsumed within the cause-in-fact inquiry. In order to prove cause in fact, a plaintiff must demonstrate that there is more than an "evenly balanced" probability that the conduct of the

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[12] Plaintiff's evidence need not address every remote possible cause in the universe. See *Skinner*, 445 Mich at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442 (" 'The evidence need not negate all other possible causes . . . .' "); *Viterbo v Dow Chem Co*, 826 F2d 420, 424 (CA 5, 1987) (holding in a toxic tort case that the plaintiff's expert need not disprove or discredit every possible cause of the plaintiff's injury other than the one espoused by him, but must do more than simply pick the cause that is most advantageous to the plaintiff's claim).

[13] While a differential etiology is not specifically or necessarily required in every toxic tort case, a plaintiff should utilize *some* reliable method, or introduce *some* evidence, designed to exclude other reasonably relevant potential causes of his or her injury. For example, some courts rely on studies comparing the incidence of the disease in groups exposed to the toxin and groups not exposed. See Green et al, pp 611-612.

defendant *was*, rather than was *not*, the cause in fact of the harm suffered. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416 n 18 (1989) (citation and quotation marks omitted); see also *Skinner*, 445 Mich at 164 ("Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory."). A differential etiology is included in the specific-causation inquiry under this burden because a plaintiff that fails to perform a differential etiology or some equivalent will not be able to meet his or her overall burden as described in *Mulholland*, i.e., when various possible causes of an injury exist, and when the plaintiff has not identified the most probable of these, the probability that the defendant's conduct—as opposed to some other potential cause—constituted the cause in fact of the plaintiff's harm remains "evenly balanced." In such instances, the jury is left to infer causation from correlation, which it cannot do because "[i]t is axiomatic in logic and in science that correlation is not causation. This adage counsels that it is error to infer that A causes B from the mere fact that A and B occur together." See, e.g., *Craig v Oakwood Hosp*, 471 Mich 67, 93 (2004). As a result, specific causation includes the need by some reasonable means to evaluate and eliminate other reasonably relevant potential causes of the plaintiff's injury.

D. EXPERT TESTIMONY

Because of the complexity of the general-and-specific-causation inquiry in toxic tort cases, it may also be necessary for a plaintiff to present expert testimony.[14] Many jurisdictions have held that expert

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[14] I am cognizant that plaintiff in this case has presented expert testimony and thus whether he was required to do so is largely irrelevant to the resolution of his claim. I address this issue nonetheless because questions concerning the need for expert testimony will often be integral in cases of the instant sort—toxic tort cases. It is altogether appropriate that this Court—as the court of last resort of this state, as the court ultimately responsible for the fair and orderly development of our common law—in reasonable ways, set forth the law more clearly so that litigants can reasonably apprehend their respective legal obligations in initiating and defending against claims of the instant sort. As members of this Court have stated on innumerable occasions during oral argument in our courtroom, it is the Court's responsibility not only to address the case immediately before us in accordance with the law but also to afford guidance in the "next one-hundred" similar cases. The question whether expert testimony is required is critical in identifying the proofs that must be provided by a plaintiff to satisfy his or her evidentiary burden when the general-and-specific-causation framework applies. My analysis would afford little guidance to litigants concerning the application of the general-and-specific-causation framework were I to fail to address the logically related and recurrent question of the need

testimony is generally necessary or else even suggest that it is always required in a toxic tort case.[15] That conclusion is reiterated in the secondary literature as well.[16] Michigan has yet to address this matter in a toxic tort case specifically, but the generally applicable rule in Michigan is that expert testimony is required when highly technical and scientific questions are at issue. *Elher v Misra*, 499 Mich 11, 21-22 (2016) (requiring expert testimony on negligence in a medical malpractice action unless the matter "is within the common knowledge and experience" of the average juror); *Teal v Prasad*, 283 Mich App 384, 394 (2009) (generally requiring expert testimony on causation in a medical malpractice action); see also *Amorello v Monsanto Corp*, 186 Mich App

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for expert testimony in such cases. Future litigants are entitled to at least minimal guidance concerning what is required to survive summary disposition in toxic tort cases.

[15] See, e.g., *Milward v Rust-Oleum Corp*, 820 F3d 469, 476 (CA 1, 2016) (requiring expert testimony in a toxic tort case and stating that "[a]s is well-established under Massachusetts law, 'expert testimony is required to establish medical causation' ") (citation omitted); *Junk v Terminix Int'l Co*, 628 F3d 439, 450 (CA 8, 2010) ("In proving both types of causation, 'expert medical and toxicological testimony is unquestionably required to assist the jury.' ") (citation omitted); *Seaman v Seacor Marine LLC*, 326 F Appx 721, 723 (CA 5, 2009) ("A plaintiff in such a case [i.e., a case involving injuries from exposure to toxins] cannot expect lay fact-finders to understand medical causation; expert testimony is thus required to establish causation."); *Wills v Amerada Hess Corp*, 379 F3d 32, 46 (CA 2, 2004) ("In a case such as this [concerning exposure to a toxin], where an injury has multiple potential etiologies, expert testimony is necessary to establish causation . . . ."); *Redland Soccer Club, Inc v Dep't of Army of US*, 55 F3d 827, 852 (CA 3, 1995) (applying Pennsylvania law in a toxic tort case and stating that "[w]hen the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson . . . the law requires that expert medical testimony be employed") (brackets, quotation marks, and citation omitted); *Harris v CSX Transp, Inc*, 232 W Va 617, 653 (2013) ("[T]he need for expert testimony to supply [the] critical causal connection is often the key to a plaintiff's toxic tort case . . . .").

[16] Gold, *The "Reshapement" of The False Negative Asymmetry in Toxic Tort Causation*, 37 Wm Mitchell L Rev 1507, 1536 (2011) ("[D]eciding a toxic causation dispute is inherently beyond the ken of lay people and therefore demands expert scientific testimony."); see also Comment, *Causation in Toxic Tort Litigation: "Which Way Do We Go, Judge?"*, 12 Vill Envtl LJ 33, 34-35 (2001) ("The existence of . . . unique causation problems that confront plaintiffs in toxic torts makes it necessary for parties to offer expert testimony.").

324, 331 (1990) (affirming summary disposition when the plaintiffs' expert failed to establish the causation element of the plaintiffs' products-liability claim). This rule originates in our common law and is grounded in the notion that scientific questions should be addressed by those with the relevant professional skill and knowledge so as not to leave jurors to speculate regarding matters beyond their knowledge. See, e.g., *Miller v Toles*, 183 Mich 252, 258 (1914); *Spaulding v Bliss*, 83 Mich 311, 315 (1890); *Mayo v Wright*, 63 Mich 32, 40 (1886); *Wood v Barker*, 49 Mich 295, 298 (1882). Put another way, the generally applicable rule is not a separate or a distinctive rule at all, but rather is a part of the plaintiff's evidentiary burden to establish cause in fact. When the jury is able only to speculate concerning causation—which is all jurors can do when a matter is scientific in character such that it is beyond their common knowledge—the plaintiff has not satisfied his or her burden. Because the causation inquiry in toxic tort cases is often scientific in nature, a plaintiff will often be hard-pressed to satisfy that evidentiary burden absent expert testimony; absent such testimony, the jury will only be left to speculate. For this reason, I would apply our general rule and conclude that the need for expert testimony regarding causation in a toxic tort case is determined on the basis of whether the matter "is so obvious that it is within the common knowledge and experience of an ordinary layperson." *Elher*, 499 Mich at 21-22. If "the untrained layman would be qualified to determine intelligently and to the best possible degree [the elements of the claim] without enlightenment from those having a specialized understanding of the subject involved in the dispute," then expert testimony is unnecessary and indeed is inadmissible.[17] *People v Kowalski*, 492 Mich 106, 123 (2012) (opinion by MARY BETH KELLY, J.) (citation and quotation marks omitted); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 790 (2004) (expert testimony is admissible to assist the trier of fact to understand a proposition that is " 'beyond the ken of common knowledge' ") (emphasis omitted), quoting *Zuzula v ABB Power T & D Co, Inc*, 267 F Supp 2d 703, 711 (ED Mich, 2003). Conversely, expert testimony may be required when the causation inquiry "is scientific in nature," *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 489 (1997), such that it is beyond "the common knowledge and experience of the jury," see *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 426 (2004) (holding that a claim sounds in medical malpractice and thus requires

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[17] Under MRE 702, expert testimony *cannot* be introduced at trial unless it assists the jury with a proposition beyond their common knowledge. As established by even our earliest medical malpractice jurisprudence, a party *must* introduce expert testimony at trial if the proposition is not within the common knowledge of the average juror. See, e.g., *Miller*, 183 Mich at 258. Both standards are helpful to the current inquiry due to their complementary character. Seemingly, when considered together, these rules suggest that expert testimony that is admissible is most often required, and expert testimony that is not required is most often inadmissible.

expert testimony when the questions at issue are not "within the common knowledge and experience of the jury").[18]

II. APPLICATION

As explained earlier, in raising a toxic tort claim, a plaintiff is required to provide proof of cause in fact. In the present case, plaintiff has relied on group-based statistical evidence or similar scientific proof. Therefore, the general-and-specific-causation framework would apply. Accordingly, the Court should examine plaintiff's evidence to determine whether he has sufficiently shown general and specific causation, that is, whether the pertinent toxin (VOCs) is capable of causing the alleged injury and whether plaintiff here was actually exposed to that toxin at a level sufficient to cause the severe coughing and vomiting that, in turn, would cause his gastric artery to avulse. Given that the final step of this inquiry is clearly beyond "the common knowledge and experience of a jury," *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47 (1999), plaintiff was required to present expert testimony to that effect. Plaintiff also needed to reasonably evaluate and eliminate other reasonable potential causes of his injuries.

A. GENERAL CAUSATION

Plaintiff here failed to establish that a causal link generally exists between the toxin released by the negligent act (VOCs) and the asserted harm (coughing, vomiting, and avulsion). Judge JANSEN correctly recognized that the harm suffered was "attenuated" from the negligent act, meaning that it required two findings to establish *general* causation: (1) VOCs in the level and duration at issue are capable of causing the degree and duration of coughing and vomiting at issue; and (2) coughing and vomiting in the degree and duration caused by the VOCs are capable of causing a gastric artery to avulse. Plaintiff's proofs—that is, the CDC documents—contain the generally recommended exposure limits and the permissible exposure limits for three of the main chemicals found in VOCs—Toluene, Benzene, and m-Xylene—as well as state that overexposure to these chemicals can cause some amount of nausea or headaches. Indeed, plaintiff's toxic tort claim did not fail with respect to damages for his coughing and nausea; the trial court denied defendants' summary disposition motion regarding those injuries. Plaintiff also presented some evidence indicating that coughing and vomiting can cause a gastric artery to avulse, albeit only rarely.

Nevertheless, plaintiff's general-causation evidence falls short because it fails to show what *level* and *duration* of exposure to VOCs can

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[18] To the extent that the Court of Appeals' opinion in *Genna*, 286 Mich App 413, has been understood *never* to require expert testimony in toxic tort cases, I believe that this is in error, and therefore I would explicitly reject this understanding.

cause the *severity* and *duration* of coughing and vomiting that is necessary to cause a gastric artery to avulse. After all, not every person suffering stomach flu also suffers an avulsion of a gastric artery. When plaintiff's expert was asked if he knew "what specific levels of exposure are required to cause any of [the] symptoms [plaintiff suffered]," he declined to provide an opinion: he did not "think that's a question that could be answered unless you are speaking of a specific person and you would have to—you would have to gauge that in retrospect because everybody is different, I think. I believe that to be true." The remainder of plaintiff's proofs also fail to address this critical point—i.e., whether plaintiff's level of VOCs exposure was capable of causing the level of vomiting necessary to cause a gastric artery to avulse. While plaintiff was not required to reference specific data and could have established general causation by alternative methods,[19] plaintiff presented *no* evidence regarding the exposure level necessary to cause his particular injuries and has failed to sustain his burden to prove general causation as a result.

B. SPECIFIC CAUSATION

Plaintiff failed to establish specific causation. Again, plaintiff's harm was attenuated from defendants' action and required two findings to establish *specific* causation—plaintiff's exposure to VOCs more likely than not caused him to cough and vomit, and such coughing and vomiting more likely than not caused his gastric artery to avulse. Plaintiff lacked evidence of specific causation on numerous grounds. First, he did not show that he was exposed to any VOCs, let alone exposure of the magnitude necessary to cause his particular symptoms. Second, he failed to reasonably consider and eliminate other potential causes of his symptoms. Third and last, he failed to provide adequate evidence concerning the causal link between his coughing and vomiting and the avulsion of his gastric artery—a determination that is certainly beyond the common knowledge of the average juror and thus that required sufficient evidence in the form of expert testimony.[20]

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[19] See, e.g., *King*, 277 Neb at 215-221 (discussing the "Bradford Hill" factors for evidence of general causation in the absence of epidemiological studies).

[20] I would presume for the purposes of my analysis that plaintiff's expert testimony was admissible, but I would find that it was nevertheless insufficient. See *Conde v Velsicol Chem Corp*, 24 F3d 809, 813 (CA 6, 1994) ("Accordingly, we turn to the question of whether the [plaintiffs'] expert testimony, assuming that it is admissible, is sufficient to withstand summary judgment for [the defendant] on the issue of medical causation."); *Elkins v Richardson-Merrell, Inc*, 8 F3d 1068, 1071 (CA 6, 1993) (affirming summary judgment in the defendant's favor and concluding that precedent establishes that the court "treat[s] the plaintiff's expert opinion indicating a basis of support for the plaintiffs'

I examine each of these shortcomings in turn. Plaintiff's first failure was to overlook the matter of personal exposure. When plaintiff's expert, Dr. Nosanchuk, was questioned regarding his conclusion that plaintiff was exposed to VOCs that made him cough and vomit, Dr. Nosanchuk admitted that he did not know where the oil spill started or how far the release site was located from plaintiff's home. When asked what chemicals were in the oil, he responded: "I think it was benzyl, toluylene, xylene. Maybe there was something else too." He obtained this knowledge online and admitted that he lacked specific knowledge of which chemical constituents were present or in what quantities. Nor did he have any information concerning the emission or dispersion rates of VOCs. "[O]n a personal level" his understanding of VOCs effects was based on pumping gasoline into his own car: "[T]hey're an irritant. I don't really understand the toxicology. I know that they're irritants and I know that they're capable of causing cough, nausea, vomiting, irritation of the eyes and any other mucous membranes." All that this testimony would reasonably demonstrate to the fact-finder is that VOCs contained in gasoline pumped into a car can, under *some* circumstances, act as an irritant. By itself, however, this fact neither evidences that plaintiff inhaled or was otherwise exposed to the VOCs contained in defendant's oil nor that such VOCs acted as an irritant under *these* circumstances.

Plaintiff himself only alleged that he smelled oil fumes "really strong" for several days. But, "[i]t is important to understand that these VOCs can be smelled at levels well below those that would cause health problems." EPA, *Enbridge Oil Spill: How is Air Quality Affected?*, p 1 (emphasis omitted), available at <https://www.epa.gov/sites/production/files/2016-06/documents/enbnridge_fs_airquality_20100802.pdf> (accessed May 31, 2017) [https://perma.cc/5FU8-DKGD]. Despite knowledge here of the oil release site's location, the amount spilled, and the duration of the incident, plaintiff did not provide any scientific information regarding VOCs, such as the conditions under which VOCs evaporate into the air, how quickly they do so and in what concentrations, the amount of surface oil necessary to produce a toxic level of VOCs in the air, how VOCs disperse in the air, and how long VOCs remain in the air.[21] This list is

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[sic] theories . . . to be admissible but 'simply inadequate . . . [to] permit a jury to conclude that [the toxin] more probably than not causes [the type of injury the plaintiff suffered]' ") (citation omitted; second alteration in original).

[21] Plaintiff did not even use the EPA air monitoring sampling data results, which provided the amounts of various VOCs in parts per billion by volume of the highest peak readings in locations near the oil spill. See, e.g., EPA, *Enbridge Oil Spill: Human Health Air Screening Levels*, available at <https://archive.epa.gov/region5/enbridgespill/data/web/pdf/enbridge_voc_screening_levels_20100813.pdf> (accessed May 31, 2017) [https://perma.cc/MF78-3UQU]. Plaintiff argues that defendants relied on information outside the record in providing the EPA's sampling

only illustrative because plaintiff was not necessarily required to provide evidence on *all* these issues or to provide detailed chemical testing, modeling, and case studies to prove his claim. But he had to, at least approximately, establish his own level of exposure. *Blanchard*, 190 Vt at 579 ("[W]hile 'it is not always necessary for a plaintiff to quantify exposure levels precisely,' courts generally preclude experts from testifying 'as to specific causation without having any measurements of a plaintiff's exposure to the allegedly harmful substance.' "), quoting *Henricksen v ConocoPhillips Co*, 605 F Supp 2d 1142, 1157 (ED Wash, 2009). Plaintiff here provided *no* information whatsoever regarding his potential exposure to VOCs. Absent evidence of his exposure level, plaintiff could not establish specific causation and therefore failed to show the cause-in-fact element of his toxic tort claim. See *Henry*, 473 Mich at 67 ("In an ordinary 'toxic tort' cause of action, a plaintiff alleges he has developed a disease *because of* exposure to a toxic substance negligently released by the defendant.") (emphasis added).[22]

Second, plaintiff failed to adequately consider and eliminate other factors that *reasonably* could have caused his injuries. Two days after his surgery, plaintiff was still in the hospital and informed Dr. Koziarski that another migraine headache was forming. Plaintiff reported to Dr. Koziarski that he was "reluctant to take Norco or Vicodin as this is what made him throw up the first time" and that he also thought Lamictal, the medication used to treat his depression, "may be causing his migraines." Plaintiff's medical history indicated that he "[g]ets migraines when stressed" and "has nausea and dry heaves[;] however it only occurs if he smokes or is around smoke." The same record stated that plaintiff smokes. Further, plaintiff had visited the hospital in January 2008, complaining of headaches and nausea, which he then attributed to his recently increased dosage of Lamictal. Plaintiff was required to exclude these reasonably relevant potential causes of his injuries with a reasonable amount of certainty, but as shown in the record, his evidence to this effect was insufficient.

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data to this Court, but defendants correctly argue that they were allowed to observe that such data existed and was publicly available in making the argument that plaintiff failed to demonstrate his exposure to harmful levels of VOCs. Such information is judicially noticeable. See MRE 201(b).

[22] Even assuming arguendo that plaintiff's exposure could be garnered from reasonable inferences given the high number of other individuals in plaintiff's area that developed symptoms consistent with VOCs exposure and plaintiff's evidence to this effect, see *Curtis*, 174 F3d at 671-672 (holding that it was acceptable that the plaintiffs' expert established exposure *in part* by considering the fact that several refinery workers developed the same cluster of symptoms consistent with benzene exposure shortly after the chemical was introduced to the refinery), plaintiff failed to establish specific causation for the additional reasons that follow.

Initially when plaintiff's expert, Dr. Nosanchuk, was asked whether he had ruled out other relevant potential causes of plaintiff's injuries, he essentially denied having performed a differential etiology of any kind, believing "that other potential causes were very unlikely." But he later recalled not having been asked to consider alternative causes and stated: "I'm sure I considered a lot of them. I don't remember any one that sticks in my mind." When asked how he was able to rule out these other causes, his *full* response was, "Thought about it." Then when he was pressed on his evaluation and elimination of alternative causes of plaintiff's symptoms, Dr. Nosanchuk several times resorted to a well-known and insufficient manner of causal reasoning—mistaking correlation for causation. See, e.g., *Craig*, 471 Mich at 93 ("It is axiomatic in logic and in science that correlation is not causation.").

For instance, when Dr. Nosanchuk was questioned on his claim that the oil leak was the *sole* cause of plaintiff's symptoms, he stated that he meant "as far as I was concerned that is what was causing it. He wasn't having the problems before and he was having the problems afterwards. The oil spill and the problems associated with the oil spill are capable of doing that and I think they did do that and that is my clinical judgment based on what I knew." As the majority's order correctly notes, Dr. Nosanchuk's reasoning is also an example of the *post hoc, ergo propter hoc* fallacy. See *State of Ohio v US Dep't of the Interior*, 279 US App DC 109, 150 (1989) (explaining the fallacy in an oil spill case and stating that it is "the fallacy of assuming that, simply because a biological injury occurred after a spill, it must have been caused by the spill"). Dr. Nosanchuk's report, in which he opined that Lamictal was not related to plaintiff's health problems, contained the same flawed analysis. In explaining the basis for his opinion, Dr. Nosanchuk cited the Michigan Department of Community Health report that stated that the chemicals released in the spill could cause headaches and nausea. Because plaintiff was "squarely within the parameters [i.e., the location of the affected area] as outlined in the report," Dr. Nosanchuk believed the spill had to have caused plaintiff's symptoms and that Lamictal had nothing to do with these symptoms. Demonstrating that the VOCs *could* have caused headaches and nausea fails to establish that Lamictal—or any other potential cause—*did not* cause plaintiff's headaches and vomiting. The fact-finder thus is left with no evidence ruling out other causes or even tending to show that other causes are less likely the cause of the injury than are the VOCs.

Additionally, when Dr. Nosanchuk was asked if smoking could have been related to the nausea and vomiting, his response was simply that it could not have been. Later, however, he acknowledged that Vicodin could cause nausea and that smoking could cause coughing, but he did not believe that smoking was related to plaintiff's problems: "Now, whether or not the smoking played any part at all [in plaintiff's symptoms], I don't know. All I know is my understanding is . . . he didn't complain of significant cough before the fumes." This type of correlative reasoning is not enough to reasonably eliminate an alternative cause. It does not provide a fact-finder any rationale for concluding that the VOCs are more likely the cause of plaintiff's maladies than smoking. In sum,

plaintiff's expert only provided conclusory conjecture based on correlative reasoning, and therefore his testimony was insufficient to reasonably eliminate other reasonably relevant potential causes of plaintiff's injuries as is required to establish specific causation. *Skinner*, 445 Mich at 164 (holding that impermissible conjectures do not amount to reasonable causal inferences).

Third and finally, plaintiff did not provide adequate evidence concerning the causal link between his coughing and vomiting and the avulsion of his gastric artery. The average juror cannot be expected to know the internal bodily reactions necessary to cause a gastric artery to avulse off of the spleen, and plaintiff did not provide adequate medical expert testimony on this topic. Plaintiff's expert provided " 'an explanation consistent with [the] known facts or conditions, but not deducible from them as a reasonable inference,' " otherwise known as a conjecture, which explanation is insufficient to establish causation. *Skinner*, 445 Mich at 164, quoting *Kaminski*, 347 Mich at 422.

When questioned about the duration of VOCs exposure necessary to trigger an avulsion, Dr. Nosanchuk speculated that the injury could have occurred suddenly or "[m]aybe" "minor micro injuries" occurred over time, but he acknowledged, "I don't know what happened," followed by: "I can't really comment on the—I felt this is what did it and it happened. As far as why it took that long, I don't know." When asked if anything in the medical literature supported his testimony, he stated, "Not as much as my experience and my clinical judgment." Even if Dr. Nosanchuk's experience was relevant, he still failed to offer the fact-finder any rationale for his conclusions and, in fact, likely undercut those conclusions by repeatedly saying that he did not "know" why he reached them.

Regarding what may have caused the avulsion of plaintiff's gastric artery, Dr. Nosanchuk had to "look this up" because he was "not an anatomist"—an expert in the structure or internal workings of the human body. He reviewed the abstracts of three articles that he considered to be relevant. The abstracts list several potential causes of gastric artery tears and note that "*rarely* [is] vomiting" a predisposing condition. (Emphasis added.) Dr. Nosanchuk made no attempt to explain why plaintiff's avulsion was among those rare cases in which coughing or vomiting caused the injury as opposed to other possibilities.

In explaining what he relied on to form his ultimate opinion concerning the cause of plaintiff's avulsion, he testified: "[T]here was an oil spill. That's a known fact. There [were] fumes. That was a known fact. People got sick and some of them coughed, had nausea, and vomiting. It was the—without anything specific, the total of that is what I based my opinion on. . . . I'm a very simple guy. Spill, fumes, sick people, to me they're related based on 40 years doing this for a living." In other words, the oil spill caused the injuries because it occurred before the injuries. A fact-finder could not rely on this rationale to reach a verdict favoring plaintiff. See *West*, 469 Mich at 186 n 12.

Overall, Dr. Nosanchuk provided only correlative reasoning based on his "clinical judgment." For purposes of this Court's review, the problems associated with his testimony are not ones of reliability or

soundness of methodology, but rather speak to whether he produced any evidence tending to show that defendants' oil fumes more likely than not caused the avulsion of plaintiff's gastric artery.[23] I, in agreement with the majority, conclude that he did not. *Wright*, 91 F3d at 1107 (stating that it is "not enough for a plaintiff to show that a certain chemical agent sometimes causes the kind of harm that he or she is complaining of"). Plaintiff's expert did not show that a causal relationship between defendants' VOCs and plaintiff's arterial tear was more probable than not, and plaintiff thereby failed to create a genuine issue of fact as to specific causation. *Skinner*, 445 Mich at 174 ("Because the experts' conclusions regarding causation are premised on mere suppositions, they did not establish an authentic issue of causation."). Therefore, the trial court properly granted summary disposition in defendants' favor.

III. CONCLUSION

A toxic tort is no different than any other negligence claim in that a plaintiff must present evidence establishing factual or "but for" causation. Where, as here, a plaintiff presents evidence in the form of group-based statistical studies or similar proof, the general-and-specific-causation framework would apply. Evidence of general causation must include proof that the toxin in the alleged exposure level can cause the alleged harm. Evidence of specific causation must include proof that the plaintiff was actually exposed to the relevant toxin as well as a rough estimation of his or her exposure level. Specific causation additionally requires a plaintiff to evaluate and eliminate to a reasonable extent other reasonably relevant potential causes of his or her injuries. Furthermore, if the issue or proposition in a toxic tort case is beyond the common knowledge of an ordinary juror, expert witness testimony is required. Because plaintiff here failed to present evidence establishing either general or specific causation, I concur in the Court's reversal of the judgment of the Court of Appeals and remand to the trial court for reinstatement of its order granting summary disposition in defendants' favor.

ZAHRA, J., and WILDER, J., join the statement of MARKMAN, C.J.

PEOPLE v WARREN, No. 155002; Court of Appeals No. 333997. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Compare *People v Johnson*, 413 Mich 487, 490 (1982), with *People v Blanton*, 317 Mich App 107, 119-120 (2016).

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[23] When considering scientific evidence of specific causation in a toxic tort case at the summary disposition stage, "the question is not whether there is some dispute about the validity or force of a given study, but rather, whether it would be unreasonable for a rational jury to rely on that study to find causation by a preponderance of the evidence." *In re Joint Eastern & Southern Dist Asbestos Litigation*, 52 F3d 1124, 1133 (CA 2, 1995).

MANIACI v DIROFF, No. 155049; Court of Appeals No. 333952. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 25, 2017:

PEOPLE v CURTIS WOODS, No. 153325; Court of Appeals No. 322608.

PEOPLE v GEORGE WRIGHT, No. 153932; Court of Appeals No. 330846.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ROCHE, No. 154007; Court of Appeals No. 323555.

PEOPLE v BARNER, No. 154111; Court of Appeals No. 330207. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's motion has been styled as a motion for relief from judgment by the courts below, it should not be regarded as a motion for relief from judgment in any future case. The defendant actually filed a motion to correct an invalid sentence under MCR 6.429, which was properly denied by the trial court for lack of merit. It was also untimely. MCR 6.429(B). The application for leave to appeal to the Court of Appeals was properly denied, but due to the lack of merit in the grounds presented, not under the rules of MCR 6.501 *et seq*. The motion for relief is denied as moot.

PEOPLE v DONALD FERGUSON, No. 154323; Court of Appeals No. 326709.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DIANE FERGUSON, No. 154326; Court of Appeals No. 326725.

WILDER, J., did not participate because he was on the Court of Appeals panel.

In re DAWSON, No. 154342; Court of Appeals No. 331589.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WHETSTONE, No. 154391; Court of Appeals No. 332906.

PEOPLE v HOLLINGSWORTH, No. 154431; Court of Appeals No. 326409.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HARDAWAY, No. 154501; Court of Appeals No. 325941.

HOLETON v CITY OF LIVONIA, No. 154551; Court of Appeals No. 321501.

PEOPLE v ZENTZ, No. 154583; Court of Appeals No. 333278.

PEOPLE v GARDNER, No. 154595; Court of Appeals No. 332986.

PEOPLE v LAKE, No. 154614; Court of Appeals No. 333781.

PEOPLE v SHAVER, No. 154619; Court of Appeals No. 332920.

PEOPLE v THOMAS TODD, No. 154647; Court of Appeals No. 334188.

PEOPLE v KEVIN MASON, No. 154657; Court of Appeals No. 334086.

PEOPLE v HORNE, No. 154658; Court of Appeals No. 333197.

PEOPLE v TENELSHOF, Nos. 154721 and 154722; Court of Appeals Nos. 328176 and 328177.

ENGEL v MONITOR TOWNSHIP ZONING BOARD OF APPEALS, No. 154729; Court of Appeals No. 327701.

PEOPLE v RAYMONE JACKSON, No. 154770; Court of Appeals No. 327203.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HODGE, No. 154777; Court of Appeals No. 333739.

PEOPLE v BAYNES, No. 154778; Court of Appeals No. 333712.

PEOPLE v MULLINS, No. 154800; Court of Appeals No. 334532.

PEOPLE v COOPER, No. 154801; Court of Appeals No. 333563.

PEOPLE v DIAGO JONES, No. 154811; Court of Appeals No. 326760.

PEOPLE v DUANE JOHNSON, No. 154818; Court of Appeals No. 327842.

LANURIAS v PROGRESSIVE INSURANCE COMPANY, No. 154837; Court of Appeals No. 327435.

WILDER, J., did not participate because he was on the Court of Appeals panel.

LONDON v LONDON, No. 154843; Court of Appeals No. 333592.

PEOPLE v KESEAN WILSON, No. 154847; Court of Appeals No. 333951.

PEOPLE v DORIAN ROBINSON, No. 154866; Court of Appeals No. 333339.

PEOPLE v ANTONIO CLARK, No. 154867; Court of Appeals No. 334283.

PEOPLE v TEEL, No. 154873; Court of Appeals No. 334670.

KEYBANK NATIONAL ASSOCIATION v LAKE VILLA OXFORD ASSOCIATES, LLC, No. 154900; Court of Appeals No. 327469.

PEOPLE v CARSON, No. 154905; Court of Appeals No. 326410.

PEOPLE v HEARN, No. 154915; Court of Appeals No. 327259.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v OBAR ELLIS, No. 154920; Court of Appeals No. 333619.

PEOPLE v NOLAN, No. 154930; Court of Appeals No. 326970.

PEOPLE v DAMIEN BREWER, No. 154941; Court of Appeals No. 334814.

PEOPLE v BLISS, No. 154949; Court of Appeals No. 334042.

PEOPLE v ROBERT HAWKINS, No. 154951; Court of Appeals No. 333273.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RUDY TUCKER, No. 154955; Court of Appeals No. 333506.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CHARLES JONES, No. 154961; Court of Appeals No. 334533.

PEOPLE v GRIFFIN, No. 154966; Court of Appeals No. 334727.

In re FOSTER ATTORNEY FEES, No. 154977; reported below: 317 Mich App 372.

PEOPLE v POWELL, No. 154986; Court of Appeals No. 334137.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TIPPINS, No. 154987; Court of Appeals No. 333602.

PEOPLE v WILLIAM HARRIS, No. 155008; Court of Appeals No. 327873.

PEOPLE v BEAL, No. 155041; Court of Appeals No. 326981.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SAUMIER, No. 155053; Court of Appeals No. 333587.

PEOPLE v DODSON, No. 155084; Court of Appeals No. 328481.

PEOPLE v MACCUNE, No. 155111; Court of Appeals No. 328732.

PEOPLE v DORCH, No. 155159; Court of Appeals No. 328119.

PEOPLE v DAVID COTTRELL, No. 155176; Court of Appeals No. 335229.

PEOPLE v WILKERSON, No. 155209; Court of Appeals No. 335363.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ABBEY, No. 155215; Court of Appeals No. 328931.

PEOPLE v MCCLOY, No. 155219; Court of Appeals No. 335828.

GLEASON v SPECTRUM HEALTH HOSPITALS, No. 155250; Court of Appeals No. 336603.

WELLS v HOME-OWNERS INSURANCE COMPANY, No. 155252; Court of Appeals No. 334847.

PEOPLE v JOSHUA HOLLOWAY, No. 155253; Court of Appeals No. 328378.

PEOPLE v EVERETT, No. 155257; Court of Appeals No. 328660.

PEOPLE v JOSEPH WILLIAMS, No. 155260; Court of Appeals No. 335572.

PEOPLE v STEVENS, No. 155268; Court of Appeals No. 327160.

SHARP v MOHLER, No. 155269; Court of Appeals No. 327110.
WILDER, J., did not participate because he was on the Court of Appeals panel.

SMELTZER v DAIGLE, No. 155270; Court of Appeals No. 328355.

PEOPLE v LYMON, No. 155274; Court of Appeals No. 328399.

In re SMITH, No. 155275; Court of Appeals No. 334531.

PEOPLE v CRAIG BRADLEY, No. 155290; Court of Appeals No. 328806.

PEOPLE v BUSSING, No. 155311; Court of Appeals No. 328801.
WILDER, J., did not participate because he was on the Court of Appeals panel.

MOUTSATSOS v CITY OF HUNTINGTON WOODS, No. 155312; Court of Appeals No. 327838.
BERNSTEIN, J., did not participate because of prior acquaintances with the parties involved in this case.

FEDERAL HOME LOAN MORTGAGE CORPORATION v MITAN, No. 155327; Court of Appeals No. 333386.

MORRIS v KINROSS CORRECTIONAL FACILITY WARDEN, No. 155330; Court of Appeals No. 334232.

PEOPLE v ZDRAL, No. 155332; Court of Appeals No. 328570.

PEOPLE v WACHTER, No. 155347; Court of Appeals No. 335961.

PEOPLE v FEZZEY, No. 155351; Court of Appeals No. 329361.

PEOPLE v HYMAN JOHNSON, No. 155354; Court of Appeals No. 328501.

WYLER v BANK OF NEW YORK MELLON, No. 155356; Court of Appeals No. 329153.

PEOPLE v HARVEY MOORE, No. 155358; Court of Appeals No. 327836.

PEOPLE v ROOT, No. 155366; Court of Appeals No. 329367.

RABURN v KIMBERG, No. 155367; Court of Appeals No. 335386.

PEOPLE v BASSETT, No. 155372; Court of Appeals No. 328933.

BARRY A SEIFMAN, PC v GUZALL, No. 155375; Court of Appeals No. 328643.

KIMBERLY-CLARK CORP & SUBSIDIARIES v DEPARTMENT OF TREASURY, No. 155378; Court of Appeals No. 329749.
MARKMAN, C.J. I would grant leave to appeal for the reasons set forth

in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, C.J.

In re MARCELLOUS BENNETT, No. 155382; Court of Appeals No. 335402.

PEOPLE v GARCIA, No. 155385; Court of Appeals No. 334520.

PEOPLE v DENNIS DURALLE HOSKINS, No. 155389; Court of Appeals No. 329897.

UKPAI v DEVLON'S COUNTRYSIDE KENNEL, No. 155392; Court of Appeals No. 335211.

PEOPLE v SPARKS, No. 155402; Court of Appeals No. 335279.

PEOPLE v DON WRIGHT, No. 155403; Court of Appeals No. 328959.

PEOPLE v ARTHUR WILLIAMS, No. 155406; Court of Appeals No. 329704.

GUTWEIN v KAHLE, No. 155407; Court of Appeals No. 329919.

PEOPLE v BROWNING, No. 155411; Court of Appeals No. 335204.

PEOPLE v LAMONT ROBINSON, No. 155424; Court of Appeals No. 335391.

PEOPLE v GENERAL JONES, No. 155435; Court of Appeals No. 329185.

PEOPLE v BARRETT, No. 155438; Court of Appeals No. 328775.

PEOPLE v LOFLAND, No. 155439; Court of Appeals No. 329186.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v CHARITY MENDOZA and PEOPLE v DEMIAN MENDOZA, Nos. 155446 and 155447; Court of Appeals Nos. 328109 and 328114.

PEOPLE v GABUT, No. 155450; Court of Appeals No. 329606.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BROWNLEE, No. 155460; Court of Appeals No. 336009.

PEOPLE v RICARD TAYLOR, No. 155462; Court of Appeals No. 328764.

PEOPLE v STATON, No. 155469; Court of Appeals No. 329926.

PEOPLE v WICKER, No. 155470; Court of Appeals No. 334939.

PEOPLE v ALEXI, No. 155472; Court of Appeals No. 335753.

TEF-THREE, LLC v MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, No. 155477; Court of Appeals No. 333501.

WILDER, J., did not participate because he was on the Court of Appeals panel.

RABURN v KIMBERG, No. 155479; Court of Appeals No. 335415.

PEOPLE v YAGER, No. 155493; Court of Appeals No. 336284.

PEOPLE v PRESSLEY, No. 155510; Court of Appeals No. 335441.

PEOPLE v TERRENCE THOMAS, No. 155519; Court of Appeals No. 334776.

PEOPLE v KENNETH COX, No. 155556; Court of Appeals No. 334709.
WILDER, J., did not participate because he was on the Court of Appeals panel.

In re BROOKS, No. 155566; Court of Appeals No. 336912.

PAYNE v STATE TREASURER, No. 155614; Court of Appeals No. 333537.

PEOPLE v KENNETH COX, No. 155647; Court of Appeals No. 335357.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MICHAEL LEWIS, No. 155672; Court of Appeals No. 330107.

GRIEVANCE ADMINISTRATOR v JACKSON, No. 155724.

ROZEN v ROZEN, No. 155730; Court of Appeals No. 333250.

In re GLEASON, No. 155744; Court of Appeals No. 337731.

PEOPLE v TOBLER, No. 155771; Court of Appeals No. 330638.

WALKER v WALKER, No. 155817; Court of Appeals No. 334752.
WILDER, J., did not participate because he was on the Court of Appeals panel.

FOSTER v GANGES TOWNSHIP, No. 155827; Court of Appeals No. 336937.

PEOPLE v PARLOVECCHIO, No. 155847; reported below: 319 Mich App 237.

COMMITTEE TO BAN FRACKING IN MICHIGAN v DIRECTOR OF ELECTIONS, No. 155897; Court of Appeals No. 334480.

Leave to Appeal Before Decision by the Court of Appeals Denied July 25, 2017:

PUNTURO v KERN, No. 155920; Court of Appeals No. 338727.

Superintending Control Denied July 25, 2017:

CHEGASH v ATTORNEY GRIEVANCE COMMISSION, No. 155408.

Reconsideration Denied July 25, 2017:

WHITE LAKE CHARTER TOWNSHIP v CIURLIK ENTERPRISES, No. 154227; Court of Appeals No. 326514. Leave to appeal denied at 500 Mich 959.

PEOPLE v LAMAR DAVIS, No. 154618; Court of Appeals No. 333277. Leave to appeal denied at 500 Mich 982.

JOHNSON v MICHIGAN DEPARTMENT OF TREASURY, No. 154620; Court of Appeals No. 327299. Leave to appeal denied at 500 Mich 960.

PEOPLE v MANNING, No. 154629; Court of Appeals No. 332671. Leave to appeal denied at 500 Mich 982.

WILDER, J., did not participate because he was on the Court of Appeals panel.

JOHN DOE 11 v DEPARTMENT OF CORRECTIONS, No. 154631; Court of Appeals No. 332260. Leave to appeal denied at 500 Mich 960.

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 154641; Court of Appeals No. 333371. Leave to appeal denied at 500 Mich 961.

CITY OF DEARBORN HEIGHTS v ROCK, No. 154820; Court of Appeals No. 330348. Leave to appeal denied at 500 Mich 962.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v NAILS, No. 155028; Court of Appeals No. 334971. Leave to appeal denied at 500 Mich 984.

PEOPLE v THOMAS WHITE, No. 155043; Court of Appeals No. 332486. Leave to appeal denied at 500 Mich 984.

PEOPLE v STURGIS, No. 155125; Court of Appeals No. 333606. Leave to appeal denied at 500 Mich 984.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered September 21, 2016:

PROPOSED AMENDMENT OF MCR 2.602.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.602 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS.

(A) [Unchanged.]

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

(1)-(4) [Unchanged.]

(5) Upon presentation to the court of a proposed judgment that is otherwise lawful, signed, and approved by the parties bound by the judgment or their counsel of record, and if an action is pending between those parties or was pending previously.

(a) If so provided in the proposed judgment, no notice to the opposing party of submission for entry is required, and submission of the judgment to the court for entry shall serve to reopen the prior case if closed.

(b) If the proposed judgment does not provide for entry without prior notice to the debtor, the submitting party must file a motion and give notice to the debtor under MCR 2.107(C) at least 14 days before the date of the motion hearing. The presenting party shall file and serve a notice of hearing for entry of the proposed judgment. If the debtor does not file and serve specific objections within that time, the court shall enter the judgment.

(c) The proposed judgment must be accompanied by an affidavit of the submitting party or its counsel averring as to the basis for entry of the judgment.

(d) Service of the entered judgment shall be as provided for in the judgment or else in accordance with MCR 2.602(D) and the manner prescribed in MCR 2.105. Within 21 days of service, the judgment debtor may file a motion to challenge the propriety of the entry of the judgment or the calculation of the judgment amount. The motion must be heard within 14 days of filing. The filing of such a motion does not extend the stay of MCR 2.614(A)(1) or prevent the court from enjoining the transfer of assets under MCR 2.621(C). The court may modify or set aside the judgment or enter such other relief as it deems appropriate.

(C)-(D) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.602(B) would provide procedural rules regarding entry of consent judgments. This language was submitted by the Representative Assembly of the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Order Entered September 21, 2016:

PROPOSED AMENDMENT OF MCR 9.115.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.115 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.115. HEARING PANEL PROCEDURE.

(A)-(E) [Unchanged.]

(F) Prehearing Procedure.

(1)-(4) [Unchanged.]

(5) Discipline by Consent.

(a) In exchange for a stated form of discipline and on the condition that the plea or admission is accepted by the commission and the hearing panel, a~~A~~ respondent may offer to

(i) plead no contest or to admit all ~~essential~~ or some of the facts and misconduct alleged ~~contained~~ in the complaint or ~~any of its allegations~~ otherwise agreed to by the parties or

(ii) stipulate to facts and misconduct in a proceeding filed under subchapter 9.100 not initiated by a formal complaint.

~~in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel.~~ The respondent's offer shall first be submitted to the commission. If ~~the offer is accepted by~~ an agreement is reached with the commission, the administrator and the respondent shall ~~prepare~~ file with the board and the hearing panel a stipulation for a consent order of discipline~~ that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation with the hearing panel~~. At the time of filing, the administrator shall serve a copy of the stipulation upon the complainant.

(b) The stipulation shall include:

(i) admissions, which may be contained in an answer to the complaint, or a plea of no contest to facts sufficient to enable the hearing panel to determine the nature of the misconduct and conclude that the discipline proposed is appropriate in light of the identified misconduct;

(ii) citation to the applicable American Bar Association Standards for Imposing Lawyer Sanctions; and

(iii) disclosure of prior discipline.

~~If the stipulation contains any nonpublic information, it shall be filed in camera.~~ Admonishments and contractual probations shall be filed separately and kept confidential until the hearing panel accepts the stipulation under this rule. ~~At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.~~

(c) Upon the filing of a stipulation for a consent order of discipline, the hearing panel may:

(i) approve the stipulation and file a report and enter a final order of discipline; or

(ii) communicate with the administrator and the respondent about any concerns it may have regarding the stipulation. Before rejecting a stipulation, a hearing panel shall advise the parties that it is considering rejecting a stipulation and the basis for the rejection. The hearing

panel shall provide an opportunity, at a status conference or comparable proceeding, for the parties to offer additional information in support of the stipulation.

(d) If a hearing panel rejects a stipulation, the hearing panel shall advise the parties in writing of its reason or reasons for rejecting the stipulation and allow the parties an opportunity to submit an amended stipulation.

(e) If a hearing panel rejects an amended stipulation, or if no amended stipulation is filed within 21 days after rejection of the initial stipulation, the matter shall be reassigned to a different hearing panel. Upon reassignment to a different hearing panel,

(i) the stipulation and any amended stipulation shall be deemed withdrawn,

(ii) statements and stipulations made in connection with the stipulation and any amended stipulation shall be inadmissible in disciplinary proceedings against the respondent and not binding on either party, and

(iii) the newly assigned hearing panel shall conduct a hearing.

(G)-(M) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.115(F)(5) would clarify that a hearing panel shall be authorized to allow parties to submit an amended stipulation. If a hearing panel rejects an amended stipulation, the matter would be referred to a different hearing panel to conduct a hearing. This proposed language was submitted jointly by the Attorney Grievance Commission and Attorney Discipline Board.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/courts-rules-admin-matters/pages/default.aspx].

Order Entered November 2, 2016:

PROPOSED AMENDMENT OF MCR 3.216.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.216 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(B) [Unchanged.]

(C) Referral to Mediation.

(1)-(2) [Unchanged.]

(3) Parties who are subject to a personal protection order or other protective order, or who are involved in a child abuse and neglect proceeding, may not be referred to mediation without a hearing to determine whether mediation is appropriate. The court may order mediation if a protected party requests mediation.

(D)-(G) [Unchanged.]

(H) Mediation Procedure.

(1) [Unchanged.]

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(2)-(8) [Renumbered but otherwise unchanged.]

(I)-(K) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.216 would update the rule to be consistent with 2016 PA 93, which allows a court to order mediation if a protected party requests it and requires a mediator to screen for the presence of domestic violence throughout the process.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-33. Your comments and the comments of others will be posted under the chapter affected by this proposal

at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 2, 2016:

PROPOSED AMENDMENT OF MCR 8.126.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.126 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Except as otherwise provided in this rule, an out-of-state attorney may seek temporary admission as determined in this subsection. 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, before an administrative tribunal or agency, or in a specific arbitration proceeding 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 be temporarily admitted to practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, administrative tribunal or agency, or arbitrator 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 and who is not a member of the State Bar of Michigan.

(1) Procedure.

(a)-(d) [Unchanged.]

(B) Waiver. An applicant is not required to associate with local counsel, limited to the number of appearances to practice, or required to pay the fee to the State Bar of Michigan, if the applicant establishes to the satisfaction of the court in which the attorney seeks to appear that:

(1) the applicant appears for the limited purpose of participating in a child custody proceeding as defined by MCL 712B.3(b) in a Michigan

court pursuant to the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*;

(2) the applicant represents an Indian tribe as defined by MCL 712B.3; and

(3) the applicant presents an affidavit from the Indian child's tribe asserting the tribe's intent to intervene and participate in the state court proceeding, and averring the child's membership or eligibility for membership under tribal law; and

(4) the applicant presents an affidavit that verifies:

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

(b) the jurisdiction where the attorney is presently eligible to practice;

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

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

(5) If the court in which the attorney seeks to appear is satisfied that the out-of-state attorney has met the requirements in this subrule, the court shall enter an order authorizing the out-of-state attorney's temporary admission.

Staff Comment: The proposed amendment of MCR 8.126, submitted by the Michigan Tribal State Federal Judicial Forum, would waive fees and other requirements for out-of-state attorneys who seek temporary admission in Michigan. The exemption from certain requirements would apply only in cases in which the attorney desires to represent an Indian tribe intervening in a child custody proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 2, 2016:

PROPOSED AMENDMENT OF MRE 404b OF THE MICHIGAN RULES OF EVIDENCE.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 404(b) of the Michigan Rules of Evidence. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) *Other crimes, wrongs, or acts.*

(1) [Unchanged.]

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. This notice must be provided in writing or orally in open court. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Staff Comment: This proposed amendment would require the prosecution to provide reasonable notice of other acts evidence in writing or orally in open court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-11. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 23, 2016:

PROPOSED AMENDMENTS OF MCR 3.203 and 3.208.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.203 and 3.208 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.203. SERVICE OF NOTICE AND COURT PAPERS IN DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1)-(2) [Unchanged.]

(3) Alternative Electronic Service

(a) A party or an attorney may file an agreement with the friend of the court to authorize the friend of the court to serve notices and court papers on the party by any of the following methods:

(i) e-mail;

(ii) text message;

(iii) sending an e-mail or text message alert to log into a secure website to view notices and court papers.

(b) Obligation to Provide and Update Information

(i) The agreement for service by e-mail or e-mail alert shall set forth the e-mail addresses for service. Attorneys who agree to e-mail service 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. Parties or attorneys who have agreed to service by e-mail or e-mail alert under this subsection shall immediately notify the friend of the court if the e-mail address for service changes.

(ii) The agreement for service by text message or text message alert shall set forth the phone number for service. Parties or attorneys who have agreed to service by text message or text message alert under this subsection shall immediately notify the friend of the court if the phone number for service changes.

(c) The party or attorney shall set forth in the agreement all limitations and conditions concerning e-mail or text message service, including but not limited to:

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

(ii) designation of exhibits as separate documents;

(iii) the obligation (if any) to furnish paper copies of e-mailed or text message 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.

(d) Documents served by e-mail or text message must be in PDF format or other format that prevents the alteration of the document contents. Documents served by alert must be in PDF format or other format for which a free downloadable reader is available.

(e) A paper served by alternative electronic service that the friend of the court or an authorized designee is required to sign may include the 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).

(f) Each e-mail or text message that transmits a document or provides an alert to log in to view a document shall identify in the e-mail subject line or at the beginning of the text message, the case by court, party name, case number, and the title or legal description of the document(s) being sent.

(g) An alternative electronic service 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 under this subrule is treated as service by delivery under MCR 2.107(C)(1).

(h) A party or attorney may withdraw from an agreement for alternative electronic service by notifying the friend of the court in writing at least 28 days in advance of the withdrawal.

(i) Alternative electronic service is complete upon transmission, unless the friend of the court learns that the attempted service did not reach the intended recipient. If an alternative electronic service transmission is undeliverable, the friend of the court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the electronic transmission was undeliverable. The friend of the court must also retain a notice that the electronic transmission was undeliverable.

(j) The friend of the court 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.

(B)-(C) [Unchanged.]

(D) Administrative Change of Address. The friend of the court office ~~shall~~may change a party's address administratively pursuant to the policy established by the state court administrator for that purpose when:

(1) a party's address changes in another friend of the court office pursuant to these rules, or

(2) notices and court papers are returned to the friend of the court office as undeliverable or the friend of the court determines that a federal automated database has determined that mail is not deliverable to the party's listed address.

(E)-(H) [Unchanged.]

(I) Notice to Attorneys.

(1) Copies of notices required to be given to the parties also must be sent to the attorneys of record.

(2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.

(J) [Former subrule "(I)" relettered as "(J)," but otherwise unchanged.]

RULE 3.208. FRIEND OF THE COURT.

(A)-(C) [Unchanged.]

~~(D) Notice to Attorneys~~

~~(1) Copies of notices required to be given to the parties also must be sent to the attorneys of record.~~

~~(2) The notice requirement of this subrule remains in effect until 21 days after judgment is entered or until postjudgment matters are concluded, whichever is later.~~

Staff Comment: The proposed amendment of MCR 3.203 would allow the friend of the court to use automated databases such as the United States Postal Services' National Change of Address database to identify outdated addresses and update them to correct addresses. The proposed amendments would allow a party or a party's attorney to agree to receive notices and other court papers from the friend of the court electronically. The proposed amendments would move the requirement to provide notices to attorneys of record from MCR 3.208.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-22.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 23, 2016:

PROPOSED AMENDMENT OF MCR 3.208.

On order of the Court, this is to advise that the Court is considering

an amendment of Rule 3.208 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.208. FRIEND OF THE COURT.

(A) [Unchanged.]

(B) Enforcement. The friend of the court is responsible for initiating proceedings to enforce an order or judgment for support, ~~visitation~~ parenting time, or custody.

(1) If a party has failed to comply with an order or judgment, the friend of the court may ~~petition for an order~~ schedule a hearing before a judge or referee for the party to show cause why the party should not be held in contempt.

(2) ~~The order to~~ Notice of the show cause hearing must be served personally, ~~or~~ by ordinary mail at the party's last known address, or in another manner permitted by MCR 3.203.

(a) The notice of the show cause hearing signed by an attorney for the friend of the court or other person designated by the chief judge to sign the notice has the force and effect of an order signed by the judge of that court ordering the party to appear.

(b) For the purpose of this subrule, an authorized signature includes but is not limited to signatures written by hand, printed, stamped, type written, engraved, photographed, or lithographed.

(c) A notice under this subrule must:

(i) be entitled in the name of the People of the State of Michigan;

(ii) be imprinted with the seal of the Supreme Court of Michigan;

(iii) have typed or printed on it the name of the court in which the matter is pending;

(iv) state the time and place where the hearing is scheduled;

(v) state that the party is required to appear;

(vi) state the title of the action in which the person is ordered to appear;

(vii) state the file designation assigned by the court;

(viii) state the amount past due and the source of the alleged past due amount if the contempt hearing is for nonpayment of support and,

if the contempt hearing is for violation of an order other than a support order, the act or failure to act that constitutes a violation of the court order; and

(ix) state that failure to obey the notice or reasonable directions of the signer as to time and place to appear may subject the person to whom it is directed to penalties for contempt of court.

The state court administrator shall develop and approve a show cause hearing and notice form for statewide use. The show cause hearing and notice form may be combined in a single document.

(d) A person must comply with the notice unless relieved by order of the court or written direction of the person who executed the notice.

(3) The show cause hearing ~~on the order to show cause~~ may be held no sooner than seven days after the ~~order~~ notice is served on the party. If service is by ordinary mail, the hearing may be held no sooner than nine days after the ~~order~~ notice is mailed.

(4) The court may hold the show cause hearing without the friend of the court unless a party presents evidence that requires the court to receive further information from the friend of the court's records before making a decision. If the party fails to appear ~~in response to the order to~~ at the show cause hearing, the court may issue an order for arrest.

(5)-(6) [Unchanged.]

(C) Allocation and Distribution of Payments.

(1) Except as otherwise provided in this subrule, all payments shall be allocated and distributed as required by the guidelines established by the ~~state court administrator~~ office of child support for that purpose.

(2) If the court determines that following the guidelines established by the ~~state court administrator~~ office of child support would produce an unjust result in a particular case, the court may order that payments be made in a different manner. The order must include specific findings of fact that set forth the basis for the court's decision, and must direct the payer to designate with each payment the name of the payer and the payee, the case number, the amount, and the date of the order that allows the special payment.

(3) [Unchanged.]

~~(4) A notice of income withholding may not be used by the friend of the court or the state disbursement unit to determine the specific allocation or distribution of payments.~~

(D) [Unchanged.]

(E) Exceptions to Friend of the Court Enforcement.

(1) The friend of the court is not required to enforce or modify a child support order when the payee is excused from cooperating in enforcing, establishing, or modifying a child support order for good cause relating to the safety of a payee or child pursuant to Title IV, Part D of the Social Security Act, 42 USC 651 *et seq*.

(2) The friend of the court is not required to enforce or modify a child support order when the case is no longer eligible for federal funding

because a party fails or refuses to take action to allow the friend of the court's activities to receive federal funding or because the federal child support case is closed pursuant to Title IV, Part D of the Social Security Act, 42 USC 651 *et seq.*

Staff Comment: The proposed amendment of MCR 3.208 would implement 2014 PA 378 permitting alternate procedures to set contempt proceedings to reduce the steps necessary to schedule a hearing. The proposed amendments also would clarify when the FOC must participate in a contempt hearing. In addition, the proposed amendments would implement 2014 PA 381 making the Office of Child Support responsible for determining allocation and distribution of child support payments, and would allow the friend of the court to refrain from enforcing child support orders in situations in which it is inappropriate or unproductive for the friend of the court to continue to enforce child support orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-11. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 23, 2016:

PROPOSED AMENDMENT OF MCR 7.121.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.121 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/ default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.121. ~~Appeals from Concealed Weapon Licensing Boards~~ Concealed Pistol.

(A) Scope. This rule governs appeals to the circuit court under MCL 28.425d~~from a final determination of a concealed weapon licensing board refusing to restore rights under MCL 28.424 or denying, failing to issue, revoking, or suspending a license to carry a concealed pistol~~. Unless this rule provides otherwise, MCR 7.101 through MCR ~~7.115~~ 7.114 apply.

(B) Suspensions and Revocations. Failure of the county clerk to reinstate a concealed pistol license under MCL 28.428(2) or (6) shall be considered a failure to issue a license under MCL 28.425d unless otherwise noted by statute.

(~~B~~C)Appeal of Right.

(1) [Unchanged.]

(2) Manner of Filing.

(a) Claim of Appeal — Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the license applicant or licensee is the appellant, and

(ii) the ~~board is~~ county clerk, department of state police, or entity taking the fingerprints may be the appellee.

(b) Claim of Appeal — Content. The claim of appeal must~~:~~ state whether the appellant is appealing a statutory disqualification, failure to issue a receipt, or failure to issue a concealed pistol license, and the facts on which venue is based.

~~(i) state:~~

~~[A] "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the county*] Concealed Weapon Licensing Board," or~~

~~[B] "[*Name of appellant*] claims an appeal from the failure of the [*name of the county*] Concealed Weapon Licensing Board to issue a decision on the application for a license by [*date*]," and~~

~~(ii) include concise statements of the following:~~

~~[A] the nature of the proceedings before the board, including citation to the statute authorizing the board's decision;~~

~~[B] citation to the statute or Const 1963, art 6 § 28 authorizing appellate review;~~

~~[C] the facts on which venue is based.~~

(c) [Unchanged.]

~~(d) Other Documents. In addition to the documents required under MCR 7.104(D), the claim of appeal shall include a copy of the board's decision and any materials accompanying the board's decision. If the appeal is from the board's failure to issue a timely decision, the claim of appeal shall state the date on which the application was filed and shall include a statement addressing whether the application complied with MCL 28.425b(1), (5), and (9).~~

(~~e~~d) Service. The appellant shall serve the claim of appeal on all parties.

(f~~e~~) Request for Certified Record. Within the time for filing a claim of appeal, the appellant shall send a written request to the ~~board~~ county clerk to send a certified copy of the record to the circuit court.

(3) [Unchanged.]

~~(C) Hearing De Novo from Denial of License for Grounds Specified in MCL 28.425b(7)(n).~~

~~(1) Briefs. The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.~~

~~(2) Hearing. The court shall hold a hearing de novo that comports with MCL 28.425d(1). Any determination that the appellant is unfit under MCL 28.425b(7)(n) shall be based on clear and convincing evidence.~~

~~(3) Decision. The circuit court shall enter an order either affirming the board's denial or finding the applicant qualified under MCL 28.425b(7)(n) and ordering the board to issue a license.~~

~~(D) Procedure in All Other Appeals.~~

(~~1~~4) Briefs. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(~~2~~5) Oral Argument. If requested in accord with MCR 7.111(C), the court shall hold oral argument within 14 days after the appellee's brief was filed or due. The court may dispense with oral argument under MCR 7.114(A).

~~(3) Decision. The court shall confine its consideration to a review of the record. If the court determines that the denial of a license was clearly erroneous, the court shall order the board to issue a license as required by the act. If the court determines that the board erroneously refused to restore rights pursuant to MCL 28.424(3), the court shall order the board to restore the applicant's rights. If the court determines that the board erroneously revoked or suspended a license, the court shall order the board to reinstate the license. If the court determines that the board failed to issue a license pursuant to MCL 28.425b(13), the court shall order the board to act on the application within 14 days. The court shall retain jurisdiction to review the board's decision.~~

(~~E~~D) Notice of Decision. The circuit court shall serve the parties with a copy of its order resolving the appeal.

~~(F) Costs and Attorney Fees.~~

~~(1) Arbitrary and Capricious Board Decision. If the court determines that the decision of the board to deny issuance of a license to an applicant was arbitrary and capricious, the court shall order the state to pay 1/3 and the county in which the concealed weapon licensing board is located to pay 2/3 of the actual costs and actual attorney fees of the applicant in appealing the denial.~~

~~(2) Frivolous Appeal. If the court determines that an applicant's appeal was frivolous, the court shall order the applicant to pay the actual costs and actual attorney fees of the board in responding to the appeal.~~

Staff Comment: The proposed amendment of MCR 7.121 would update the court rules to incorporate statutory changes enacted in 2015 PA 3 and 207.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 23, 2016:

PROPOSED AMENDMENTS OF MCR 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213.

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5.801. APPEALS TO ~~OTHER COURTS~~ COURT OF APPEALS.

~~(A) Right to Appeal. An interested person aggrieved by an order of the probate court may appeal as provided by this rule.~~

(~~A~~B) ~~Orders Appealable to Court of Appeals~~ Appeal of Right. ~~Orders appealable of right to the Court of Appeals are defined as and limited to the following~~ Pursuant to MCL 600.308(1), a final order affecting the rights or interests of either a party to a civil action in a probate court or an interested person in a proceeding in the probate court is appealable

as a matter of right to the Court of Appeals. A probate court order is "final" if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter, including, but not limited to, the following orders:

(1) a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C).;

~~(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:~~

(2~~a~~) appointing or removing a ~~personal representative, conservator, trustee,~~ fiduciary or trust protector as ~~referred to~~ defined in MCL 700.7103(n), or denying such an appointment or removal;

(3~~b~~) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(4~~c~~) determining the validity of a governing instrument as defined in MCL 700.1104(m);

(5~~d~~) interpreting or construing a governing instrument as defined in MCL 700.1104(m);

(6~~e~~) approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(m);

(7~~f~~) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

(8~~g~~) granting or denying a petition to consolidate or divide trusts;

(9~~h~~) discharging or denying the discharge of a surety on a bond from further liability;

(10~~i~~) allowing, disallowing, or denying a claim;

(11~~j~~) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

(12~~k~~) authorizing or denying the continuation of a business;

(13~~l~~) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;

(14~~m~~) authorizing or denying rights of election;

(15~~n~~) determining heirs, devisees, or beneficiaries;

(16~~o~~) determining title to or rights or interests in property;

(17~~p~~) authorizing or denying partition of property;

(18~~q~~) authorizing or denying specific performance;

(19~~r~~) ascertaining survivorship of parties;

(20~~s~~) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

(21~~t~~) granting or denying a petition to determine *cy pres*;

(22~~u~~) directing or denying the making or repayment of distributions;

(23~~v~~) determining or denying a constructive trust;

(24~~w~~) determining or denying an oral contract relating to a will;

(25~~x~~) allowing or disallowing an account, fees, or administration expenses;

(26~~y~~) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);

(27~~z~~) determining or directing payment or apportionment of taxes;

(28~~aa~~) distributing proceeds recovered for wrongful death under MCL 600.2922;

(29~~bb~~) assigning residue;

(30~~cc~~) granting or denying a petition for instructions;

(31~~dd~~) authorizing disclaimers;

(32~~ee~~) allowing or disallowing a trustee to change the principal place of a trust's administration;

(33) affecting the rights and interests of an adult or a minor in a guardianship proceeding under the Estates and Protected Individuals Code;

(34) affecting the rights or interests of a person under the Mental Health Code;

(35~~3~~) other appeals as may be hereafter provided by ~~statute~~law.

~~(C) Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:~~

~~(1) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding;~~

~~(2) a final order affecting the rights or interests of a person under the Mental Health Code, except for a final order affecting the rights and interests of a person in the estate of an individual with developmental disabilities.~~

(B~~D~~) Appeal by Leave~~Interlocutory Orders~~. Any judgment or order of the probate court which is not a final judgment or final order appealable of right ~~interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account,~~ may be appealed only to the ~~circuit c~~Court of Appeals and only by leave of that court. ~~The circuit court shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.~~

~~(E) Transfer of Appeals from Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.~~

~~(F) Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals~~

~~may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.~~

RULE 5.802. APPELLATE PROCEDURE; STAYS PENDING APPEAL.

(A)-(B) [Unchanged.]

(C) Stays Pending Appeals. An order removing or appointing a fiduciary; appointing a special personal representative or a special fiduciary; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary's bond; or suspending a fiduciary and appointing a special fiduciary, is not stayed pending appeal unless ordered by the court on motion for good cause.

RULE 7.102. DEFINITIONS.

For purposes of this subchapter:

(1)-(8) [Unchanged.]

(9) "trial court" means the district~~, probate,~~ or municipal court from which the "appeal" is taken.

RULE 7.103. APPELLATE JURISDICTION OF THE CIRCUIT COURT.

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) [Unchanged.]

~~(2) a final order of a probate court under MCR 5.801(C);~~

(2~~3~~) a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 *et seq*.; and

(3~~4~~) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) [Unchanged.]

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A)-(D) [Unchanged.]

~~(E) Probate Actions.~~

~~(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.~~

~~(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).~~

RULE 7.109. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

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

(a) [Unchanged.]

~~(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.~~

(c)-(e) [Relettered (b)-(d) but otherwise unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

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)-(v) [Unchanged.]

(vi) 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 a reversal of an earlier final judgment or order commenced in the probate court under MCR 5.101(C);

(vii) a final order, as defined in MCR 5.801(B), affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, an inter vivos trust or a trust created under a will, a guardianship proceeding of an adult or minor under the Estates and Protected Individuals Code, or a mental health proceeding under the Mental Health Code.

(b) [Unchanged.]

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, probate court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court

(a)-(b) [Unchanged.]

(2) [Unchanged.]

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court ~~and~~, probate court, or court of claims that is not a final judgment appealable of right;

(2)-(5) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1)-(4) [Unchanged.]

~~(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;~~

(5~~6~~) proof that a copy of the filed documents was served on all other parties; and

(6~~7~~) the entry fee.

(C)-(H) [Unchanged.]

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM

(A)-(C) [Unchanged.]

(D) Probate Actions. The probate court retains continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.

(D)-(I) [Relettered (E)-(J) but otherwise unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614 or MCL 600.867, or except as otherwise provided under this rule, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a cause in which a party has appealed a trial court's denial of the party's claim of governmental immunity.

(2)-(3) [Unchanged.]

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions and Probate Proceedings. Unless determined by law, or as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action or probate proceeding must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Conditions of Stay Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant shall promise in writing:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(G) Sureties and Filing of Bond; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court that entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings.

(a)-(g) [Unchanged.]

(2) [Unchanged.]

(H)-(I) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court ~~in an estate or trust proceeding~~, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

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

(a) [Unchanged.]

(b) In an appeal from probate court ~~in an estate or trust proceeding~~, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcript.

(c)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.212. BRIEFS.

(A) Time for Filing and Service.

(1) *Appellant's Brief.*

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 28 days after the claim of appeal is filed, the order granting leave is certified, the transcript is filed with the trial court, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later, in a child custody case, adult or minor guardianship case under the Estates and Protected Individuals Act or under the Mental Health Code, mental illness cases under the Mental Health Code, or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion; or

(ii)-(iii) [Unchanged.]

(b) [Unchanged.]

(2) *Appellee's Brief.*

(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 21 days after the appellant's brief is served on the appellee, in an interlocutory criminal appeal, adult or minor guardianship case under the Estates and Protected Individuals Act or under the Mental Health Code, mental illness cases under the Mental Health Code, or a child custody case. This time may be extended only by the Court of Appeals on motion;

(ii) [Unchanged.]

(3)-(5) [Unchanged.]

(B)-(I) [Unchanged.]

RULE 7.213. CALENDAR CASES.

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1) [Unchanged.]

(2) child custody cases, guardianship cases under the Estates and Protected Individuals Act and under the Mental Health Code, and mental illness cases under the Mental Health Code.

(3)-(7) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The proposed amendments of Rules 5.801, 5.802, 7.102, 7.103, 7.108, 7.109, 7.202, 7.203, 7.205, 7.208, 7.209, 7.210, 7.212, and 7.213 of the Michigan Court Rules would require all appeals from probate court to be heard in the Court of Appeals, instead of the bifurcated system that previously required some probate appeals to be heard in the Court of Appeals and some to be heard in the local circuit court. The proposal also would establish priority status for appeals in guardianship and mental illness cases, similar to child custody cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-32. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 30, 2016:

PROPOSED AMENDMENTS OF 7.306 and 7.316.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.306 and Rule 7.316 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A) When Available. A complaint may be filed to invoke the Supreme Court's superintending control power

(1)-(2) [Unchanged.]

When a dispute regarding court operations arises between judges within a court that would give rise to a complaint under this rule, the judges shall participate in mediation as provided through the State Court Administrator's Office before filing such a complaint. The mediation shall be conducted in compliance with MCR 2.411(C)(2).

(B)-(I) [Unchanged.]

RULE 7.316. MISCELLANEOUS RELIEF.

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers

(1)-(6) [Unchanged.]

(7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require; ~~or~~

(8) if a judgment notwithstanding the verdict is set aside on appeal, grant a new trial or other relief; ~~.~~ or

(9) order an appeal submitted to mediation. The mediator shall file a status report with this Court within the time specified in the order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318.

(B)-(C) [Unchanged.]

Staff Comment: Under the proposed amendment of MCR 7.306, judges in an intra-court dispute would be required to submit to mediation before filing a complaint for superintending control under this rule. The proposed amendment of MCR 7.316 would explicitly provide that the Supreme Court may order an appeal to mediation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

MARKMAN, J. (*concurring*). This proposal would amend MCR 7.316(A) to allow the Court to "order an appeal submitted to mediation." I concur in its publication because this affords bench and bar, and the public, the opportunity to consider this proposal carefully and to share their thoughts with the Court. While I am by no means averse to mediation,

and indeed am supportive of the process in many contexts, I do respectfully have concerns about the instant proposal and pose the following questions:

(1) For the past 180 years, indeed until just a few weeks ago, see *Huntington Woods v Oak Park*, 500 Mich 885 (November 2, 2016), this Court has never ordered parties to engage in mediation. What now warrants a change in this policy?

(2) Is the mediator better equipped than the seven justices of this Court to resolve cases or controversies that are the subject of appeal in this Court, and under what circumstances?

(3) Given that the seven justices of this Court were specifically chosen by the people of this state to resolve "cases and controversies" brought to their highest court, while the mediator was not, why should this responsibility now be subject to delegation?

(4) Even more to the point, no matter how capable the mediator, is mediation the process by which the parties, and the people of this state, intended their Supreme Court would dispose of legal "cases and controversies"? Or did they intend rather that such disputes would be decided by a collective exercise of the "judicial power" under their Constitution by the seven justices of their highest court? In other words, do parties file appeals in this Court to obtain a legal judgment or so that the Court might assign a mediator to negotiate a settlement? Should it be the role of this Court to broaden the manner in which disputes brought before it may be resolved by including a mediative process, thereby narrowing the possibility that a dispute will be resolved in accordance with the rule of law?

(5) Although mediation may constitute a useful tool for resolving *disputes*, is it an equally useful tool for resolving the *law*? What guidance, for example, does it afford regarding what the law will be in the next 100 similar or related cases?

(6) When parties file appeals in this Court, are they seeking a judicial determination of "what the law is," *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803), or a decision-making process focused on which outcome would optimize the overall satisfaction of the parties? Are such parties *disinterested* in which of these processes is brought to bear in resolving their disputes?

(7) The proposed rule states only that this Court can "order an appeal submitted to mediation." Will parties be allowed to opt out of mediation or will it be mandatory? Will parties have a voice in choosing who their mediator will be or whether he or she will be a judge? Will a mediator be required to have training or experience, either in mediation in general or in the specific subject matter of the case before the Court? Who will bear the costs of mediation? How will mediation confidentiality be preserved? Will all types of cases potentially be subject to mediation? If not, what *standards* will determine which cases are subject to mediation?

(8) How would the proposed mediation procedure affect parties contemplating an appeal in this Court? Before filing an appeal, and in the absence of mediation-submission standards, will *every* party find it

necessary to assess the likelihood that it may be required to mediate, thus having to consider at least the following: (a) the risk of incurring additional costs (mediation may save time and resources when freely pursued on day 1 of the legal process, but will it do the same when it is compelled on day 821, especially after oral arguments have already been heard in the Court on day 815); (b) the risk of a more drawn-out appellate process; (c) the risk of 55-45 outcomes that may be far more prevalent in a mediation process compared to 95-5 outcomes typifying the judicial process; (d) the risk of which person will be selected by the Court to serve as mediator; and (e) the risk of failing to obtain a precedential legal judgment that may be of relatively high value to a litigant pursuing a "test case," a litigant involved regularly in disputes of a similar kind, or a litigant whose interests reflect those of significant numbers of similarly placed litigants within the same industry or association?

(9) As a practical matter, how effective is mandatory mediation likely to prove for parties who—at considerable time, expense, resources, and anxiety—have undergone the trial process, the intermediate appellate process (which may also include a mediation process), and the filing process in this Court without having voluntarily chosen to engage in mediation?

(10) Finally, while recognizing that an appellate mediation procedure has been established at the Court of Appeals, see MCR 7.213, are there differences between these courts that might warrant an appellate mediation procedure at one but not the other? Are there, for example, relevant differences between an intermediate "error-correcting" appellate court, having largely mandatory jurisdiction, and a "law-developing" court of last resort, having largely discretionary jurisdiction, that warrant distinctive approaches? Moreover, is the specific mediation procedure in the Court of Appeals properly described as "mandatory"?

Order Entered December 14, 2016:

PROPOSED ADOPTION OF MCR 5.731a.

On order of the Court, the Court declines to adopt proposed Rule 5.731a of the Michigan Court Rules, which was published for comment at 497 Mich 1224-1225 (2015), and an opportunity provided for comment in writing and at a public hearing. This administrative file is closed without further action.

Order Entered December 21, 2016:

PROPOSED AMENDMENT OF MCR 9.108.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.108 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A)-(D) [Unchanged.]

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

(1)-(3) [Unchanged.]

(4) seek an injunction from the Supreme Court against an attorney's misconduct or from the practice of law when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5)-(8) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.108 would clarify that the Court has the authority to enjoin an attorney from practicing law.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered December 21, 2016:

PROPOSED AMENDMENTS OF MCR 3.903, MCR 3.932, AND MCR 3.936.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.903, 3.932, and 3.936 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(24) [Unchanged.]

(25) "Records" are as defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders.

(26) "Register of actions" means the ~~permanent~~ case history of all cases, as defined in subrule (A)(1), maintained in accordance with Michigan Supreme Court Case File Management Standards. See MCR 8.119(D)(1)(~~c~~a).

(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

~~(C) Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may proceed on the consent calendar without authorizing a petition to be filed. No case may be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian and the prosecutor, agree to have the case placed on the consent calendar. A court may not consider a case on the consent calendar that includes an offense listed as an assaultive crime by the Juvenile Diversion Act, MCL 722.822(a). The court may transfer a case from the formal calendar to the consent calendar at any time before disposition.~~

~~(1) Notice. Formal notice is not required for cases placed on the consent calendar except as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 *et seq*.~~

~~(2) Plea; Adjudication. No formal plea may be entered in a consent calendar case unless the case is based on an alleged violation of the Michigan Vehicle Code, MCL 257.1 *et seq*. in which case the court shall enter a plea. The court must not enter an adjudication.~~

~~(3) Conference. The court shall conduct a consent calendar conference with the juvenile and the parent, guardian, or legal custodian to discuss the allegations. The victim may, but need not, be present.~~

~~(4) Case Plan. If it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan.~~

~~(5) Custody. A consent calendar case plan must not contain a provision removing the juvenile from the custody of the parent, guardian, or legal custodian.~~

~~(6) Disposition. No order of disposition may be entered by the court in a case placed on the consent calendar.~~

~~(7) Closure. Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding.~~

~~(8) Transfer to Formal Calendar. If it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition, citation, or appearance ticket. Statements made by the juvenile during the proceeding on the consent calendar may not be used against the juvenile at a trial on the formal calendar on the same charge.~~

~~(9) Abstracting. If the court finds that the juvenile has violated the Michigan Vehicle Code, the court must fulfill the reporting requirements imposed by MCL 712A.2b(d).~~

(C) Consent Calendar.

(1) If the court determines that formal jurisdiction should not be acquired over the juvenile, the court may proceed with the case on the consent calendar. A case transferred to the consent calendar shall be transferred before disposition but may occur any time after receiving a petition, citation, or appearance ticket. Upon transfer, the clerk of the court shall make the case nonpublic.

(2) A case shall not be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar. A case involving the alleged commission of an offense as that term is defined in section 31 of the Crime Victim's Rights Act, MCL 780.781 *et seq*., shall only be placed on the consent calendar upon compliance with the procedures set forth in MCL 780.786b.

(3) Fingerprinting. Except as otherwise required by law, a juvenile shall not be fingerprinted unless the court has authorized the petition. If the court authorizes the petition and the juvenile is alleged to have committed an offense that requires the juvenile to be fingerprinted according to law, the court shall ensure the juvenile is fingerprinted before placing the case on consent calendar under subrule (C)(1).

(4) Victim Notice. After a case is placed on consent calendar, the prosecutor shall provide the victim notice as required by article 2 of the Crime Victim's Rights Act, MCL 780.781 to 780.802.

(5) Conference. After placing a matter on the consent calendar, the court shall conduct a consent calendar case conference with the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian. The prosecutor and victim may, but need not, be

present. At the conference, the court shall discuss the allegations with the juvenile and issue a written consent calendar case plan in accordance with MCL 712A.2f(7).

(6) Case Plan. The case plan is not an order of the court, but shall be included as part of the case record. If the court determines the juvenile has violated the terms of the case plan, it may transfer the case to the formal calendar in accordance with subrule (C)(9).

(7) Disposition. The court shall not enter an order of disposition in a case while it is on the consent calendar.

(8) Access to Consent Calendar Case Records. Records of consent calendar proceedings shall be nonpublic. Access to consent calendar case records is governed by MCL 712A.2f(5).

(9) Transfer to Formal Calendar. If it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court may transfer the case from the consent calendar to the formal calendar. The court shall proceed with the case where court proceedings left off before the case was placed on the consent calendar.

(a) If the original petition was not authorized before being placed on the consent calendar, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition to determine whether the petition should be authorized.

(b) If the original petition was authorized before being placed on the consent calendar, the court shall conduct a hearing on the record before transferring the case to the formal calendar. At the hearing, the court shall:

(i) Advise the juvenile that any statements made during the consent calendar proceedings cannot be used against the juvenile at a trial on the same charge.

(ii) Allow the juvenile and the juvenile's attorney, if any, the opportunity to address the court and state on the record why the case should not be transferred to the formal calendar.

(10) Closing the Case. Upon a judicial determination that the juvenile has completed the terms of the consent calendar case plan, the court shall report the successful completion to the juvenile and the Department of State Police. The report to the Department of State Police shall be in a form prescribed by the Department of State Police.

(11) Record Retention. The case records shall only be destroyed in accordance with the approved record retention and disposal schedule established by the State Court Administrative Office.

(D) [Unchanged.]

RULE 3.936. FINGERPRINTING.

(A) [Unchanged.]

(B) Order for Fingerprints. At the time that the court authorizes the filing of a petition alleging a juvenile offense and before the court enters an order of disposition on a juvenile offense or places the case on consent calendar, the court shall examine the confidential files and verify that

the juvenile has been fingerprinted. If it appears to the court that the juvenile has not been fingerprinted, the court must:

(1)-(2) [Unchanged.]

(C) [Unchanged.]

(D) Order for Destruction of Fingerprints. ~~When a juvenile has been fingerprinted for a juvenile offense, but no petition on the offense is submitted to the court, the court does not authorize the petition, or the court does not take jurisdiction of the juvenile under MCL 712A.2(a)(1), if the records have not been destroyed as provided by MCL 28.243(7)-(8), the court, on motion filed pursuant to MCL 28.243(8), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the fingerprints and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12).~~ The court, on motion filed pursuant to MCL 28.243(8), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the fingerprints and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12), when a juvenile has been fingerprinted for a juvenile offense and no petition on the offense is submitted to the court, the court does not authorize the petition, or the court has neither placed the case on consent calendar nor taken jurisdiction of the juvenile under MCL 712A.2(a)(1).

Staff Comment: The proposed amendments of MCR 3.903, 3.932, and 3.936 are intended to clarify the procedures used for consent calendar proceedings in juvenile delinquency cases, consistent with the recent enactment of 2016 PA 185.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-39. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered December 21, 2016:

PROPOSED AMENDMENTS OF MCR 2.625 AND MCR 3.101.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 2.625 and 3.101 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.625. TAXATION OF COSTS.

(A)-(D) [Unchanged.]

(E) Costs in Garnishment Proceedings brought Pursuant to 3.101(M). Costs in garnishment proceedings to resolve the dispute between a plaintiff and a garnishee regarding the garnishee's liability are allowed as in civil actions. Costs may be awarded to the garnishee defendant as follows:

(1)-(2) [Unchanged.]

(F) Procedure for Taxing Costs at the Time of Judgment.

(1)-(4) [Unchanged.]

(G)-(J) [Unchanged.]

(K) Procedure for Taxing Costs and Fees After Judgment.

(1) A judgment creditor considered a prevailing party to the action under subrule (B) is entitled to recover from the judgment debtor(s) the taxable costs and fees expended after a judgment is entered, including all taxable filing fees, service fees, certification fees, and any other costs, fees, and disbursements associated with postjudgment actions as provided by law.

(2) Until the judgment is satisfied, the judgment debtor may serve on the judgment creditor a request to review postjudgment taxable costs and fees.

(a) Within 28 days of receipt from a judgment debtor of a request to review postjudgment taxable costs and fees, the judgment creditor shall file with the court a memorandum of postjudgment taxable costs and fees and serve the same upon the judgment debtor. A memorandum of postjudgment taxable costs and fees shall include an itemized list of postjudgment taxable costs and fees.

(b) Within 28 days after receiving the memorandum of postjudgment taxable costs and fees from the judgment creditor, the judgment debtor may file a motion to review postjudgment taxable costs and fees. Upon receipt of a timely motion, the court shall review the memorandum filed by the judgment creditor and issue an order allowing or disallowing the postjudgment costs and fees. The review may be conducted at a hearing at the court's discretion. If the court disallows the postjudgment costs and fees or otherwise amends them in favor of the judgment debtor, the

court may order the judgment creditor to deduct from the judgment balance the amount of the motion fee paid by the judgment debtor under this rule.

(c) The judgment creditor shall deduct any costs or fees disallowed by the court within 28 days after receipt of an order from the court disallowing the same.

(d) Any error in adding costs or fees to the judgment balance by the judgment creditor or its attorney is not actionable upon a finding by the court that the costs and fees were added in good faith.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A) [Unchanged.]

(B) Postjudgment Garnishments.

(1) Periodic garnishments are garnishments of periodic payments, as provided in this rule.

(a) [Unchanged.]

(i) the amount withheld pursuant to the writ equals the amount of the unpaid judgment, interest, and costs stated in the verified statement in support of the writ; however, if the plaintiff has sent a statement to the garnishee in accordance with MCL 600.4012(5)(a), the balance on which may include additional interest and costs, the periodic garnishment is effective until the balance on the most recent statement is withheld or

(ii) [Unchanged.]

(b) [Unchanged.]

(c) If a writ of periodic garnishment is served on a garnishee who is obligated to make periodic payments to the defendant while another order that has priority under MCL 600.4012(2) is in effect, or if a writ or order with higher priority is served on the garnishee while another writ is in effect, the garnishee is not obligated to withhold payments pursuant to the lower priority writ until the ~~expiration of the~~ higher priority ~~one~~writ ceases to be effective under subrule (B)(1)(a). However, in the case of garnishment of earnings, the garnishee shall withhold pursuant to the lower priority writ to the extent that the amount being withheld pursuant to the higher priority order is less than the maximum that could be withheld by law pursuant to the lower priority writ (see, e.g., 15 USC 1673). Upon the expiration of the higher priority writ, the lower priority one becomes effective until it ~~would otherwise have expired~~ceases to be effective under subrule (B)(1)(a). The garnishee shall notify the plaintiff of receipt of any higher priority writ or order and provide the information required by subrule (H)(2)(c).

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(1) [Unchanged.]

(2) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date, which may include the costs associated with filing the current writ of garnishment; the total amount of the postjudgment payments made to date, and the amount of the unsatisfied judgment

now due (including interest and costs), which may include the costs associated with filing the current writ of garnishment;

(3) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Liability of Garnishee.

(1) [Unchanged.]

(2) The garnishee is liable for no more than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment unless a statement is sent to the garnishee in accordance with MCL 600.4012(5)(a), in which case the garnishee is liable for the amount of the remaining judgment balance as provided in the most recent statement. Property or debts exceeding that amount may be delivered or paid to the defendant notwithstanding the garnishment.

(H)-(I) [Unchanged.]

(1)-(2) [Unchanged.]

(3) In the case of periodic earnings, withholding shall cease ~~according to the following provisions~~when the periodic garnishment becomes no longer effective under subrule (B)(1).~~:~~

~~(a) For garnishees with weekly, biweekly, or semimonthly pay periods, withholding shall cease upon the end of the last full pay period prior to the expiration of the writ.~~

~~(b) For garnishees with monthly pay periods, withholding shall continue until the writ expires.~~

(4) [Unchanged.]

(5) If funds have not been withheld because a higher priority writ or order was in effect, and the higher priority writ ceases to be effective before ~~expiration of~~ the lower priority ~~one~~writ ceases to be effective, the garnishee shall begin withholding pursuant to the lower priority writ as of the date ~~of the expiration of~~that the higher priority writ ceases to be effective.

(6) [Unchanged.]

(J) Payment.

(1) [Unchanged.]

(2) For periodic garnishments, all future payments shall be paid as they become due as directed by the court pursuant to subrule (E)(3)(e) until ~~expiration of~~ the garnishment ceases to be effective under subrule (B)(1).

(3) [Unchanged.]

(4) Payment to the plaintiff may not exceed the amount of the unpaid judgment, interest, and costs stated in the verified statement requesting the writ of garnishment; however, if the plaintiff has sent a statement to the garnishee in accordance with MCL 600.4012(5)(a), the balance on which may include additional interest and costs, the garnishee shall pay to the plaintiff the amount provided in the most recent statement. ~~If the plaintiff claims to be entitled to a larger amount, the plaintiff must proceed by motion with notice to the defendant.~~

(5) [Unchanged.]

(6) For periodic garnishments, within 14 days after the ~~expiration of the~~ writ ceases to be effective under subrule (B)(1) or after the garnishee is no longer obligated to make periodic payments, the garnishee shall file with the court and mail or deliver to the plaintiff and the defendant, a final statement of the total amount paid on the writ. If the garnishee is the defendant's employer, the statement is to be filed within 14 days after the ~~expiration of the~~ writ ceases to be effective, regardless of changes in employment status during the time that the writ was in effect. The statement shall include the following information:

(a)-(c) [Unchanged.]

(d) the total amount withheld~~;~~

~~(e) the difference between the amount stated in the verified statement requesting the writ and the amount withheld~~.

(7) [Unchanged.]

(K) Objections.

(1) Objections shall be filed with the court within 14 days of the date of service of the writ on the defendant or within 14 days of the date of the most recent statement sent to the defendant pursuant to MCL 600.4012(5)(a). Objections may be filed after the time provided in this subrule but do not suspend payment pursuant to subrule (J) unless ordered by the court. Objections may only be based on defects in or the invalidity of the garnishment proceeding itself or the balance provided on the statement sent pursuant to MCL 600.4012(5)(a), and may not be used to challenge the validity of the judgment previously entered.

(2) [Unchanged.]

(a)-(e) [Unchanged.]

(f) the garnishment was not properly issued or is otherwise invalid;

(g) the balance on the statement sent pursuant to MCL 600.4012(5)(a) is incorrect.

(3)-(4) [Unchanged.]

(L)-(Q) [Unchanged.]

(R) Costs and Fees.

(1) [Unchanged.]

(2) ~~If the garnishee is not indebted to the defendant, does not hold any property subject to garnishment, and is not the defendant's employer, the plaintiff is not entitled to recover the costs of that garnishment~~Within 28 days after receipt of the disclosure filed pursuant to subrule (H) by a garnishee of a periodic garnishment disclosing that it does not employ the defendant and is not otherwise liable for periodic payments, or from a garnishee of a nonperiodic garnishment disclosing that it does not hold property subject to garnishment and the defendant is not indebted to the garnishee, the plaintiff shall deduct any costs associated with that garnishment that may have been added to the judgment balance pursuant to MCR 2.625(K), unless the court otherwise directs.

(S)-(T) [Unchanged.]

Staff Comment: The proposed amendments, submitted by the Michigan Creditor's Bar Association, would address recent amendments of

MCL 600.4012, would clarify the authority and process for recovering postjudgment costs, and would provide clearer procedure for garnishment proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-40. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx]

Order Entered January 25, 2017:

PROPOSED AMENDMENT OF MCR 2.116 AND MCR 2.119.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 2.116 and 2.119 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.116. SUMMARY DISPOSITION.

(A)-(F) [Unchanged.]

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i)-(ii) [Unchanged.]

(iii) the moving party or parties may file a reply brief in support of the motion. Reply briefs must be confined to rebuttal of the arguments

in the nonmoving party or parties' response brief and must be limited to 5 pages. The reply brief must be filed and served at least 3 days before the hearing.

(iv) no additional or supplemental briefs may be filed without leave of the court.

(b) If the court sets a different time for filing and serving a motion, ~~or~~ a response, or a reply brief, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

(c) A copy of a motion, ~~or~~ response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(2)-(6) [Unchanged.]

(H)-(J) [Unchanged.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions.

(a) Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits.

(b) Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed.

(c) Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type.

(d) A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

(3)-(4) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment: The proposed amendments would amend the rules regarding motions for summary disposition to allow for the filing of reply briefs only in summary disposition proceedings. The State Bar of Michigan Representative Assembly had submitted a proposal that would have extended the summary disposition time frame an additional 7 days to accommodate filing of a reply brief and make the practice uniform in trial courts. Under current local practices, some judges allow reply briefs and others do not. Although the Court was not persuaded at this time that the overall time period for setting a hearing for motions for summary disposition should be extended, it did agree to publish for comment proposed amendments that would explicitly allow the moving

party to file a reply brief at least 3 days before the scheduled hearing, and limit the reply brief to no more than 5 pages in length.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered January 25, 2017:

PROPOSED ADDITION OF MCR 6.007.

On order of the Court, this is to advise that the Court is considering an addition of Rule 6.008 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

RULE 6.007. CRIMINAL JURISDICTION.

(A) District Court. The district court has jurisdiction over all misdemeanor cases and all felony cases through the preliminary examination and until the entry of an order binding the defendant over to the circuit court.

(B) Circuit Court. The circuit court acquires jurisdiction over all felony cases upon entry of an order by the district court binding the defendant over to circuit court. The circuit court also acquires jurisdiction over all misdemeanors arising out of the same transaction that are charged in the felony information. The failure of the district court to properly document the bindover decision shall not deprive the circuit court of jurisdiction. A party challenging a bindover decision must do so before any plea of guilty or no contest is entered, or before trial is commenced. The circuit court may remand a criminal case to the district court only as provided by law.

(C) Pleas and Verdicts in Circuit Court. Once the circuit court acquires jurisdiction over a criminal case, it retains jurisdiction even if a plea is entered or a verdict is rendered on a charge that would

normally be cognizable in the district court.

(D) Sentencing Misdemeanors in Circuit Court. The circuit court shall sentence all defendants who are bound over to circuit court, including defendants who either plead guilty to, or are found guilty of, a misdemeanor.

(E) Concurrent Jurisdiction. As part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the presentence investigation report and supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court. The case remains under the jurisdiction of the circuit court.

Staff Comment: The proposed addition of Rule 6.008 would establish procedures for a circuit court to follow if a defendant bound over to circuit court on a felony either pleads guilty to, or is convicted of, a misdemeanor in circuit court, and would eliminate the practice of circuit courts remanding cases to district court except where otherwise provided by law. Remand to district court would remain a possibility in certain limited circumstances, including where the evidence is insufficient to support the bindover, *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965); *People v Salazar*, 124 Mich App 249, 251-252; 333 NW2d 567 (1983), or where there was a defect in the waiver of the right to a preliminary examination, *People v Reedy*, 151 Mich App 143, 147; 390 NW2d 215 (1986); *People v Skowronek*, 57 Mich App 110, 113; 226 NW2d 74 (1975), or where the prosecutor adds a new charge on which the defendant did not have a preliminary examination, *People v Bercheny*, 387 Mich 431, 434; 196 NW2d 767 (1972), adopting the opinion in *People v Davis*, 29 Mich App 443, 463; 185 NW2d 609 (1971), aff'd *People v Bercheny*, 387 Mich 431 (1972). See also MCR 6.110(H). The proposal is intended to promote greater uniformity and address a practice that varies among courts.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by May 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered April 5, 2017:

PROPOSED AMENDMENT OF MCR 6.425.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal; Motion to Withdraw.

(1)-(2) [Unchanged.]

(3) Motions to Withdraw in Guilty Plea or No Contest Cases. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) A motion to withdraw is made by filing:

(i) a motion that identifies any points the appellant seeks to assert and any other matters that the attorney has considered as a basis for appeal;

(ii) a brief that refers to anything in the record that might arguably support the appeal, contains relevant record references, and cites and deals with those authorities which appear to bear on the points in question;

(iii) proof that copies of the motion, brief in support, and notice that the motion may result in the conviction or trial court judgment being affirmed were served on the appellant by certified mail; and

(iv) proof that a copy of the motion only and not the brief was served on the appellee.

(b) Timing.

(i) A motion to withdraw shall be filed within 56 days after the transcript is filed.

(ii) Within 21 days after the motion to withdraw is filed and served, the appellant may file with the court an answer and brief in which he or she may make any comments and raise any points that he or she chooses concerning the appeal and the attorney's motion. The appellant must file proof that a copy of the answer was served on his or her attorney.

(iii) The court shall decide the motion within 14 days after the answer is filed and served (or could have been filed and served).

(c) If the court finds that the appeal is wholly frivolous, it may grant

the motion and affirm the conviction or trial court judgment. If the court grants the motion to withdraw, the appellant's attorney shall mail to the appellant a copy of the transcript within 14 days after the order affirming is certified and file proof of that service. If the court finds any legal point arguable on its merits, it will deny the motion and the court appointed attorney must proceed in support of the appeal.

(3) [Renumbered (4) but otherwise unchanged.]

Staff Comment: The proposed amendments of MCR 6.425 would expressly provide for a procedure under which appointed counsel may withdraw in light of a frivolous appeal in a way that protects a plea-convicted criminal defendant's right to due process. This amendment would ensure that a plea-convicted defendant could obtain the type of protections expressed in *Anders v California*, 386 US 738 (1967), even if the defendant's appeal proceeds by application and not by right. In such a case, a motion to withdraw may be filed in the trial court, which does not currently have a rule establishing the procedure like that in the Court of Appeals at MCR 7.211(C)(5). The timing of the procedure is intended to ensure that if an attorney's motion to withdraw is granted, the defendant would have sufficient time to file an application for leave to appeal under MCR 7.205(G).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-15. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered April 5, 2017:

PROPOSED AMENDMENTS OF RULES 1.0, 1.2, 4.2, AND 4.3 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT AND MCR 2.107, MCR 2.117, AND MCR 6.001.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules. Please be aware that two alternatives are included for comment in MRPC 1.2(b). 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.0. SCOPE AND APPLICABILITY OF RULES AND COMMENTARY.

(a)-(c) [Unchanged.]

Preamble: A Lawyer's Responsibilities. [Unchanged until section entitled "Terminology."]

Terminology.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [Would be inserted after term "Belief" and before term "Consult."]

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. [Would be inserted after term "Fraud" and before term "Knowingly."]

Alternative A

RULE 1.2. SCOPE OF REPRESENTATION.

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the ~~objectives~~ scope of ~~the~~ a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assis-

tance without entering a general appearance may rely on the client's representation of facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment: [Would be added following the paragraph entitled "Services Limited in Objectives or Means," and before the paragraph entitled "Illegal, Fraudulent and Prohibited Transactions."]

Reasonable under the Circumstances. Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

Alternative B

RULE 1.2. SCOPE OF REPRESENTATION.

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the ~~objectives~~ scope of ~~the~~ a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent in writing, unless exempt from a writing as set forth below.

(1) The client's informed consent need not be given in writing if:

(A) the representation of the client consists solely of telephone consultation;

(B) the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms;

(C) the court appoints the lawyer for a limited purpose that is set forth in the appointment order; or

(D) the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

(2) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of

the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(3) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment: [Would be added following the paragraph entitled "Services Limited in Objectives or Means," and before the paragraph entitled "Illegal, Fraudulent and Prohibited Transactions."]

Reasonable under the Circumstances. Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

RULE 4.2. COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL.

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) An otherwise self-represented person receiving limited representation in accordance with Rule 1.2(b) is considered to be self-represented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation. Oral communication shall be made first to the limited scope representation lawyer, who may, after consultation with the client, authorize oral communications directly with the client as agreed.

(c) Until a notice of termination of limited scope representation comporting with MCR 2.117(B)(2)(c) is filed, or other written communi-

cation terminating the limited scope representation is provided, all written communication, both court filings and otherwise, shall be served upon both the client and the limited scope representation attorney.

RULE 4.3. DEALING WITH ~~AN UNR~~ SELF-REPRESENTED PERSON.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the ~~un~~self-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.

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

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(c) [Unchanged.]

(d) The court may order service on the party.;

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every paper later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A) [Unchanged.]

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a)-(b) [Unchanged.]

(c) Pursuant to MRPC 1.2(b), a party to a civil action may appear through an attorney for limited purposes during the course of an action, including, but not limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(i) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and

(ii) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter.

(d) An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of the representation.

(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, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) [Unchanged.]

(2) Unless otherwise stated in this rule, a~~A~~n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.

(3) An attorney who has filed a notice of limited appearance pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded and the attorney has taken all actions necessitated by the limited representation, and providing to the court a current service address and telephone number for the self-represented litigant. If the notice of withdrawal from limited appearance is signed by the client, it shall be effective immediately upon filing and service. If it is not signed by the client, it shall become effective 14 days after filing and service, unless the self-represented client files and serves a written objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services.

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other papers without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a paper.

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

(A)-(C) [Unchanged.]

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

(1) [Unchanged.]

(2) when it clearly appears that they apply to civil actions only, ~~or~~

(3) when a statute or court rule provides a like or different procedure~~.~~, or

(4) with regard to limited appearances and notices of limited appearance.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) [Unchanged.]

Staff Comment: Proposed amendments of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules were submitted to the Court by the State Bar of Michigan Representative Assembly. The proposed rules are intended to provide guidance for attorneys and clients who would prefer to engage in a limited scope representation. The proposal, which limits these types of "unbundled" arrangements to civil proceedings, describes how such an agreement is made known to the court and other parties, what form of communication should be conducted with clients in a limited scope representation, and how the agreement is terminated. The proposed rules also would explicitly allow attorneys to provide document preparation services for a self-represented litigant without having to file an appearance with the court.

The proposal submitted by the Representative Assembly provides for a limited scope representation where the "client gives informed consent, preferably confirmed in writing," at MRPC 1.2(b). The Court included this language in the order publishing the proposal for comment, but also provided an alternative formulation for this particular provision that would require such an arrangement to be confirmed in writing, unless the relationship falls within several typical scenarios in which a writing would be unnecessary or impracticable.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-41. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered April 26, 2017:

PROPOSED AMENDMENT OF MCR 3.206.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.206 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.206. PLEADING.

(A) Information in Complaint.

(1) Except for matters considered confidential by statute or court rule, in all domestic relations actions, the complaint must state

(a)-(c) [Unchanged.]

(d) the complete names ~~and dates of birth~~ of any minors involved in the action, including all minor children of the parties and all minor children born during the marriage.

(2)-(7) [Unchanged.]

(B)-(C) [Unchanged.]

Staff Comment: The Michigan Judges Association requested this revision as a way to protect personal information from being accessible from court records. The information is otherwise required to be included in the nonpublic verified statement.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-12.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered April 26, 2017:

PROPOSED AMENDMENT OF MCR 7.300 *et seq*.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 7.300 *et seq*. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.301. ORGANIZATION AND OPERATION OF SUPREME COURT.

(A) [Unchanged.]

(B) Term and Sessions. The annual term of the Court begins on August 1 and ends on July 31. Except as provided in MCR 7.313(E), the end of a term has no effect on pending cases. Oral arguments are generally scheduled at sessions in October, November, December, January, March, April, and May. The Court will only schedule cases for argument in September, February, June, ~~or~~ July, or August pursuant to an order on the Court's own initiative or upon a showing of special cause by a moving party.

(C)-(D) [Unchanged.]

(E) Reporter of Decisions. The Supreme Court will appoint a reporter of decisions. The reporter shall

(1)-(2) [Unchanged.]

(3) ensure that opinions are published ~~each opinion~~ in advance sheets as soon as practicable; and

(4) ~~publish~~ensure that bound volumes are printed as soon as practicable after the last opinion included in a volume is issued.

The reasons for denying leave to appeal, as required by Const 1963, art 6, § 6 and filed in the clerk's office, are not to be published and are not to be regarded as precedent.

(F) [Unchanged.]

RULE 7.302. ELECTRONIC FILING, SERVICE, AND NOTIFICATION.

(A) Electronic Filing. Except as otherwise provided in this subchapter or specified by Court order, there is no requirement to submit paper copies of documents that are electronically filed.

(B) Electronic Service. A document that is electronically filed may be served electronically on registered users of the e-filing system at their registered e-mail addresses.

(C) Electronic notification. The clerk may electronically transmit or provide electronic access to Court notices, orders, opinions, and other communications to the parties, the attorneys, the Court of Appeals, and the trial court or tribunal.

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A) What to File. To apply for leave to appeal, a party must file

(1) ~~4~~1 signed copy~~ies~~ of an application for leave to appeal ~~(1 signed)~~ prepared in conformity with MCR 7.212(B) and consisting of the following:

(a)-(f) [Unchanged.]

(2) ~~4~~1 copy~~ies~~ of any opinion, findings, or judgment of the trial court or tribunal relevant to the question as to which leave to appeal is sought and ~~4~~1 copy~~ies~~ of the opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(3)-(4) [Unchanged.]

(B) [Unchanged.]

(C) When to File.

(1) ~~Before Court of Appeals Decision~~Bypass Application. In an appeal before the Court of Appeals decision, the application must be filed within 42 days after

(a) [Unchanged.]

(b) an application for leave to appeal is filed in the Court of Appeals; or

(c) an original action is filed in the Court of Appeals.~~; or~~

~~(d) entry of an order of the Court of Appeals granting an application for leave to appeal.~~

(2) Application ~~A~~after Court of Appeals Decision Resolving an Appeal or Original Action. Except as provided in subrule (C)(4), the application must be filed within 28 days in termination of parental rights cases, within 42 days in other civil cases, or within 56 days in criminal cases, after ~~the date of~~

(a) the Court of Appeals order or opinion ~~disposing of the~~ resolving an appeal or original action, including an order denying an application for leave to appeal,

(b)-(c) [Unchanged.]

(3) Interlocutory Application from the Court of Appeals. Except as provided in subrules (C)(1) and (C)(2), the application must be filed within 28 days after a Court of Appeals order that does not resolve the appeal or original action, including an order granting an application for leave to appeal.

(3)-(7) [Renumbered (4)-(8) but otherwise unchanged.]

(D) Answer. A~~ny~~ responding party may file ~~4~~1 signed copy~~ies~~ of an answer ~~(1 signed)~~ within 28 days ~~of~~ after service of the application. The party must file proof that a copy of the answer was served on all other parties.

(E) Reply. ~~A~~ The appellant may file 1 signed copy of a reply ~~may be filed as provided in MCR 7.212(G)~~within 21 days after service of the answer, along with proof of its service on all other parties. The reply must

(1) contain only a rebuttal of the arguments in the answer;

(2) include a table of contents and an index of authorities; and

(3) be no longer than 10 pages, exclusive of tables, indexes, and appendixes.

(F)-(G) [Unchanged.]

(H) Decision.

(1) Possible Court Actions. The Court may grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order. The clerk shall issue the order entered and provide either a paper copy~~ies~~ or access to an electronic version to ~~the~~each party~~ies~~ and to the Court of Appeals clerk.

(2)-(3) [Unchanged.]

(4) Issues on Appeal.

(a) [Unchanged.]

(b) On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal. Permission to brief and argue additional issues does not extend the time for filing the brief~~s~~ and appendixes.

(I) [Unchanged.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A) When Available. A complaint may be filed to invoke the Supreme Court's superintending control power

(1) over a lower court or tribunal, including the Attorney Discipline Board, when an application for leave to appeal could not have been filed under MCR 7.305, or

(2) over the Board of Law Examiners~~, the Attorney Discipline Board~~, or the Attorney Grievance Commission.

(B) What to File. To initiate an original proceeding, a plaintiff must file with the clerk

(1) ~~4~~1 signed copy~~ies~~ of a complaint ~~(1 signed)~~ prepared in conformity with MCR 7.212(B) and entitled, for example,

"[*Plaintiff*] *v* [*Court of Appeals, Board of Law Examiners, Attorney Discipline Board, or Attorney Grievance Commission*]."

The clerk shall retitle a complaint that is named differently.

(2) ~~4~~1 signed copy~~ies~~ of a brief ~~(1 signed)~~ conforming as nearly as possible to MCR 7.212(B) and (C);

(3) proof that ~~a copy of~~ the complaint and brief were~~as~~ served on the defendant, and, for a complaint filed against the Attorney Discipline Board or Attorney Grievance Commission, on the respondent in the underlying discipline matter; and

(4) [Unchanged.]

Copies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint.

(C) Answer. The defendant must file the following with the clerk within ~~21~~28 days ~~of~~after ~~notice~~service of the complaint:

(1) ~~Four~~1 signed copy~~ies~~ of an answer ~~and a brief (1 signed)~~ in conformity~~ng~~ with MCR 7.212(B) and (D). The grievance administrator's answer to a complaint against the Attorney Grievance Commission must show the investigatory steps taken and any other pertinent information.

(2) [Unchanged.]

(D) Brief by Respondent in Action Against Attorney Grievance Commission or Attorney Discipline Board. A respondent in an action against the Attorney Grievance Commission or Attorney Discipline Board may file a response brief with the clerk within 21 days after the service of the complaint, and a proof that a copy of the response brief was served on plaintiff and defendant. A response brief filed under this subsection shall conform ~~with~~to MCR 7.212(B) and (D).

(E) Reply Brief. ~~4~~1 signed copy~~ies~~ of a reply brief ~~(1 signed)~~ may be filed as provided in MCR ~~7.212(G)~~7.305(E).

(F) [Unchanged.]

(G) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a ~~plaintiff~~party who filed a pleading~~complaint or supporting brief or a defendant who filed an answer~~ that does not substantially comply with the requirements of this rule to file a conforming pleading within a specified time or else it may strike the nonconforming pleading. The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading if it has not been corrected within the specified time.

(H) Submission and Argument. Original pleadings may be submitted for a decision after service of the reply brief ~~has been filed~~ or the time for filing a reply brief has expired, whichever occurs first. There is no oral argument on an original complaint~~s~~ unless ordered by the Court.

(I) [Unchanged.]

RULE 7.307. CROSS-APPEAL.

(A) Filing. An application for leave to appeal as a cross-appellant may be filed with the clerk within 28 days ~~of~~after service of the application for leave to appeal. The cross-appellant's application must comply with the requirements of MCR 7.305(A). A late application to cross-appeal will not be accepted.

(B) [Unchanged.]

RULE 7.308. CERTIFIED QUESTIONS AND ADVISORY OPINIONS.

(A) Certified Questions.

(1) From Michigan Courts.

(a) Whenever a trial court or tribunal from which an appeal may be taken to the Court of Appeals or to the Supreme Court has pending before it an action or proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination according to executive message of the governor

addressed to the Supreme Court, the Court may authorize the court or tribunal to certify the question to the Court with a statement of the facts sufficient to make clear the application of the question. Further proceedings relative to the case are stayed to the extent ordered by the court or tribunal, pending receipt of a decision of the Supreme Court.

(b)-(c) [Unchanged.]

(d) After the decision of the Court has been sent, the lower court or tribunal will proceed with or dispose of the case in accordance with the Court's answer.

(2) From Other Courts.

(a)-(b) [Unchanged.]

(c3) With the certificate, tBriefing. The parties to the underlying proceeding shall submit briefs in conformity with MCR 7.312 that include a request for oral argument on the title page of the pleading if oral argument is desired. Unless the Court directs a different time or procedure for filing, or the parties file a written stipulation agreeing to a different schedule,

(ia) briefs conforming with MCR 7.312the brief and appendixes of the appellant, or the plaintiff if the underlying proceeding is not an appeal, are due within 35 days after the certificate is filed with the Court;

(iib) a joint appendix conforming with 7.312(D)the brief and appendixes of an appellee, or a defendant if the underlying proceeding is not an appeal, are due within 28 days after service of the appellant's brief; and

(iiic) a request for oral argument on the title page of the pleading, if oral argument is desireda reply brief is due within 21 days after service of the last timely filed appellee's or defendant's brief.

Joint or individual appendixes may be filed in conformity with MCR 7.312(D).

(d) If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court.

(e) The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

(34) Submission and Argument. A Ccertified questions may be submitted for a decision after receipt of the question and after the reply is filed or the time for filing the reply has passed, whichever occurs first. There is no oral argument on a certified question unless ordered by the Court.Oral argument on a certified question under subrule (2), if properly requested under subrule (2)(c)(iii), or under subrule (1) if desired by the Court, will be scheduled in accordance with MCR 7.313.

(5) Decision. The Supreme Court may deny the request for a certified question by order, issue a peremptory order, or render a decision in the ordinary form of an opinion to be published with other opinions of the Court. The clerk shall send a paper copy or provide electronic notice of the Court's decision to the certifying court.

(6) Costs. The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

(B) Advisory Opinion.

(1) Form Request. A request for an advisory opinion by either house of the legislature or the governor pursuant to Const 1963, art 3, § 8 may be in the form of letter that includes a copy or verbatim statement of the enacted legislation and identifies the specific questions to be answered by the Court. ~~Four~~One signed copy~~ies~~ of the request ~~(1 signed)~~ and 1 set of supporting documents are to be filed with the Court.

(2) Briefing. The governor, any member of the house or senate, and the attorney general may file briefs in support of or opposition to the enacted legislation within 28 days after the request for an advisory opinion is filed. Interested parties may file amicus curiae briefs on motion granted by the Court. The party shall file ~~4~~1 signed copy~~ies~~ of the brief ~~(1 signed), which must~~that conforms as nearly as possible to MCR 7.2~~3~~12~~(B) and (C)~~.

(3) [Unchanged.]

(4) Decision. The Supreme Court may deny the request for an advisory opinion by order, issue a peremptory order, or render a decision in the ordinary form of an opinion~~,~~ to be published with other opinions of the Court.

RULE 7.310. RECORD ON APPEALS.

(A) Transmission of Record. An appeal is heard on the original papers, which constitute the record on appeal. When requested by the Supreme Court clerk to do so, the Court of Appeals clerk or the lower court clerk shall send to the Supreme Court all papers or electronic documents on file in the Court of Appeals or the lower court, certified by the clerk. For an appeal originating from an administrative board, office, or tribunal, the record on appeal is the certified record filed with the Court of Appeals clerk and the papers or electronic documents filed with the Court of Appeals clerk.

(B) Return of Record. After final adjudication or other disposition of an appeal, the Supreme Court clerk shall return the original record to the Court of Appeals clerk, to the clerk of the ~~lower~~trial court or tribunal in which the record was made, or to the clerk of the court to which the case has been remanded for further proceedings. Thereafter, the clerk of the lower court or tribunal to which the original record has been sent shall promptly notify the attorneys of the receipt of the record. The Supreme Court clerk shall ~~forward~~provide a certified copy of the order or judgment entered by the Supreme Court to the Court of Appeals clerk and to the clerk of the trial court or tribunal from which the appeal was taken.

(C) [Unchanged.]

RULE 7.311. MOTIONS IN SUPREME COURT.

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

(1) ~~4~~1 signed copy~~ies~~ of a motion ~~(1 signed)~~and supporting papers, except as otherwise provided in this rule, stating briefly but distinctly the grounds on which ~~it~~the motion is based and the relief requested and including an affidavit supporting any allegations of fact in the motion;

(2) proof that the motion and supporting papers were served on ~~the~~each opposing party; and

(3) [Unchanged.]

~~Only 2 copies (1 signed) need be filed of a motion to extend time, to place a case on or adjourn a case from the session calendar, or for oral argument.~~

(B) Submission and Argument. Motions are submitted for decisions on Tuesday of each week at least 14 days after they are filed, but administrative orders (e.g., motions to extend time for filing a pleading, to file an amicus brief, to appear and practice, to exceed the page limit) may be entered earlier to advance the efficient administration of the Court. There is no oral argument on a motion unless ordered by the Court.

(C) Answer. An opposing party may file 1 signed copy of an answer ~~may be filed~~ at any time before an order is entered on the motion.

(D)-(E) [Unchanged.]

(F) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed

(a) ~~14~~ signed copy~~ies~~ of a motion for rehearing~~(1 signed) if the opinion decided a case placed on a session calendar, or 8 copies of a motion (1 signed) if the opinion decided a noncalendar case~~; and

(b) proof that a copy was served on ~~the parties~~each party.

The motion for rehearing must include reasons why the Court should modify its opinion. Motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3).

(2) Unless otherwise ordered by the Court, the timely filing of a motion for rehearing postpones issuance of the Court's judgment order until the motion is either denied by the Court or, if granted, until at least 21 days after the filing of the Court's ~~opinion~~decision on rehearing.

(3) Any party or amicus curiae that participated in the case may answer a motion for rehearing within 14 days after it is served by filing

(a) ~~14 or 8~~1 signed copy~~ies~~ of the answer~~motion (1 signed), in accordance with subrule (F)(1)(a)~~; and

(b) proof that a copy was served on ~~the~~all other parties.

(4)-(5) [Unchanged.]

(G) [Unchanged.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A) Form. Briefs in calendar cases must be prepared in the form provided in MCR 7.212(B), (C), (D), and (G). Briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. ~~Original t~~Typewritten, handwritten, or carbon copy pages may be used~~, but not carbon copies~~ so long as the printing is legible.

(B) Citation of Record; Summary of Arguments~~; Length of Briefs~~.

(1)-(2) [Unchanged.]

~~(3) Except by order of the Court allowing a longer brief, a brief may not exceed 50 pages, excluding the table of contents, index of authorities, and appendixes, but including the summary of argument.~~

(C) Cover. A brief must have a suitable cover of heavy paper. The cover page must follow this form:

IN THE SUPREME COURT
APPEAL FROM THE [COURT OR TRIBUNAL APPEALED FROM]
[JUDGE OR PRESIDING OFFICER]

[Name of Party],
Plaintiff-[Appellant or Appellee],

v

MSC No. [leave blank]
COA No. _____
Trial Ct No. _____

[Name of Party],
Defendant-[Appellant or Appellee].

Brief on Appeal — [Appellant or Appellee]
ORAL ARGUMENT [REQUESTED/NOT REQUESTED]

_____
Attorney for [PL or DF]-[AT or AE]
[Business Address]
_____
_____
_____

~~The cover page of the appellant's brief must be blue; that of the appellee's brief, red; that of an intervenor or amicus curiae brief, green; and that of a reply brief, gray. The cover page of a cross-appeal brief, if filed separately from the primary brief, must be the same color as the primary brief.~~

(D) Appendixes.

(1) Form ~~and Color of Cover~~. Appendixes must be prepared in conformity with MCR 7.212(B), ~~except that they must be printed on both sides of the page. The cover pages of appendixes shall be printed on yellow paper~~ and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix. Appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on a USB flash media (i.e., thumb drive), DVD, CD, or comparable electronic media using a file format that can be opened and printed by the Court.

(2) Appellant's Appendix. An appendix filed by the appellant must be entitled "Appellant's Appendix," must be separately bound, and numbered separately from the brief with the letter "a" following each page

number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain

(a) the relevant docket entries of the ~~lower~~trial court or tribunal and the Court of Appeals arranged in a single column;

(b)-(e) [Unchanged.]

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3)-(4) [Unchanged.]

(E) [Unchanged.]

(F) What to File. ~~The~~Each party~~ies~~ shall

(1) file 1~~4~~ signed copy~~ies~~ of a brief ~~(1 signed)~~ and 1 set of appendixes with the clerk;

(2)-(4) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief.

(H) [Unchanged.]

(I) Supplemental Authority. A party may file 1 signed copy of a supplemental authority ~~as provided~~ in conformity with MCR 7.212(F).

(J) Extending or Shortening Time; Failure to File; Forfeiture of Oral Argument.

(1) [Unchanged.]

(2) If the appellant fails to file the brief and appendix~~es~~ within the time required, the Court may dismiss the case and award costs to the appellee or affirm the judgment or order appealed.

(3) [Unchanged.]

RULE 7.313. SUPREME COURT CALENDAR.

(A) [Unchanged.]

(B) Notice of Hearing; Request for Oral Argument.

(1) After the briefs of both parties have been filed or the time for filing the appellant's reply brief has expired, the clerk shall notify the parties that the calendar case~~s~~ and the cases to be argued on the application under MCR 7.305(H)(1) will be ~~argued~~heard at a monthly session of the Supreme Court not less than 35 days after the date of the notice. The Court may direct that a case be scheduled for argument at a future monthly session with expedited briefing times or may shorten the 35-day notice period on its own initiative or on motion of a party.

(2) [Unchanged.]

(C) [Unchanged.]

(D) Rearrangement of Calendar; Adjournment. At least 21 days

before the first day of a session, the parties may stipulate to have a case specially placed on the calendar, grouped to suit the convenience of the attorneys, or placed at the beginning or end of the call. After that time, changes to the session calendar may be requested only by motion, not by stipulation of the parties. A motion to adjourn a case from the call after the schedule is released will be granted only by order upon a showing of good cause with an explanation of why the motion could not have been filed sooner. Costs payable to the Court may be imposed on the moving party for a late-filed motion to adjourn.

(E) Reargument of Undecided Calendar Cases. When a calendar case remains undecided at the end of the term in which it was argued, ~~either~~the parties~~y~~ may file ~~a~~ supplemental briefs. In addition, by directive of the Court or upon a party's written request within 14 days after the beginning of the new term, the clerk shall schedule the case for reargument. This subrule does not apply to a case argued on the application for leave to appeal under MCR 7.305(H)(1)~~ and 7.314(B)(2)~~.

RULE 7.315. OPINIONS, ORDERS, AND JUDGMENTS.

(A)-(B) [Unchanged.]

(C) Orders or Judgments Pursuant to Opinions.

(1) [Unchanged.]

(2) Routine Issuance.

(a) If a motion for rehearing is not timely filed under MCR 7.311(F)(1), the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file, and to the trial court or tribunal that tried the case with its record, not less than 21 days or more than 28 days after entry of the order judgment.

(b) [Unchanged.]

(3)-(4) [Unchanged.]

(D) Entry, Issuance, Execution, and Enforcement of Other Orders and Judgments. An order or judgment, other than those by opinion under subrule (C), is entered on the date of filing. Unless otherwise stated, an order or judgment is effective the date it is entered. The clerk must promptly send a copy or provide electronic notification of the order or judgment ~~certified copy~~ to each party, ~~to~~ the Court of Appeals, and ~~to~~ the ~~lower~~trial court or tribunal. A motion may not be decided or an order entered by the Court unless all required documents have been filed and the requisite fees have been paid.

RULE 7.316. MISCELLANEOUS RELIEF.

(A) Relief Obtainable. While a matter is pending in ~~T~~the Supreme Court, the Court may, at any time, in addition to its general powers

(1) exercise any or all of the powers of amendment of the lower court or tribunal~~ below~~;

(2)-(8) [Unchanged.]

(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1) The Court may, on its own initiative or the motion of any party filed before a case is placed on a session calendar, dismiss an appeal,

assess actual and punitive damages or take other disciplinary action when it determines that an appeal or original action ~~any of the proceedings in an appeal~~ was vexatious because

(a) the ~~appeal~~matter was ~~taken~~filed for purposes of hindrance or delay or is not reasonably well-grounded in fact or warranted by existing law or good-faith argument for the extension, modification, or reversal of existing law~~without any reasonable basis for belief that there was a meritorious issue to be determined on appeal~~; or

(b) [Unchanged.]

(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.319, or other restriction the Court deems just.

RULE 7.317. INVOLUNTARY DISMISSAL; NO PROGRESS.

(A) Designation. If an appellant's brief has not been timely filed under MCR 7.312(E)(1) or within the time period granted by an order extending time for filing the brief, or if the appellant fails to pay the filing fee or pursue the case in substantial conformity with the rules, the case shall be designated as one in which no progress has been made.

(B) Notice; Dismissal. When a case is designated as one in which no progress is made, the clerk shall mail or provide electronic notice to each party notice that, unless the appellant's brief that conforms with the rules is filed within 21 days or a motion is filed seeking further extension upon a showing of good cause, the case will be dismissed. ~~A copy of a~~An administrative order dismissing an action under this rule will be sent or made electronically accessible to the parties and the lower court or tribunal from which the action arose.

(C) Reinstatement. Within 21 days of the dismissal order, the appellant may seek reinstatement of the action by paying the filing fee or by filing a conforming brief along with a motion showing mistake, inadvertence, or excusable neglect. The clerk shall not accept a late-filed motion to reinstate.

(D) [Unchanged.]

RULE 7.318. VOLUNTARY DISMISSAL.

The parties may file with the clerk a stipulation agreeing to the administrative dismissal of an application for leave to appeal, an appeal, or an original proceeding. The Court may deny the stipulation if it concludes that the matter should be decided notwithstanding the stipulation. Costs payable to the Court may be imposed on the parties in the order granting the stipulated dismissal if the case has been

scheduled for oral argument and the stipulation is received less than 21 days before the first day of the monthly session.

RULE 7.319. TAXATION OF COSTS; FEES.

(A)-(B) [Unchanged.]

(C) Fees Paid to Clerk. The clerk shall collect the following fees, which may be taxed as costs when costs are allowed by the Court:

(1)-(3) [Unchanged.]

(4) 50 cents per page for ~~(a)~~ a certified copy of a paper from a public record or ~~(b)~~ a copy of an opinion~~, although one copy must be provided without charge to the attorney for each party in the case~~;

(5)-(6) [Unchanged.]

A party who is unable to pay a filing fee may ask the Court to waive the fee by filing a motion and an affidavit disclosing the reason for that inability. There is no fee for filing the motion but, if the motion is denied, the party must pay the fee for the underlying filing.

(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.300 *et seq*. would clarify certain practices and procedures in the Supreme Court, especially as they pertain to electronic filing by parties and electronic notification of the Court's opinions and orders, as well as require only the signed originals of documents to be filed in hard copy.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-12.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered May 24, 2017:

PROPOSED AMENDMENT OF MRE 404(b) OF THE MICHIGAN RULES OF EVIDENCE.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 404(b) of the Michigan Rules of Evidence. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) *Other crimes, wrongs, or acts.*

(1) [Unchanged.]

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. This notice must be provided in writing 14 days before trial or orally in open court on the record. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Staff Comment: This proposed amendment would require the prosecution to provide reasonable notice of other acts evidence in writing at least 14 days before trial or orally in open court on the record.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-12.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered June 21, 2017:

PROPOSED AMENDMENTS OF MCR 8.110 and MCR 8.111.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 8.110 and 8.111 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(3) [Unchanged.]

(4) If a judge does not timely dispose of his or her assigned judicial work, or fails or refuses to comply with an order or directive from the chief judge made under this rule, or otherwise acts in a way that raises questions regarding the propriety of the judge's continued service, the chief judge shall report the facts to the state court administrator who will, under the Supreme Court's discretion, initiate whatever corrective action is necessary, which may include relieving the judge from presiding over some or all of the judge's docket. If the basis for this report is a good faith doubt as to the judge's fitness, the chief judge may, with the approval of the state court administrator, order the judge to submit to an independent medical examination.

(5)-(7) [Unchanged.]

(D) [Unchanged.]

RULE 8.111. ASSIGNMENT OF CASES.

(A)-(B) [Unchanged.]

(C) Reassignment.

(1)(a) If a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason.

(b) If a judge is relieved from presiding over some or all of the judge's docket under MCR 8.110(C)(4), the chief judge shall reassign the judge's caseload to another judge or judges by a written order.

For cases reassigned under this subrule, ~~T~~to the extent feasible, the alternate judge or judges should be selected by lot. The chief judge shall file the order with the trial court clerk and have the clerk notify the attorneys of record. The chief judge may also designate a judge to act temporarily until a case is reassigned or during a temporary absence of a judge to whom a case has been assigned.

(2) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The proposed amendments would explicitly provide that corrective action may be taken by the State Court Administrator, under the Supreme Court's direction, against a judge whose actions raise the question of the propriety of the judge's continued service. Such corrective action may include relieving a judge of the judge's caseload, and reassigning such cases to another judge or judges. The proposed amendments also would provide explicit authority for a chief judge (with approval from the state court administrator) to order a judge to submit to an independent medical examination if there is a good faith doubt as to the judge's fitness that prompted the chief judge's report.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-12.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].

Order Entered June 21, 2017:

PROPOSED AMENDMENT OF CANON 4 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Canon 4 of the Michigan Code of Judicial Conduct. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

CANON 4. A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of

substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge may engage in the following activities:

(A)-(D) [Unchanged.]

(E) Financial Activities.

(1)-(3) [Unchanged.]

(4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of ~~$100~~375, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) [Unchanged.]

(c) A judge or family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and if ~~its~~the aggregate value of gifts received by a judge or family member residing in the judge's household from any source exceeds ~~$100~~$375, the judge reports it in the same manner as compensation is reported in Canon 6C. For purposes of reporting gifts under this subsection, any gift with a fair market value of $150 or less need not be aggregated to determine if the $375 reporting threshold has been met.

(5)-(7) [Unchanged.]

(F)-(I) [Unchanged.]

Staff Comment: The proposed amendment would increase the acceptable value for a gift given incident to a public testimonial, and likewise would increase the threshold amount for disclosure of a gift. This proposed increase would be the first revision since the $100 value threshold was adopted in 1974.

The threshold amount for reporting gifts is widely variable among the states and federal government. The disclosure threshold for reporting gifts in other states, established by statute or court rule, ranges from $50 to $500. Many states do not have a threshold amount at all; instead, such states may prohibit the acceptance of gifts from certain classes of donors, or alternatively allow judges to accept a certain class of gifts without regard to value for specific events, such as a wedding, or 25th or 50th wedding anniversary. In considering whether to publish for comment a proposed change, the Court also considered the increase in

the value of money since the $100 threshold was adopted. According to the American Institute for Economic Research, the value of $100 in today's economy is $495.92.

In settling on a structure for purposes of publication, the Court used the federal disclosure rule and threshold as its model. For federal judges, the gift disclosure amount is $375, as established by the Judicial Conference. The instructions for submitting the annual disclosure report require a federal judge to:

> Report information on gifts aggregating more than $375 in value received by the filer, spouse and dependent child from any source other than a relative during the reporting period. Any gift with a fair market value of $150 or less need not be aggregated to determine if the $375 reporting threshold has been met.

Thus, similar to the federal rule, the proposed amendment would increase the disclosure threshold to $375, but would require gifts to the judge and his family members from a single source to be aggregated for purposes of reporting. Gifts with value less than $150 would not need to be included in this aggregate amount. Further, the proposed amendment would not change the restriction that a gift may be accepted under this subsection only if the donor is not a party or other person whose interests have come or are likely to come before the judge.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-12.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/Courts/MichiganSupremeCourt/Rules/Court-Rules-Admin-Matters/Pages/default.aspx].