FILED UNDER AO 2019-6 **NO. 163833**

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

GLEICHER (PRESIDING AND DISSENTING), CAVANAGH, LETICA

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

JERARD NATHANIEL WELCH,
Defendant-Appellant.

MSC No. 163833
COA No. 355030
Circuit No. 2019-271266-FH

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

MICHAEL SKINNER (P62564)
540 N. Lapeer Rd. #270
Lake Orion, MI 48362
(248) 693-4100
mskinner@mskinner.com

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I. Statement of Jurisdiction

This Court has jurisdiction pursuant to its Order of May 27, 2022, directing argument on the Application and ordering the parties to submit supplemental briefs.

Mr. Welch is appealing from the Opinion of the Court of Appeals issued October 14, 2021, affirming by a 2-1 vote the Oakland County Circuit Court's Order dated January 21, 2020, granting People's Motion to Exclude Evidence of Fault.

II. Questions Presented for Review

1. Whether there is sufficient evidence that Mr. Welch caused the accident such that it is necessary for any other cause to be considered superseding and intervening in the first instance.

2. Whether the Court of Appeals majority erred by:

   a. Holding as a matter of law that that pretrial evidence of the weather, roadway conditions, and actions of third-party drivers are insufficient to permit a jury to consider these facts as they affect the causation element;

   b. Preventing trial court reconsideration of a pretrial evidentiary ruling on an element of the charge based on evidence presented at trial by barring consideration of *res gestae* evidence;

   c. *Sua sponte* ordering a limiting instruction to restrict the jury's consideration of *res gestae* evidence as it relates to the element of causation, also preventing reconsideration by the trial court based on evidence presented at trial.

3. Whether it violates federal due process and Michigan law to prevent evidence and argument regarding the *res gestae* circumstances surrounding the event as it relates to an element of the charge, causation.

4. Whether the Court of Appeals opinion and the trial court order effectively direct a verdict against Mr. Welch on one of the elements of the charge against him, violating Mr. Welch's constitutional rights to a jury trial and due process.

III. Statement of Facts

Mr. Welch is charged with operating while intoxicated causing a serious impairment (OWICSI). MCL 257.625(5) provides that if a person operates a motor vehicle while intoxicated "and by the operation of that motor vehicle causes a serious impairment of a body function of another person[,]" then that person "is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both."[1]

The following facts are derived from the police reports and implied consent hearing transcript. Mr. Welch has, in the trial court and the Court of Appeals, consistently presented these facts *arguendo*: "for background but waiving no right to contest the accuracy, veracity, or admissibility of these allegations."

On December 29, 2018, at around 10:30 p.m., there was an accident on westbound 696 and Telegraph in Southfield, Michigan. There were four cars involved and injuries to one of the drivers, Jeremiah Goemaere. MSP Trooper James and fire and rescue responded. The highway was shut down for a short

[1] *See generally, People v Schaefer*, 473 Mich 418, 434 (2005). *Schaefer* was a "causing death" case, but its holding has been extended to serious impairment cases. *See e.g., People v Wardwell*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2009 (Docket No. 280298).

time to clear the accident.[2]

The four vehicles involved in the accident were:

1. The Goemaeres' car, which was the lead car in the middle lane of the four car "pack" travelling on 696.

2. An unidentified car, which was behind the Goemaeres' and ahead of the other two cars.

3. Mr. Welch's car, which was the third car of the "pack" and also in the middle lane.

4. The witnesses' car,[3] which was anywhere from immediately behind the other three to one-quarter mile back, was in an unknown lane.[4]

There was fresh snowfall on the curve where the accident occurred, and the road was slippery.[5] Mr. Goemaere stated that he started to lose traction immediately prior to the accident.[6] Mr. Goemaere also stated that he was fishtailing.[7] The witnesses saw Mr. Goemaere drift into the right lane.[8]

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[2] T 15 (Apx. 035).
[3] The witnesses were Ms. Islam and Mr. Cook. T 14 (Apx. 024).
[4] T 20-21 (Apx. 040-41).
[5] T 17 (Apx. 037).
[6] T 16 (Apx. 036).
[7] T 22-23 (Apx. 042-43).
[8] T 23 (Apx. 043).

Before the crash, the unknown vehicle (second in the pack) passed the Goemaeres.[9] Mr. Welch tried to follow the unidentified vehicle in passing but was unsuccessful because the Goemaeres tried to slow down and in doing so lost traction, lost control, and fishtailed into Welch's lane.[10] Mr. Welch was unable to stop and rear-ended the Goemaeres.

There was no accident reconstruction, but Tpr. James concluded that Mr. Welch rear-ended the Goemaeres' car.[11] Tpr. James did not request an accident reconstruction because it would shut down 696 for hours.[12]

Tpr. James identified signs of intoxication in Mr. Welch, including red, bloodshot, and watery eyes; the odor of intoxicants; and confusion regarding which highway they were on. Mr. Welch admitted to some drinking.[13] Tpr. James conducted three field sobriety tests, and according to Tpr. James, Mr. Welch failed the horizontal gaze nystagmus, walk and turn, and the one-leg stand.[14] Mr. Welch declined the PBT. A search warrant was obtained, and Mr. Welch's blood was drawn at

[9] T 19 (Apx. 039).
[10] T 25-26 (Apx. 045-46).
[11] T 6, 15 (Apx. 026, 035).
[12] T 15-16 (Apx. 035-36).
[13] T 6 (Apx. 026).
[14] T 7 (Apx. 027).

Providence Southfield.[15] The forensic report calculated Mr. Welch's BAC as 0.113.

The Prosecution moved *in limine* to exclude evidence of fault, which, through litigation, became focused on the element of causation. Mr. Welch has suggested and suggests in this appeal that the weather, the actions of the other drivers, the roadway conditions, and additional or different facts that may become evident at trial are relevant to the element of causation. But the Circuit Court granted the motion, stating in full:

> This matter was before the Court on People's Motion in Limine to Exclude Evidence of Fault. Defendant is charged with one felony count of Operating While Intoxicated Causing Serious Injury, contrary to MCL 257.625(5). Defendant seeks to assert the defense that he was not at fault for the accident that caused the Victim's injuries. The People seek to preclude the defense and suppress any evidence in support of that defense. The Court heard oral arguments and took the matter under advisement. After careful review of the briefs and applicable law, the Court now issues its Opinion and Order.
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> While the specific issue of whether the People

[15] T 8 (Apx. 028).

need to prove that Defendant. is at fault for the accident from which the Victim's injury arises does not appear to have been addressed by Michigan appellate courts, this Court concludes that Defendant cannot argue the issue of fault when Defendant is charged with Operating While Intoxicated Causing Serious Injury. In *People v Schaefer*, 473 Mich 418 (2005), the Michigan Supreme Com1 held that the People need not prove causation between Defendant's intoxication and the Victim's injury. In *People v Pace*, 311 Mich App 1 (2015), the Michigan Court of Appeals unanimously concluded that the crime of Moving Violation Causing Serious Impairment is a strict liability offense. This Court finds that Operating While Intoxicated Causing Serious Injury is also a strict liability offense, where the prosecution need only prove beyond a reasonable doubt that Defendant committed the prohibited act, regardless of Defendant's intent and regardless of what Defendant actually knew or did not know. Because neither the snowy weather nor another vehicle amount to an intervening superseding cause under the facts presented in this case, the People arc only required to prove that Defendant's operation of the vehicle was a cause of the injury. Accordingly,

IT IS HEREBY ORDERED that People's

Motion to Exclude Evidence of Fault is GRANTED.

IT IS SO ORDERED.[16]

Mr. Welch appealed to the Court of Appeals, and in a 2-1 decision, the court affirmed the trial court but with significant modifications: the majority found that the trial court incorrectly classified OWICSI as a strict liability offense, found that the *res gestae* or "background" evidence regarding the accident ("inclement weather, roadway conditions, or the fishtailing of the Goemaere's vehicle") is admissible, reclassified the order as regarding causation and not fault, and, *sua sponte*, directed the trial court to instruct the jury that the *res gestae* evidence could not be considered regarding factual or proximate causation.

~~Judge Gleicher dis~~sented, pointing out that the disposition was premature, as the nature of the trial evidence may differ from that currently on the record, which is derived from an administrative implied consent hearing and police reports. In addition, she analyzed this Court's several cases interpreting MCL 257.625, noting both that the precise nature of the evidence presented at trial is crucial in determining causation and, in summary, that according to *People v Feezel*, ""[W]hile a victim's negligence is not a defense, it is an important factor to be considered by the trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt."[17]

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[16] Opinion and Order (Apx. 015-16).

[17] 486 Mich 188, 196 (2010).

Mr. Welch now appeals to this Court.

IV. Summary of Argument

Mr. Welch is charged with operating while intoxicated causing serious impairment (MCL 257.625(5)) (OWICSI) for a nighttime accident on a snowy I-696 in which the pretrial evidence indicates that the driver of another car, Jeremiah Goemaere, lost control of his car and fishtailed into Mr. Welch's lane, causing the accident and the injury to Mr. Goemare's passenger, Rebekah Goemaere. According to the police reports, Mr. Welch had a blood alcohol level of 0.113.

The Prosecution moved *in limine* to exclude evidence of "fault" – which encompassed facts relevant not to fault but to causation (like the weather conditions, roadway conditions, and the driving of Mr. Goemaere). The trial court granted the motion, mistakenly classifying OWICSI as a strict liability offense.

Mr. Welch appealed, asking the Court of Appeals to reverse or to require the trial court to specify exactly which *res gestae* facts were at issue. The Court of Appeals majority affirmed but modified the order *sua sponte* and held some "background" (i.e., *res gestae*) evidence admissible but directed the trial court to instruct the jury that this evidence could *not* be considered regarding factual or proximate causation.

The dissent argued that the pretrial order was improper as the factual record was inadequate and it was premature to conclude that no factual development or trial evidence could put causation at issue for a jury to consider.

Mr. Welch did not cause the accident. On a snowy road at night, Mr. Goemaere fishtailed into Mr. Welch's lane, causing the accident in which Ms. Goemaere was injured. Unlike in *Schaefer*, where the defendant performed the act of swerving that caused the accident, Mr. Welch took *no action* to cause the accident. As in the companion case to *Schaefer*, *People v Large*, Mr. Welch faced an unavoidable accident. Nevertheless, the Court of Appeals majority opinion prevents Mr. Welch from arguing causation to his constitutional trier-of-fact, the jury, using the *res gestae* or "background" facts of the accident.

V. ARGUMENT

"In a different context, an intoxicated driver may be guilty of negligence per se, but if the accident involved a rear-end collision while the intoxicated driver's vehicle was stopped at a traffic light, it is unlikely that anyone would even suggest that that negligence might have been a proximate cause of the accident."[18]

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"The question of whether an intervening act of negligence is a superseding cause, relieving the defendant of liability, is a question for the jury."[19]

V.A Standard of Review

> We review for an abuse of discretion a trial court's ruling on a motion in limine. *Bartlett v. Sinai Hosp. of Detroit*, 149 Mich. App. 412, 418, 385 N.W.2d 801 (1986). However, we review de novo as a question of law matters of statutory interpretation. *People v. Thomas*, 263 Mich. App. 70, 73, 687 N.W.2d 598 (2004) . . . . A trial court abuses its direction when it makes an error of law or operates within an incorrect legal framework. *People v. Everett*, 318 Mich. App. 511, 516,

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[18] *Silonova v Town of Greenwich*, No. FSTCV116008082S, 2013 WL 5663497, at *3 (Conn Super Ct, September 23, 2013)

[19] *Williams v Johns*, 157 Mich App 115, 120 (1987).

899 N.W.2d 94 (2017).[20]

In addition, due process is violated if a defendant is convicted on the basis of less than legally sufficient evidence.[21] The prosecution has the burden of proving every element of the charged crime beyond a reasonable doubt.[22]

V.B Mr. Welch Does Not Have to Demonstrate a Superseding and Intervening Cause Where the Prosecution Cannot Identify Any Act of His that Caused the Accident, Operating While Intoxicated Is Not Alone Sufficient for Causation , and the *Res Gestae* Facts Demonstrate that the Other Driver Caused the Accident

Neither the Prosecution nor the lower courts have identified nor can identify any act of Mr. Welch that constituted the cause, factual or proximate, of the accident in this case. As far as Mr. Welch can discern, the Prosecution is theorizing that Mr. Welch is the cause solely because he was driving his car and at the same time was intoxicated. The Prosecution has not proposed a negligent act or a moving violation that caused the accident other than an improper theory of merely operating while intoxicated.

In other words, the Prosecution is proposing a "mere

[20] *People v Langlois*, 325 Mich App 236, 240 (2018).

[21] US Const, Ams V, XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970).

[22] *In re Winship*, 397 US 358 (1970); *People v Wright*, 408 Mich 1 (1980).

presence"-type theory that in other contexts is prohibited as a theory of liability.[23]

Driving while license suspended is an analogous situation. If a defendant is driving with a suspended license, he is, by that act alone, committing a criminal or prohibited act. Driving while intoxicated is, also, an independent criminal act. But to connect these crimes to a subsequent injury accident requires more, because there is no causal connection between a suspended license and a traffic accident, just as there is no causal connection between driving while intoxicated *without additional facts* and a traffic accident.

In driving while license suspended cases, courts have recognized the necessity of some additional facts other than the mere suspension of the license. For instance, the Court of Appeals has noted the difference between failing to stop at the scene of an injury accident (which does not require a causal nexus between the defendant's act and the injury) and driving while license suspended (which does require a causal link):

> Therefore, unlike his conviction for failure to stop at the scene of an accident resulting in serious impairment of a body function, for a jury to convict defendant of operation of a motor vehicle with a suspended license causing serious impairment of a body function, the jury

[23] *People v Norris*, 236 Mich App 411, 419-420 (1999); *People v Moldenhauer*, 210 Mich App 158, 160 (1995).

> would have to find that defendant's operation of the motor vehicle was both the factual and proximate cause of McDonald's injuries. See *Feezel*, 486 Mich. at 193–95.[24]

Courts throughout the country have recognized this need for a separate causal link in driving while license suspended cases.[25] One federal court found that driving on a suspended license does not explain the cause of an accident:

> The Court finds that Alliant has not satisfied its burden of proving this causal connection. Specifically, Alliant has not proven that driving on a suspended license was a contributing cause to White's accident. Instead, the Court finds that there is not a sufficient causal connection between the accident and White's driving on a suspended license. According to the police report, the accident occurred as White "started into curve [sic] and lost control and struck a power pole." [Court File No. 20, Exhibit C]. This accident would have occurred whether White was driving on a suspended license or a valid license. Consequently, driving on a suspended license was not a contributing cause to White's accident.[26]

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[24] *People v Cochran*, unpublished opinion of the Court of Appeals, issued March 31, 2016 (Docket No. 323916), 2016 WL 1276411, p *3

[25] *See, e.g., Huff v Rodriguez*, 88 AD3d 1274, 1275; 930 NYS2d 717, 719 (2011) ("It is well settled that 'the absence or possession of a driver's license relates only to the authority for operating a vehicle, and not to its manner of operation.'").

[26] *Chattanooga-Hamilton Cnty. Hosp Auth v Alliant Health Plans, Inc*, No. 1:03-CV-0415, 2004 WL 3327268, at *4 (ED Tenn, October 22, 2004)

For two reasons, this analysis should be adopted by this Court. First, the Legislature has established the need for a causal link. The statute requires that the defendant's operation of the vehicle *cause* the injury in question. Driving while intoxicated is no different than driving while license suspended: neither crime relates directly to how the driver operated the vehicle in fact. As the *Silonova* court opined in the quote above, no reasonable fact-finder would consider a driver who is intoxicated or has a suspended license to be at fault when, for instance, rear-ended by another vehicle.[27]

Second, this Court should adopt this reasoning explicitly because it already has adopted it implicitly. In *People v Schaefer/Large*,[28] discussed more below, this Court considered at length the specific *res gestae* facts of each accident to determine whether the fact-finder could find causation in those accidents. There would be no reason to consider these *res gestae* facts if operation while intoxicated was alone sufficient to sustain the causal element of OWICSI. If operating without any identifiable moving violation or negligent act *other than* being intoxicated were sufficient, both defendants Schaefer and Large would have been criminally liable without any consideration of the underlying facts (highway construction and swerving in

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[27] *Silonova v Town of Greenwich*, No. FSTCV116008082S, 2013 WL 5663497, at *3 (Conn Super Ct, September 23, 2013) ("In a different context, an intoxicated driver may be guilty of negligence per se, but if the accident involved a rear-end collision while the intoxicated driver's vehicle was stopped at a traffic light, it is unlikely that anyone would even suggest that that negligence might have been a proximate cause of the accident.")

[28] 473 Mich 418 (2005)

Schaefer and an unavoidable child on a bicycle in *Large*).

This Court does not need to determine whether, in a hypothetical case, the *res gestae* facts of the accident constitute a superseding and intervening cause because the Prosecution cannot demonstrate a causal connection between Mr. Welch's driving and the accident in the first instance. Without a theory of causation that implicates Mr. Welch, the Prosecution cannot even get to the point of arguing that the *res gestae* evidence is not a superseding and intervening cause.

V.C The Admissibility of Weather and Roadway Conditions Evidence

In its Order of May 27, 2022, this Court directed the parties to address "whether the trial court abused its discretion by granting the prosecution's motion in limine precluding the defendant from introducing evidence of inclement weather, roadway conditions, or the fishtailing of another vehicle, as causes of the collision that resulted in the victim's injuries."

The Court of Appeals dissent makes the trenchant point that the trial court's order freezes the record in place and prevents Mr. Welch from presenting evidence or arguing causation *even though it is not clear what the trial will reveal about the circumstances of the accident*:

> That is not to say that Welch has a valid causation defense. Rather, a determination of whether the facts surrounding Welch's causation defense (including the snow and Goemaere's driving) create a jury- submissible

> causation defense should await actual witness testimony. On this ground alone, the court should have denied Welch's motion to dismiss the charges. This Court should reverse the circuit court's in limine ruling as premature rather than conjuring a limiting instruction applicable to evidence that no one has even heard.[29]

The Court of Appeals has bound and chained the parties to a pretrial evidentiary ruling. The trial court erroneously forbade admission of the *res gestae* evidence. But Mr. Welch could at least, under that ruling, seek reconsideration should the trial evidence diverge from the anticipated evidence. MCR 6.435(B) allows the court to reconsider, correct, or rescind any order it concludes was erroneous. In addition, the court rule for reconsideration provides:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.[30]

Therefore, "[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right

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[29] Dissent p. 3 (Apx. 010).

[30] MCR 2.119(F)(3).

to do so, and this court rule does nothing to prevent this exercise of discretion."[31] The Sixth Circuit has expressly recognized the fluid nature of pretrial rulings that can be revisited at trial.[32]

But in Mr. Welch's case, the Court of Appeals has *sua sponte* rewritten the trial court's order and, in the same stroke, etched the order in stone. The trial court's ruling was modifiable by the trial court, but the Court of Appeals opinion is arguably binding on the trial court even if the trial evidence changes the anlysis.[33]

The Court of Appeals majority permitted the admission of evidence of, for instance, the weather conditions, but *sua sponte* required a jury instruction that renders such evidence mere surplusage – the jury will be instructed that it cannot consider such evidence as it relates to causation, but only as *res gestae* evidence. The majority opinion admits *res gestae* evidence to no end; it is admissible simply as a matter of form.

This is not consistent with Michigan law and is not consistent with the facts of this case and the jury's role as fact-

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[31] *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723 (1986) (cited in *People v Walters*, 266 Mich App 341, 350-351 (2005)); accord, *Hill v City of Warren*, 276 Mich App 299, 307 (2007) ("courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court").

[32] *See, e.g., United States v Labona*, 689 Fed Appx 835, 839 (CA 6, 2017) ("Moreover, a court is well within its discretion to reverse a pretrial evidentiary ruling to account for the changing dynamics of a trial.").

[33] *Johnson v White*, 430 Mich 47, 52-53 (1988).

finder. For instance, consider the following Court of Appeals decision that follows a properly deferential approach to the jury, permitting it to consider the *res gestae* facts and judge the weight of those facts as they relate causation:

> Under the facts of this case, we cannot conclude that defendant's actions or inactions were "the one most immediate, efficient, and direct cause" of the accident. *Curtis, supra* at 563. Plaintiff's expert acknowledged that the road conditions were the proximate cause when he averred that, but for the icy conditions, Houser would have been able to safely stop his van within 54 to 60 feet. Nevertheless, plaintiff argues that Houser's alleged negligence was excused under the sudden emergency doctrine and that the doctrine prevented him from being considered a potential cause of the accident under the proximate cause analysis. This argument assumes that individual fault is a prerequisite to consideration as a proximate cause. However, causes that do not involve an individual's fault may be considered in proximate cause analysis. Several courts have determined that icy conditions can constitute a proximate cause of an injury. *Haliw v. Sterling Heights*, 464 Mich. 297, 310; 627 NW2d 581 (2001); *Davis v. Pere Marquette R Co*, 241 Mich. 166, 168; 216 NW 424 (1927); *Hopson v. Detroit*, 235 Mich. 248, 252; 209 NW 161 (1926), *Colovos v. Dep't of Trans*, 205 Mich.App 524, 527; 517 NW2d 803 (1994). In this case, the accident was primarily caused by the icy condition of the road and, therefore, defendant's conduct was not the "one most immediate, efficient, and direct cause" of plaintiff's injuries. The trial court properly granted summary

> disposition for defendant on the basis of government immunity under MCL 691.1407(2).[34]

As explained in more detail below, these types of factual issues – weather, roadway conditions, and other drivers' actions – are properly entrusted to the jury. The Court of Appeals has foreclosed that possibility and ordered a jury instruction that will violate Mr. Welch's due process rights.

V.D The Admissibility of Mr. Goemaere's Driving and His Fishtailing

Again, this Court directed the parties to address "the fishtailing of another vehicle[;]" specifically, Mr. Goemaere's loss of control and collision with Mr. Welch's car.

The lower courts' decisions are at odds with the law entrusting these decisions to the fact-finder and at odds with cases specifically addressing third-party fault for the accident in question:

> "It is entirely proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty." *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich.App 622, 627; 415 NW2d 224 (1987). Plaintiff testified that, prior to the accident, the driver of the car in front of him appeared to lose control, and plaintiff observed the car fishtailing. In

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34 *Hedglen v Kokesh*, unpublished opinion of the Court of Appeals, issued October 24, 2006 (Docket No. 270164), 2006 WL 3019458, p *2–3.

> response, plaintiff applied his brakes. Defendant then applied his own brakes, but was unable to stop or to swerve prior to striking the rear of plaintiff's car. We conclude that these instructions were adequately supported by the evidence. See *Case, supra* at 6.[35]

The *Stober* case distinguished between *res gestae* evidence jury instructions that related to negligence versus causation. As to negligence (or breach of a duty), the *Stober* court held that a jury instruction was improper because the surrounding conditions could not excuse the defendant's violation of the assured clear distance statute. But the court found *as to proximate causation* that the instruction was appropriate, as nonparty fault is relevant to causation.

The Court of Appeals in Mr. Welch's case dismissed Mr. Goemaere's driving as a possible cause based on its interpretation of the facts:

> Defendant indicated that he was attempting to pass Goemaere—who was driving too slow for defendant's liking despite the allegedly hazardous snowy conditions—when Goemaere allegedly fishtailed into defendant's lane of travel.[] Clearly, then, Goemaere was not driving at a speed that could be considered excessive considering the snowy conditions.[36]

The Court of Appeals was pointedly critical in its

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[35] *Stober v McCracken*, unpublished opinion of the Court of Appeals, issued March 20, 2001 (Docket No. 217996), 2001 WL 704368, p *3.

[36] Majority Opinion, p.6 (Apx. 006)

analysis: criticizing Mr. Welch's attitude toward Goemaere's driving as "too slow *for defendant's liking*[.]" The court then insinuated that the snowy conditions were only "allegedly" hazardous when, in fact, all the evidence, including the conclusion of the investigating officer, supports the conclusion that the snowy conditions were a key factor in the accident.

This was the extent of the Court of Appeals's consideration of Goemaere's driving. The court considered no possible driving error on the part of Goemaere except speeding. Concluding that he was not speeding, the court closed the issue. The court ignored the evidence that Goemaere fishtailed into Mr. Welch *because he slowed down and in doing so lost traction and lost control.*[37] The court did not consider other factors like Goemaere braking too hard for conditions, or failing to be able to get out of a fishtail in snowy conditions, or driving in conditions that he may have been unable to handle due to skill or health. From ignoring the record evidence of Goemaere's fault in the investigating officer's opinion to failing to account for possible evidentiary divergence at trial, the majority failed to account for Goemaere's causal role.

VI.E *People v Schaefer/Large* and Causation

People v Schaefer[38] established "that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation" for criminal liability under

[37] T 25-26 (Apx. 046-47).

[38] 473 Mich 418 (2005).

MCL 257.625(4).[39]

In *Schaefer*, this Court affirmed a jury trial conviction where the defendant presented evidence that the highway was defectively designed, causing the accident. Because the trial evidence regarding the highway design did not establish gross negligence, the highway design could not constitute a superseding cause that would relieve Schaefer of liability.

In the companion case to *Schaefer*, *People v Large*,[40] the defendant was charged after hitting a child on a bicycle who "made the collision unavoidable." This Court found that the district court should consider whether this scenario was even sufficient for a bind over.

In Mr. Welch's case, the current pre-trial record consists of police reports and an implied consent hearing transcript. No accident reconstruction was done. This pretrial record supports the conclusion that Mr. Welch performed no act that caused the accident. Rather, Mr. Goemaere fishtailed at night in snowy conditions into Mr. Welch's lane, causing the accident.

The Court of Appeals majority concluded that the *res gestae* or "background" facts do not support a causation defense

[39] *Schaefer* involved the death of the other driver; in the instant case, the third party was injured, and Mr. Welch was charged under the subsection for operating while intoxicated causing serious impairment of a body function. MCL 257.624(5) (OWICSI).

[40] 473 Mich 418 (2005).

and, indeed, ordered *sua sponte* that the jury be instructed to disregard *res gestae* evidence as it applies to causation. The prosecution bears the burden of proving causation, yet the Court of Appeals preemptively ordered that the jury be instructed that the evidence most relevant to causation not be considered as it relates to causation. This is nothing less than directing a verdict on that element for the prosecution.

Mr. Welch has proposed a defense based on causation, which is an element of the charge for which the prosecution bears the constitutional burden of proof. Preventing the jury from hearing or considering *res gestae* evidence regarding the causation element will deprive Mr. Welch of due process and his right to a jury trial. Even when confronted with *res gestae* evidence that is arguably prohibited under another rule of evidence, this Court has held that the intertwined nature of *res gestae* events requires admission:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence.[41]

[41] *People v Delgado*, 404 Mich 76, 83 (1978).

The Prosecution has a constitutional burden to prove the element of causation beyond a reasonable doubt, yet it sought to prevent introduction of evidence of the *res gestae* of the incident, including weather conditions and the facts of the victim's driving, and possibly more.[42]

Causation must be both factual and proximate, and the jury must be allowed to consider the facts *in full*. Case law does not permit wholesale excising of *res gestae* facts from consideration by the jury. On the contrary, case law is explicit that causation is case-specific and for consideration by the trier of fact:

> Indeed, this principle is embedded within the concept of proximate causation, which requires the trier of fact to determine whether the victim's own conduct amounted to a superseding cause. See *Schaefer*, 473 Mich. at 438–439, 703 N.W.2d 774 (stating that gross negligence "by the victim ... will generally be considered a superseding cause") (emphasis added). Thus, to hold defendant criminally responsible, the trier of fact must find beyond a reasonable doubt that defendant's conduct was a

[42] The Prosecution did not identify in detail what evidence it sought to prohibit and the Circuit Court did not elaborate in its Order. The Court of Appeals majority identified three pieces of evidence that were covered by its opinion: "inclement weather, roadway conditions, or the fishtailing of Goemaere's vehicle[.]" COA Majority p. 7 (Apx. 007).

proximate cause of this victim's death or of this accident given the particular facts of the case.[43]

Mr. Welch is entitled to present evidence and argue that he was not the factual or proximate cause of the accident because it was not his conduct or act that caused the accident.

1. The accident occurred at night on a multi-lane expressway.

2. It had started to snow before the accident and the roadway was slippery.

3. There was no accident reconstruction.

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4. The investigating MSP trooper concluded that when trying to slow down, Goemaere lost control and lost traction, causing Goemaere to fishtail into Welch's lane.

5. Welch was unable to stop before hitting the out-of-control Goemaere vehicle.

6. There is a complete lack of evidence that Mr. Welch operated his car negligently: He was driving without incident with a "pack" of four cars. After the unidentified fourth car moved to pass the Goemaeres, Welch did the same. The cause of the accident was not Welch's driving, but Goemaere's loss of control on the new snow and fishtailing into

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[43] *People v Feezel*, 486 Mich 184, 201 (2010).

Welch's lane.

Simply, the conditions of roadway overtook *Mr. Goemaere*, not Mr. Welch. *Mr. Goemaere* lost control and fishtailed out of his lane. Mr. Welch's inability to avoid another driver's out-of-control car is not itself the cause of the accident, a necessary constitutional requirement for criminal liability. Considered from a different perspective, the conditions of the roadway and Mr. Goemaere's own negligent operation intervened and superseded any causal connection between Mr. Welch's driving and the accident, where Michigan recognizes that such intervening and superseding causes can sever the causal link for criminal liability.

Mr. Welch is entitled to argue the element of causation to a jury, specifically how the weather, roadway conditions, and relative fault of the parties affects the causation element. This right implicates his due process rights to a fair trial, to present a defense, and to a properly instructed jury.

The Court of Appeals and the Circuit Court should be reversed.

V.F The Prosecution Must Prove and the Jury Must Determine Proximate Causation

Legal causation is both factual and proximate, and it is a fact for the jury to decide. Factual causation is discussed below, but the existence of factual causation alone will not support the

imposition of criminal liability. Rather, proximate causation must also be established.[44]

In *Schaefer/Large*, this Court reasoned that, "proximate cause is a 'legal colloquialism.' It is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural."[45] In order for a defendant's conduct to be regarded as a proximate cause, "the victim's injury must be a direct and natural result of the defendant's actions."[46]

Under *Schaefer/Large*, in order to determine whether the injury was a direct and natural result of the defendant's driving, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct, such that the causal link between the defendant's conduct and the victim's injury was broken.[47] If an intervening cause did indeed supersede the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.[48] The principal factor for determining whether the ultimate outcome was proximately caused is whether that result was reasonably foreseeable:

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[44] *Id*.

[45] 473 Mich. at 436.

[46] *Id.*

[47] *Id.* at 436-437.

[48] *Id.*

> The linchpin in the superseding cause analysis therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable….then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.[49]

This Court in *Schaefer* held that the negligent design of a freeway exit was not a superseding cause of the accident which caused the death, because that negligence was ordinary, and thus reasonably foreseeable, as differentiated from gross negligence, which would not be regarded as foreseeable.[50]

In applying these same concepts in *People v Large*, the companion case to *Schaefer*, this Court remanded to the district court for further consideration of whether the child victim's act of riding a bicycle without brakes down an obstructed hill onto a busy road was a superseding cause of the accident which caused her death, thus breaking the causal link to the defendant's drunken driving.[51]

Superseding causes do not have to be the sole cause of the accident; they can coexist with the defendant's own causal act or

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[49] *Id.* at 437-438.

[50] *Id.* at 443-444.

[51] *Id.* at 445.

other independent acts, so long as the superseding cause meets the other legal tests:

> A superseding intervening cause does not need to be the only cause. Indeed, as the Court noted in *Schaefer*, while the defendant's conduct in that cause was a factual cause of the accident, the victim's conduct may also have been a cause and, more to the point, potentially a superseding cause.[52]

Schaefer/*Large* and its associated case law require that *an* intervening cause can coexist with a defendant's causal act and still abrogate criminal liability.

The foreseeability and the interaction of such diverse forces as the weather, the roadway conditions, and the relative negligence of the drivers are valid bases to submit the issue of proximate causation to the jury. The Court of Appeals majority opinion and the Circuit Court's Order are not consistent with *Schaefer*/*Large* and should be reversed.

V.G The Prosecution Must *Also* Prove and the Jury Must Determine Factual Causation

In criminal law, the causation element of an offense is

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[52] *People v Rideout*, 272 Mich App 602, 607-08 (2006) *rev'd in part*, 477 Mich 1062 (2007).

generally comprised of factual cause and proximate cause.[53] In determining whether a defendant's conduct is a factual cause of the result, the question is whether "but for" the defendant's conduct, would the result have occurred?[54] If the result would not have occurred absent the defendant's conduct, then factual causation exists.[55]

Factual or "but for" causation is often skipped over in analysis or presumed by the parties because of the perceived laxity of the "but for" test. But it is a well-attested requirement of criminal causation, and in the right case, an insurmountable hurdle for the prosecution. The key in understanding factual causation in Mr. Welch's case is the necessity, repeated wherever the requirement is discussed in the case law, that the result be caused by defendant's *conduct*. This is a critical requirement because fault in our constitutional system is individually based and can be apportioned only upon a finding that the defendant *acted* – that something that the defendant *did* in turn caused the harm that is at issue.[56]

For instance, in *Schaefer*, the defendant was driving on I-75 when his passenger abruptly told him that they had reached their freeway exit. The defendant himself *swerved* to exit the

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[53] *People v Tims*, 449 Mich 83, 95 (1995).

[54] *Id.*

[55] *Id.*

[56] *Delgado v United States*, 327 F2d 641, 642 (CA 9, 1964); *People v Sobczak*, 344 Mich 465, 469-470 (1955).

freeway, hit the curb, and lost control of the car. (In other words, the defendant *committed an act* (swerving) that factually caused the accident.) The car rolled over, killing the passenger. The defendant, who was charged with OWI causing death, argued that the exit ramp was not safe.

The *Schaefer* Court held that in a charge of OWI causing death, the prosecution needs to prove that the defendant was intoxicated and that his driving was the cause of another's death. Because the defendant in *Schaefer* argued that it was not his negligent driving that caused the death, but rather the design of the freeway, the *Schaefer* Court went on to discuss the causation element and noted that, "in the criminal law context, the word 'cause' has acquired a unique, technical meaning."[57] This Court then noted, "in criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause."[58] Because the defendant's own negligence was not contested (he *swerved*, putting the chain of events in motion), this Court virtually ignored the factual cause element and went right to the proximate cause element noting that proximate cause "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural."[59]

By contrast, in Mr. Welch's case, the evidence

[57] *Id* at 435.

[58] *Id* (emphasis added).

[59] *Id* at 436.

demonstrates that Mr. Welch did not act to factually cause the accident. Indeed, Welch did not lose control, *Goemaere* lost control. Analogous to *Schaefer*, Goemaere swerved, causing the accident. There is no evidence of an *act* of Mr. Welch that caused the accident. Mr. Welch was, rather, at the mercy of coincidental events, namely the snowfall, the slippery road, the curve in the road, and Goemaere's loss of control and fishtailing into Welch's lane.

As the Court of Appeals dissent explained, *People v Large* is more analogous to Mr. Welch's case where the defendant in *Large* was charged with hitting a child riding a bike, but the evidence indicated that the child darted out into the road and the accident was unavoidable. Under these circumstances, this Court remanded for reconsideration of the bind over itself.

That Mr. Welch was unable to avoid Goemaere's car fishtailing into his lane does not mean that criminal liability attaches to his non-negligent driving because *Schaefer*/*Large* commands that the focus be not on Mr. Welch's intoxication but on his driving. In several places, *Schaefer*/*Large* emphasizes the point that "the statute requires the defendant's *operation* of the motor vehicle, not defendant's intoxicated manner of driving, must cause the victim's death."[60] This point is repeated at least seven times.[61] This Court went so far as to establish as one of the

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[60] *Schaefer*, 473 Mich at 422 (emphasis in original).

[61] *Id* at 431, 432, 433, 434, 435, 441, and 446

elements that the prosecution must prove that "the defendant's operation of the motor vehicle caused the victim's death."

In other words, the defendant cannot be found responsible for criminal negligence when he has committed no negligence to cause the accident. Mr. Welch was merely the instrument of other forces and never committed an act that the law recognizes as a factual cause.

The Court of Appeals majority opinion and the Circuit Court's Order are not consistent with *Schaefer/Large* and should be reversed.

If this Court finds that *Schaefer/Large* compels affirmance despite the above arguments, then Mr. Welch asks that this Court grant leave to reconsider the rule of *Schaefer/Large*.

V.H The Causation Issue Is, at a Minimum, a Jury Question

Mr. Welch is not asking for a final ruling on whether the Prosecution can prove factual or proximate causation in this appeal. The sole claim in this appeal is that the jury should be permitted to consider this element of the charge in light of the relevant evidence.

"The Due Process Clause protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is

charged."[62] When determining whether a verdict was based on sufficient evidence, a court "must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt."[63] If the prosecution fails to present sufficient evidence, a judgment of acquittal should be entered.[64]

A criminal defendant has a due process right to a meaningful opportunity to present a complete defense.[65] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment … or in the Compulsory Process or Confrontation Clause of the Sixth Amendment …, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[66]

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.[67] A criminal

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[62] *In re Winship*, 397 US 358 (1970); US Const, Ams V, XIV; Const 1963, art 1, §17.

[63] *People v Hampton*, 407 Mich 354, 366 (1979) (citing *Jackson v Virginia*, 443 US 307 (1979)).

[64] *In re Winship, supra.*

[65] US Const, Ams V, XIV; Const 1963, art 1, § 17, Const 1963, art 1, § 13.

[66] *Crane v Kentucky*, 476 US 683, 690 (1986) (citing *California v Trombetta*, 467 US 479, 485 (1984)).

[67] *People v Canales*, 243 Mich 571, 574 (2000); *People v Reed*, 393 Mich 342,

defendant is entitled to have a properly instructed jury consider the evidence against him.[68] Furthermore, jury instructions must clearly present the case and the applicable law to the jury.[69]

Manifest injustice will occur if the Court of Appeals's version of the Circuit Court Order stands because the jury will be deprived of relevant evidence on an element of the offense.[70]

> Proximate cause must be decided on a case-by-case basis. *Feezel*, 486 Mich. at 201. The trier of fact is required to "determine whether the victim's own conduct amounted to a superseding cause." *Id.*[71]

Given the constitutional protections and case law regarding the jury's role in determining causation, the Circuit Court erred in granting the Prosecution's Motion, and the Court of Appeals majority opinion deprives Mr. Welch of his constitutional rights to due process and a jury trial.[72]

VI. Conclusion

349-350 (1975).

[68] *People v Riddle,* 467 Mich 116, 124 (2002).

[69] *People v McKinney*, 258 Mich App 157, 162 (2003).

[70] *People v Rice (On Remand),* 235 Mich App 429, 443 (1999).

[71] *People v Dienhert*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 10, 2010 (Docket No. 285489).

[72] *People v Rideout*, 272 Mich App 602, 607-08 (2006) rev'd in part, 477 Mich 1062 (2007).

This Court should reverse the Court of Appeals and the Circuit Court or order additional proceedings as necessary.

If this Court finds that *Schaefer*/*Large* compels affirmance despite the above arguments, then Mr. Welch asks that this Court grant leave to reconsider the rule of *Schaefer*/*Large*.

Respectfully Submitted,

/s/ Patrick T. Barone
Patrick T. Barone (P44677)
280 N. Old Woodward Ave. Ste 200
Birmingham, MI 48009
(248) 594-4554

-and-

s/ Michael Skinner
Michael Skinner (P62564)
Of Counsel to Barone Defense Firm
540 N. Lapeer Rd, #270
Lake Orion, MI 48362
(248) 693-4100
mskinner@mskinner.com

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 7,461 countable words. The document is set in Palatino Linotype, and the text is in 14-point type with 21-point line spacing and minimum of 12 points of spacing between paragraphs.

/s/ Michael Skinner