MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

August 6, 2014, through June 29, 2015

CORBIN R. DAVIS
REPORTER OF DECISIONS

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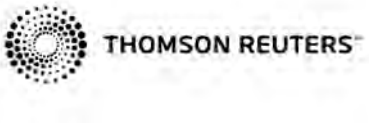

2015

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019

Justices

MICHAEL F. CAVANAGH	2015[1]
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2015
RICHARD H. BERNSTEIN	2023[2]

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	SAMUEL R. SMITH
DON W. ATKINS	ANNE E. ALBERS
JÜRGEN O. SKOPPEK	AMY L. Van DYKE[3]

State Court Administrator

JOHN A. HOHMAN, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

[1] To January 1, 2015.

[2] From January 1, 2015.

[3] From January 5, 2015.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019[1]
MICHAEL J. TALBOT	2015[2]
Chief Judge Pro Tem	
DAVID H. SAWYER	2017[3]
CHRISTOPHER M. MURRAY	2015[4]
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015[5]
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017[6]
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2015
MARK T. BOONSTRA	2015
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017[7]

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

[1] Chief Judge to January 1, 2015.

[2] Chief Judge from January 1, 2015.

[3] Chief Judge Pro Tem to January 1, 2015.

[4] Chief Judge Pro Tem from January 1, 2015.

[5] To January 1, 2015.

[6] To November 21, 2014.

[7] From December 5, 2014.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	JOHN E. DEWANE	2015[1]
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021[2]
3.	DAVID J. ALLEN	2015
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015[3]
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2021
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015[4]
	THOMAS CAMERON	2019
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	DAPHNE MEANS CURTIS	2021
	CHRISTOPHER D. DINGELL	2021
	CHARLENE M. ELDER	2021
	VONDA R. EVANS	2021
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017

[1] To December 31, 2014.

[2] From January 1, 2015.

[3] To December 31, 2014.

[4] To December 31, 2014.

	Term Expires January 1 of
JOHN H. GILLIS, Jr.	2021
ALEXIS GLENDENING	2017
DAVID ALAN GRONER	2017
RICHARD B. HALLORAN, Jr.	2019
CYNTHIA GRAY HATHAWAY	2017
DANIEL ARTHUR HATHAWAY	2021
MICHAEL M. HATHAWAY	2017
DANA MARGARET HATHAWAY	2019
CHARLES S. HEGARTY	2019
CATHERINE HEISE	2019
SUSAN L. HUBBARD	2017
MURIEL D. HUGHES	2017
VERA MASSEY JONES	2015[5]
EDWARD JOSEPH	2021
CONNIE MARIE KELLEY	2021
TIMOTHY MICHAEL KENNY	2017
QIANA D. LILLARD	2019
ARTHUR J. LOMBARD	2015[6]
KATHLEEN I. MACDONALD	2017
KATHLEEN M. McCARTHY	2019
BRUCE U. MORROW	2017
JOHN A. MURPHY	2017
MARIA L. OXHOLM	2019
LYNNE A. PIERCE	2021
LITA MASINI POPKE	2017
DANIEL P. RYAN	2019
RICHARD M. SKUTT	2021
MARK T. SLAVENS	2017
LESLIE KIM SMITH	2019
VIRGIL C. SMITH	2019
MARTHA M. SNOW	2017
CRAIG S. STRONG	2017
BRIAN R. SULLIVAN	2017
LAWRENCE S. TALON	2021
DEBORAH A. THOMAS	2019
MARGARET MARY VanHOUTEN	2021
SHANNON N. WALKER	2021[7]
ROBERT L. ZIOLKOWSKI	2015[8]

[5] To December 31, 2014.

[6] To December 31, 2014.

[7] From January 1, 2015.

[8] To December 31, 2014.

		Term Expires January 1 of
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	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	2017
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023[9]
	CHERYL A. MATTHEWS	2017
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	RUDY J. NICHOLS	2021[10]
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2021
9.	PAUL J. BRIDENSTINE	2019[11]
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2019[12]

[9] From January 1, 2015.

[10] To June 30, 2015.

[11] From February 9, 2015.

[12] To November 1, 2014.

		Term Expires January 1 of
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	JAMES T. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2021
14.	TIMOTHY G. HICKS	2017
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2017
	ANNETTE ROSE SMEDLEY	2019
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JOHN C. FOSTER	2021[13]
	JAMES M. MACERONI	2021[14]
	PETER J. MACERONI	2015[15]
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	KATHRYN A. VIVIANO	2017
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENENFELD	2017
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	GEORGE JAY QUIST	2017[16]
	JAMES ROBERT REDFORD	2017[17]

[13] To May 1, 2015.

[14] From January 1, 2015.

[15] To December 31, 2014.

[16] From June 1, 2015.

[17] To January 13, 2015.

		Term Expires January 1 of
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2021
19.	JAMES M. BATZER	2015[18]
	DAVID A. THOMPSON	2021[19]
20.	KENT D. ENGLE	2017
	JON H. HULSING	2021
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	PATRICK J. CONLIN, Jr.	2021[20]
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DONALD E. SHELTON	2015[21]
	DAVID S. SWARTZ	2021
23.	RONALD M. BERGERON	2015[22]
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2021
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015[23]
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017

[18] To December 31, 2014.

[19] From January 1, 2015.

[20] From January 1, 2015.

[21] To September 1, 2014.

[22] To December 31, 2014.

[23] To December 31, 2014.

		Term Expires January 1 of
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2017
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2017
	MICHAEL L. WEST	2019
32.	ROY D. GOTHAM	2021
33.	ROY C. HAYES, III	2021[24]
	RICHARD M. PAJTAS	2015[25]
34.	MICHAEL J. BAUMGARTNER	2017[26]
35.	GERALD D. LOSTRACCO	2015[27]
	MATTHEW J. STEWART	2021[28]
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JAMES C. KINGSLEY	2015[29]
	BRIAN KIRKHAM	2017
	SARAH SOULES LINCOLN	2021[30]
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2021
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2018
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017

[24] From January 1, 2015.

[25] To December 31, 2014.

[26] To August 31, 2015.

[27] To December 31, 2014.

[28] From January 1, 2015.

[29] To December 31, 2014.

[30] From January 1, 2015.

		Term Expires January 1 of
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2017
	GEORGE J. MERTZ	2021
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2021
49.	KIMBERLY L. BOOHER	2021[31]
	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015[32]
50.	JAMES P. LAMBROS	2019
51.	RICHARD I. COOPER	2015[33]
	SUSAN K. SNIEGOWSKI	2021[34]
52.	M. RICHARD KNOBLOCK	2015[35]
	GERALD M. PRILL	2021[36]
53.	SCOTT LEE PAVLICH	2017
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JEFFREY L. SAUTER	2021
57.	CHARLES W. JOHNSON	2019

[31] From January 1, 2015.

[32] To December 31, 2014.

[33] To December 31, 2014.

[34] From January 1, 2015.

[35] To December 31, 2014.

[36] From January 1, 2015.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015[1]
	TERRENCE P. BRONSON	2019
	JAROD M. CALKINS	2021[2]
	JACK VITALE	2017
2A.	JONATHAN L. POER	2021[3]
	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015[4]
2B.	SARA S. LISZNYAI	2021[5]
	DONALD L. SANDERSON	2015[6]
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2017
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021[7]
	SCOTT SCHOFIELD	2015[8]
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2021
	ROBERT T. HENTCHEL	2017
8.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019[9]

[1] To July 2, 2014.

[2] From January 1, 2015.

[3] From January 1, 2015.

[4] To December 31, 2014.

[5] From January 1, 2015.

[6] To December 31, 2014.

[7] From January 1, 2015.

[8] To December 31, 2014.

[9] To February 8, 2015.

		Term Expires January 1 of
	CHRISTOPHER HAENICKE	2019[10]
	ROBERT C. KROPF	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2021
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2017
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2019
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017
14B.	CHARLES POPE	2021
15.	JOSEPH F. BURKE	2019
	CHRISTOPHER S. EASTHOPE	2021
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2021
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	WILLIAM C. HULTGREN	2017
	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[11]
	WILLIAM J. SUTHERLAND	2015[12]
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2017
25.	MICHAEL F. CIUNGAN	2015[13]
	GREGORY A. CLIFTON	2021[14]
	DAVID J. ZELENAK	2017

[10] From February 9, 2015.

[11] From January 1, 2015.

[12] To December 31, 2014.

[13] To December 31, 2014.

[14] From January 1, 2015.

		Term Expires January 1 of
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2017
31.	PAUL J. PARUK	2021
32A.	ROGER J. LA ROSE	2015[15]
	DANIEL S. PALMER	2021[16]
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2021
	MICHAEL K. MCNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	JOSEPH N. BALTIMORE	2015[17]
	NANCY MCCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2017
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT-WEEKES	2021
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, JR.	2019
	WANDA EVANS	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2021
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM MCCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	DAVID PERKINS	2017

[15] To December 31, 2014.

[16] From January 1, 2015.

[17] To December 31, 2015.

		Term Expires January 1 of
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2021[18]
	MICHAEL E. WAGNER	2021
37.	DEAN AUSILIO	2017[19]
	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2017[20]
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2017
	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	2017
44.	TERRENCE H. BRENNAN	2015[21]
	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023[22]
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2017[23]
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
	WILLIAM J. RICHARDS	2017[24]
47.	JAMES BRADY	2021
	MARLA E. PARKER	2017

[18] To July 1, 2015.

[19] To December 31, 2014.

[20] From January 1, 2015.

[21] To December 31, 2014.

[22] From January 2, 2015.

[23] From July 31, 2015.

[24] To July 3, 2015.

		Term Expires January 1 of
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2021
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2017[25]
	BRIAN W. MacKENZIE	2015[26]
	DENNIS N. POWERS	2017[27]
	TRAVIS REEDS	2021[28]
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2021
52-4.	WILLIAM E. BOLLE	2015[29]
	KIRSTEN NIELSEN HARTIG	2017
	MAUREEN M. McGINNIS	2021[30]
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2021
	HUGH B. CLARKE, Jr.	2017
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015[31]
54B.	RICHARD D. BALL	2017
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2021
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2021

[25] From February 27, 2015.

[26] To December 31, 2014.

[27] To September 1, 2014.

[28] From January 1, 2015.

[29] To December 31, 2014.

[30] From January 1, 2015.

[31] To December 31, 2014.

		Term Expires January 1 of
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019[32]
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2021
	J. MICHAEL CHRISTENSEN	2017[33]
	MICHAEL J. DISTEL	2019[34]
	JENNIFER FABER	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019[35]
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2021
63-1.	JEFFREY J. O'HARA	2021[36]
	STEVEN R. SERVAAS	2015[37]
63-2.	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021[38]
	RICHARD D. WELLS	2015[39]
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	JOHN L. CONOVER	2015[40]
	MARK W. LATCHANA	2017
	JENNIFER J. MANLEY	2021[41]

[32] From October 6, 2014.

[33] To September 19, 2014.

[34] From January 20, 2015.

[35] To November 30, 2014.

[36] From January 1, 2015.

[37] To December 31, 2014.

[38] From January 1, 2015.

[39] To December 31, 2014.

[40] To December 31, 2015.

[41] From January 1, 2015.

		Term Expires January 1 of
67-3.	VIKKI BAYEH HALEY	2021[42]
	LARRY STECCO	2015[43]
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2021
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2021
70-2.	ALFRED T. FRANK	2021
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2017
	TIMOTHY J. KELLY	2019
	DAWN A. KILDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	SUSAN H. GRANT	2015[44]
	PETER JAKLEVIC	2021[45]
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
81.	ALLEN C. YENIOR	2021
82.	RICHARD E. NOBLE	2021
	DANIEL L. SUTTON	2015[46]
84.	AUDREY D. VAN ALST	2021
86.	MICHAEL J. HALEY	2015[47]
	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2017
87A.	PATRICIA A. MORSE	2021
88.	THEODORE O. JOHNSON	2015[48]

[42] From January 1, 2015.

[43] To December 31, 2014.

[44] To December 31, 2014.

[45] From January 1, 2015.

[46] To June 27, 2015.

[47] To January 31, 2015.

[48] To December 31, 2014.

		Term Expires January 1 of
89.	MARIA L. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021[49]
	GLENN A. PEARSON	2015[50]
95A.	JEFFREY G. BARSTOW	2021
95B.	CHRISTOPHER S. NINOMIYA	2021
96.	DENNIS H. GIRARD	2017[51]
	ROGER W. KANGAS	2021
97.	MARK A. WISTI	2021
98.	ANDERS B. TINGSTAD, Jr.	2015[52]

[49] From January 1, 2015.

[50] To December 31, 2014.

[51] To August 30, 2015.

[52] To December 31, 2014.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2016
CARL F. JARBOE	2018
THEODORE A. METRY	2016
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	KAREN TIGHE	2019[2]
Benzie	JOHN MEAD	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Berrien	THOMAS E. NELSON	2019[3]
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	2021
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
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019

[1] From March 30, 2015.

[2] To February 1, 2015.

[3] To August 1, 2015.

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[4]
Kalamazoo	CURTIS J. BELL	2019
Kalamazoo	PATRICIA N. CONLON	2014[5]
Kalamazoo	G. SCOTT PIERANGELI	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2021
Kent	GEORGE JAY QUIST	2017[6]
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	CARL J. MARLINGA	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019[7]
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2019

[4] From January 1, 2015.

[5] To December 31, 2014.

[6] To May 31, 2015.

[7] To July 2, 2015.

Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
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
Saginaw	FAYE M. HARRISON	2015[8]
Saginaw	PATRICK J. McGRAW	2019
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
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
Van Buren	FRANK D. WILLIS	2019[9]
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	MILTON L. MACK, JR.	2017[10]
Wayne	MARTIN T. MAHER	2015[11]
Wayne	LISA MARIE NEILSON	2017
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

[8] To December 31, 2014.

[9] To December 31, 2014.

[10] To July 24, 2015.

[11] To December 31, 2014.

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

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ADMINISTRATIVE ORDERS AMENDED

ADMINISTRATIVE ORDERS RESCINDED

RULES ADOPTED

MICHIGAN COURT RULES OF 1985

ADMINISTRATIVE ORDER No. 2014-14

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 47TH CIRCUIT COURT, THE 94TH DISTRICT COURT, AND THE DELTA COUNTY PROBATE COURT

Entered August 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 47th Circuit Court, the 94th District Court, and the Delta County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-15

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 16TH CIRCUIT COURT, THE 42D DISTRICT COURT, AND THE MACOMB COUNTY PROBATE COURT

Entered August 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 16th Circuit Court, the 42d District Court, and the Macomb County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-16

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 32D CIRCUIT COURT, THE 98TH DISTRICT COURT, AND THE GOGEBIC AND ONTONAGON COUNTY PROBATE COURTS

Entered August 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby revises Administrative Order No. 2005-1 and approves adoption of the following concurrent jurisdiction plan, effective immediately:

• The 32d Circuit Court, the 98th District Court, and the Gogebic and Ontonagon County Probate Courts.

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

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

ADMINISTRATIVE ORDER
No. 2014-17

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 4TH CIRCUIT COURT, THE 12TH DISTRICT COURT, AND THE JACKSON COUNTY PROBATE COURT

Entered August 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 4th Circuit Court, the 12th District Court, and the Jackson County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-18

MERGER OF THE STATE APPELLATE DEFENDER OFFICE (SADO) AND MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM (MAACS)

Entered September 17, 2014, effective immediately (File No. 2014-36)—REPORTER.

1978 PA 620 authorized the Appellate Defender Commission to develop a system of indigent appellate defense services to include services provided by the State Appellate Defender Office and locally appointed private counsel. In Administrative Order No. 1981-7, the Court authorized the Appellate Defender Commission to establish an Appellate Assigned Counsel Administrator's Office to operate the roster of private attorneys providing appellate defense services. SADO and the Michigan Assigned Appellate Counsel System have operated separately until now. On order of the Court, at the request of the Appellate Defender Commission, effective immediately, to promote efficiency and improve the administration of assigned appellate counsel for indigent defendants, the Court orders that operations of the two offices be merged. The State Appellate Defender shall serve as administrator of the Michigan Assigned Appellate Counsel System. Further, the Court directs the Appellate Defender Commission to review operations of the MAACS and submit a proposed administrative order that reflects the consolidation of the two offices

and incorporates proposed updates or revisions that the commission recommends. The commission shall submit the proposed administrative order to the Court no later than March 31, 2015.

Staff Comment: MCL 780.711 *et seq*. charged the Appellate Defender Commission with development of a mixed system of appellate assigned defense representation, consisting of both a public defender office and roster of private attorneys qualified and willing to accept appellate assignments. The State Appellate Defender Office (SADO) was created in 1978 to function as the public defender office; in 1981, the Michigan Appellate Assigned Counsel System (MAACS) was authorized to function as administrator of the statewide roster of private attorneys. Administrative Order No. 1981-7 commentary recognized two administrative models for the system, one defender-administered and one with independent offices. Over time, the Appellate Defender Commission, overseer of both components, has recognized the benefits of the defender- administered model; as in the federal system, this model produces cost-effective and coordinated management of resources. To better serve the interests of appellate defendants, the Appellate Defender Commission has recommended the change.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

ADMINISTRATIVE ORDER
No. 2014-19

REPORTING REQUIREMENTS OF THE 36TH DISTRICT COURT

Entered October 1, 2014, effective immediately (File No. 2014-41)—REPORTER.

On order of the Court, effective immediately and continuing through December 31, 2017, the 36th District Court shall submit quarterly benchmark reports (by the 20th of October, January, April, and July) for review and evaluation by the State Court Administrative Office. The following benchmarks for reporting shall begin on October 20, 2014:

FISCAL

I. Budget to Actual Expenditures Report

II. Budget Proposal for Next Fiscal Year (for January 20th only)

III. Revenues Collected Report

IV. Bond Account Reconciliation

V. Bank Account Reconciliation

VI. Past Debt (Outstanding Receivables) Plan (specify actions that have been taken to identify and reduce both collectible and uncollectible receivables, including collection and enforcement actions and results of these actions)

VII. Organizational Chart (including salaries)

CASE PROCESSING

I. Case Age Report by Judge — Felonies to be reported by October 20, 2014; State Misdemeanors and Traffic to be reported no later than January 20, 2015

II. Time between Filing and Entry of Case in Case Management System (by division)

III. Juror Utilization Report (number of panels/cases called compared to number of jury trials conducted)

ADMINISTRATIVE

I. Litigation Update

II. Project List (noting specific timelines)

JUDGES

I. Judges' Attendance Records

II. Judges' Arrival Time (to be conducted by monitors secured by the State Court Administrator or designee)

ADMINISTRATIVE ORDER
No. 2014-20

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 35TH CIRCUIT COURT, THE 66TH DISTRICT COURT, AND THE SHIAWASSEE COUNTY PROBATE COURT

Entered October 22, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 35th Circuit Court, the 66th District Court, and the Shiawassee County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-21

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 18TH DISTRICT COURT AND THE 29TH DISTRICT COURT

Entered October 22, 2014, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

• The 18th District Court and the 29th District Court.

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

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

ADMINISTRATIVE ORDER
No. 2014-22

RESCISSION OF ADMINISTRATIVE ORDER NO. 2006-3
(MICHIGAN UNIFORM SYSTEM OF CITATION)

Entered November 5, 2014, effective immediately (File No. 2014-38)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2006-3, the order setting forth the Michigan Uniform System of Citation, is rescinded. The Court currently uses, and encourages others to use, the Michigan Appellate Opinion Manual, which sets forth the Court's standards for citation of authority, quotation, and style in opinions of the Supreme Court and the Court of Appeals. The manual is now available in a searchable online format, and may be found at www.courts.mi.gov.

ADMINISTRATIVE ORDER
No. 2014-23

E-FILING SYSTEM FOR THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

Entered November 26, 2014, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, effective immediately, the Michigan Supreme Court (MSC) and the Michigan Court of Appeals (COA) are authorized to implement an electronic filing and electronic service system.

Although the Court of Appeals has had an e-filing system available for several years, this new system by ImageSoft, Inc., called TrueFiling, will enable filers to e-file documents with either the MSC or COA. The TrueFiling system allows for initiating a new case or e-filing a document into an existing case. The system is designed to maximize ease of its use and promote utility for e-filers, whether they are attorneys or self-represented litigants.

Under this system, e-filing will initially be voluntary for filers in all case types, but the Court anticipates that e-filing will eventually become mandatory in both courts. The experience gained from this voluntary program will help determine the future parameters of an expected mandatory program.

Although this order sets out the manner in which e-filed documents are submitted to the courts or served

on other parties to an action, it does not change the time periods required for taking action under the Michigan Court Rules, except as explicitly provided.

I. Definitions

For purposes of this order:

(A) "Authorized user" means a party, a party's attorney, or court staff who is registered in the TrueFiling system (www.truefiling.com) and who has satisfied the requirements imposed by the courts relating to electronic filing and service procedures. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach or failure to comply with system requirements. An authorized user must notify the court and ImageSoft, Inc., of any change in the authorized user's firm name, delivery address, telephone number, fax number, e-mail address, or other required registration information. This notice must occur as soon as practicable but no later than 7 days after the effective date of the change.

(B) "Electronic filing" or "e-filing" means the completed electronic transmission of documents or information to the court.

(C) "Electronic notice/notification" or "e-notice/notification" means the electronic transmission of documents or information from the court.

(D) "Electronic service" or "e-service" means the electronic transmission of documents or information to a party, a party's attorney, or a party's representative.

II. Scope

(A) Consistent with the Michigan Court Rules and the provisions of this order, the MSC and the COA may:

(1) accept electronic filing and permit electronic service of documents from authorized users, except as provided in subsection (B) below;

(2) issue electronic filing guidelines consistent with this order. The guidelines must be posted prominently on the courts' electronic filing website; or

(3) electronically issue, file, and serve notices, orders, opinions, and other documents, subject to the provisions of this order.

Filers need not provide hard copies to the courts, as otherwise required by the court rules, of documents that are electronically filed.

(B) Registered users agree to accept e-service through the TrueFiling system unless and until the user's registration is terminated. Service on nonregistered users must be accomplished in a manner allowed under the court rules, such as by first-class mail, hand delivery, or e-mail under MCR 2.107(C)(4).

III. Signatures

(A) A document electronically filed or electronically served under this order shall be deemed to have been signed by the party, the party's attorney, or the declarant for all purposes provided in the Michigan Court Rules. A statutory or court rule requirement for an original signature in a document is satisfied by inserting a typed signature with "/s/ [Name]" or a graphic image of a handwritten signature, including an actual signature on a scanned document. A digital signature that authenticates digital information through computer cryptography may not be used.

(B) A document containing the signature of a third party (e.g., affidavits, stipulations) may also be filed electronically by indicating that the signed original is maintained by the filing party. Signed copies shall be provided to the parties or court upon request.

IV. Retention of Documents

Unless otherwise ordered by the court, copies of all

documents electronically filed or served shall be maintained by the party filing those documents and shall be made available, upon reasonable notice, for inspection or copying. Parties shall retain such copies until final disposition of the case and the expiration of all appeal opportunities.

V. Official Case Record

The electronically filed documents maintained on the courts' servers are the official record of the court.

VI. Payment of Filing Fees and Costs

(A) A filing fee is due and payable at the time of the transmission of the electronic document unless:

(1) the document type does not require a fee;

(2) the filing is accompanied by a motion to waive fees;

(3) the fee is waived by the court pursuant to statute or court rule; or

(4) payment is deferred pending an interagency transfer of funds.

Failure to timely pay a filing fee may result in the filing being rejected by the court.

(B) Fees and costs are paid electronically through the TrueFiling system.

VII. Transmission Failures and System Outages

(A) In the event of a transmission failure of an electronically filed document, a party may file a motion requesting that the court enter an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful transmission. The moving party must prove to the court's satisfaction that:

(1) the transmission was attempted on the date and at the time asserted by the party;

(2) the transmission failed because of the failure of the TrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document; and

(3) the transmission failure was not caused, in whole or in part, by the action or inaction of the party.

(B) Scheduled system outages, such as for system maintenance, shall be posted on the court and TrueFiling websites and will be scheduled before 9:00 a.m. or after midnight on business days whenever feasible.

(C) Notice will be provided on the court and TrueFiling websites if the TrueFiling system becomes unavailable for an extended or uncertain period. The notice shall indicate whether filers are responsible for filing the documents conventionally in order to meet the deadlines imposed by statute or court rule.

VIII. Filing Completion

(A) A document filed electronically shall be considered filed with the court when the transmission to the TrueFiling system is complete and the system reflects a "Filed" status.

(B) If the court rejects an e-filed document pursuant to court rule, the court shall notify the filer of the rejection and the document shall not become part of the official court record.

(C) Upon completion of an e-filing transmission to the TrueFiling system, the system shall issue to the filer and to the court a notification that includes the date and time of the transmission.

IX. Time for Filing

Filings may be transmitted to the TrueFiling system twenty-four hours a day, seven days a week (with the exception of the system's downtime required for peri-

odic maintenance). However, a document electronically filed or served after 11:59 p.m. Eastern Time, or on a Saturday, Sunday, or court holiday (see MCR 8.110[D][2]) shall be deemed to have been filed or served on the next business day. See MCR 1.108.

X. Format of Documents

The TrueFiling system accepts the following file types for e-filed documents: Microsoft Word (DOC and DOCX), PDF, text files (TXT), images such as a TIFF, PNG or JPG. The courts strongly prefer that original pleadings be submitted as Word documents, text files, or searchable PDFs. Nonoriginal documents may be scanned into PDF as nonsearchable images.

Staff Comment: Administrative Order No. 2014-23 authorizes implementation and sets out the basic requirements for voluntary e-filing in the Michigan Supreme Court and Michigan Court of Appeals.

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

ADMINISTRATIVE ORDER
No. 2014-24

EXTENSION OF EXPIRATION DATE FOR E-FILING PILOT PROJECT IN OAKLAND CIRCUIT COURT, FAMILY DIVISION

Entered November 26, 2014, effective immediately (File No. 2002-37)—REPORTER.

By revision of Administrative Order No. 2010-3, dated January 23, 2013, this Court extended the e-filing project of the Family Division of the Oakland Circuit Court through December 31, 2014. Since that time, the validity and scalability of e-filing has been successfully demonstrated in Oakland Circuit Court's Family Division, and in six other courts participating in e-filing pilot projects. Recognizing that the "pilot" aspect of the projects would be ending before a statewide system is available, the State Court Administrator communicated to all pilot courts that their e-filing projects would end, at the latest, at the expiration of their administrative orders that authorized or extended their projects. Pilot projects would be replaced, as the State Court Administrator noted, with an accessible and affordable statewide system for all Michigan residents, litigants, and courts. To that end, the Court anticipates working with the Michigan Legislature and the Governor in 2015 for authorization and funding of a statewide system.

Given the looming expiration date of the Family Division's e-filing project, the Oakland Circuit Court has expressed its desire for a limited extension of that

project. Consistent with this Court's long-term goals, the Oakland Circuit Court communicated an interest in "a uniform approach and consistent e-filing experience, no matter where, when, and in which court they file" and the court "firmly . . . support[s] . . . the statewide e-filing initiative." Considering Oakland Circuit Court's interest and willingness to partner with the State Court Administrative Office on this statewide effort, the State Court Administrator has recommended a limited extension of the pilot project "to ensure the continuity of e-filing services as [the Oakland Circuit Court, Family Division,] transition[s] from [its] local pilot to the statewide initiative."

On order of the Court, the e-filing pilot project operating in Oakland Circuit Court's Family Division, under Administrative Order No. 2010-3, is extended until June 30, 2015, which is the same expiration date for Oakland Circuit Court's e-filing pilot project authorized by Administrative Order No. 2007-3.

ADMINISTRATIVE ORDER No. 2014-25

ESTABLISHMENT OF VIDEOCONFERENCING STANDARDS

Entered November 26, 2014, effective January 1, 2015 (File No. 2013-18)—REPORTER.

On order of the Court, Administrative Order No. 2014-25 is adopted, effective January 1, 2015, to require the State Court Administrator to establish videoconferencing standards.

Administrative Order No. 2014-25

To ensure consistency in videoconferencing practices and procedures throughout the state of Michigan; to improve service to the public, other agencies, and the judiciary; and to improve the performance and efficiency of videoconferencing in the courts, it is ordered that the State Court Administrator establish Videoconferencing Standards and that appellate and trial courts conform to those standards. The State Court Administrative Office shall enforce the standards and assist courts in adopting practices to conform to those standards.

Staff Comment: This administrative order requires the State Court Administrator to establish videoconferencing standards and requires that the appellate and trial courts conform to those standards. Please note that this administrative order is part of a group of orders issued today that relate to videoconferencing, including amendments adopted in MCR 3.210 and MCR 3.215, and adoption of new rule MCR 2.407, along with rescission of Administrative Order No. 2007-1.

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

ADMINISTRATIVE ORDER No. 2015-1

AUTHORIZATION OF PILOT PROJECT FOR SUMMARY JURY TRIALS IN THE 16TH CIRCUIT COURT AND FOR PILOT PROJECTS TESTING SUMMARY JURY TRIALS IN OTHER COURTS

Entered March 25, 2015, effective immediately (File No. 2014-24)—REPORTER.

On order of the Court, the 16th Circuit Court and other courts approved by the Michigan Supreme Court are authorized to implement summary jury trial pilot projects. A summary jury trial is a voluntary, binding jury trial, typically conducted in a single day before a panel of six jurors and presided over by the assigned judge, a judge appointed by the court, or a special hearing officer selected jointly by the parties. The summary jury trial process is intended to afford parties an efficient and economical means of resolving their dispute. The pilot projects are established to study the effectiveness of the summary jury trial process in resolving civil cases without adjudication by the trial court. The pilot projects shall begin as soon as possible after the approval by the Court, and shall remain in effect for 24 months. The 16th Circuit Court and other pilot courts will track participation in and the effectiveness of their pilot programs and shall report to, and make such findings available to, the Michigan Supreme Court.

(A) Applicability.

This administrative order governs summary jury trial practice in the pilot projects conducted in the 16th Circuit Court and other pilot courts. The pilot projects are intended to include cases that can be presented on a summary basis, including those tort, no-fault and business proceedings that do not involve complex facts or numerous witnesses, but each pilot site will establish its own standards for identifying eligible cases. Parties who agree to participate in the summary jury trial pilot projects must participate in the scheduled summary jury trial unless the parties reach a resolution before the summary jury trial.

(B) Procedure.

(1) Stipulation: At any time after the filing of a complaint, parties who agree to participate in a summary jury trial shall file with the court a Consent Order for Summary Jury Trial. The attorneys and/or parties may stipulate to any high/low parameters, which shall not be disclosed to the jury.

(2) Presiding Officer: The parties shall agree on who shall preside over the summary jury trial. The presiding officer may be the assigned trial court judge, a retired judge appointed to preside over the proceeding, or a special hearing officer. The trial court shall not appoint, recommend, direct or otherwise influence a party's or attorney's selection of a special hearing officer. If the parties agree that a retired judge should be assigned or a special hearing officer should preside, the court shall enter an order naming the presiding officer.

(3) Appointment and Qualification of Special Hearing Officer: The special hearing officer must be licensed to practice law in the State of Michigan. A special hearing officer is not authorized to enter judicial orders but must present them to the court's assigned judge for

entry. The parties and the special hearing officer, by agreement, shall determine the compensation, if any, of the special hearing officer and how that cost will be allocated between the parties.

(4) Mediation and Case Evaluation: Upon entry of a Consent Order for Summary Jury Trial, the trial court shall not require that mediation under MCR 2.411 or case evaluation under MCR 2.403 take place prior to the summary jury trial. However, the parties may voluntarily engage in any ADR processes following the entry of the consent order and before the summary jury trial.

(5) Scheduling: The clerk of the court, in consultation with the parties, shall schedule the summary jury trial and provide notice of the scheduled summary jury trial to the parties and attorneys at least 56 days before the trial's date. The clerk of the court shall allocate such space or staff as may be available and suitable to conduct the summary jury trial. Once scheduled, the summary jury trial will be adjourned only upon written stipulation of the parties with approval of the presiding officer or upon good cause shown.

(6) Pretrial Submissions:

(a) Documentary Evidence: Any party intending to offer evidence at the summary jury trial shall serve copies of any proposed exhibits and a witness list upon all parties not less than 28 days before the scheduled date of the summary jury trial. Unless otherwise agreed by all parties, exhibits that are not served upon all parties as required under this provision are not admissible. Witnesses who have not been listed shall not be called at trial.

(b) Pretrial Conference: No later than 14 days before the scheduled date of the summary jury trial, the judge or special hearing officer assigned to the case shall

conduct a pretrial conference, at which time the special hearing officer or judge shall address:

(i) objections to any evidence, including proposed redactions, motions in limine, and other evidentiary issues;

(ii) juror questionnaires and proposed voir dire questions;

(iii) whether the jury shall be permitted to take notes;

(iv) jury instructions and the jury verdict form; and,

(v) any other matters the judge, special hearing officer, or parties consider important in governing the summary jury trial process.

(7) Record: The summary jury trial shall not be recorded by the court's court reporter. However, any party may record or transcribe the proceedings at that party's expense.

(8) Jury Composition: The jury of a summary jury trial shall be comprised of six jurors, selected for examination in the regular term of court. Ten potential jurors shall be seated, and after questioning, plaintiff(s) shall strike one juror, defendant(s) shall strike one juror, plaintiff(s) shall strike a second juror and defendant(s) shall strike a second juror until six jurors remain and have been impaneled. Challenges for cause are not permitted.

(9) Time Allocations: It is expected that a summary jury trial shall last no longer than one day. Unless otherwise agreed to by the parties and the court under subrule (17) below, the summary jury trial shall be conducted within the following time allocations:

(a) Jury Selection: Jury selection shall take no longer than 30 minutes, which includes 10 minutes allocated to the special hearing officer or judge for an introduc-

tion and general questions to be given to all potential jurors agreed to by the parties, and 10 minutes for questions by each side.

(b) Opening Statements: Each side shall have 15 minutes for opening statements.

(c) Presentation of Proofs: Each side shall have up to 2 hours for presentation of proofs. This time allocation shall include the party's direct examination of witnesses, cross-examination of the other party's witnesses, admission of exhibits, and any time spent directing the jury's attention to specific aspects of documents that have been admitted.

(d) Closing Argument: Each side shall have up to 15 minutes for closing argument, and plaintiff shall have an additional 3 minutes for rebuttal.

(e) Jury Instruction: The parties shall make efforts to limit the number of instructions read to allow the instructions to be presented in 10 minutes or less.

(10) Rules of Evidence: The parties may offer evidence that is relevant and material to the dispute. The judge or hearing officer shall not require authentication of documentary evidence for purposes of admissibility. As part of the Consent Order for Summary Jury Trial, the parties may agree to modify the rules of evidence. The parties are encouraged to stipulate to modes and methods of presentation that will expedite the process, such as an agreement regarding the admissibility of video or written depositions, affidavits, written reports and ex parte depositions with any agreed upon redactions.

(11) Jury Verdict: The verdict of the jury shall be returned on a written verdict form and is binding, subject to any written high/low limitations agreed upon by the parties. A verdict will be received when five of the six jurors agree on a disposition.

(12) Inconsistent Verdict: In the case of an inconsistent verdict, the judge or special hearing officer shall recharge the jury as appropriate and require it to return to deliberation to resolve any inconsistency.

(13) Posttrial Motions: The only posttrial motion available to the parties shall be a motion for new trial, which must be filed with the trial court and served on the judge or special hearing officer as well as the other parties within seven days after entry of the jury's verdict. The judge or special hearing officer shall grant a new trial only under the following circumstances:

(a) an irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion that denied the moving party a fair trial;

(b) misconduct of the jury or of the prevailing party during the trial;

(c) error of law occurring in the proceedings; or

(d) fraud (intrinsic or extrinsic) of an adverse party.

(14) Order of Judgment: The nonprevailing party shall pay the prevailing party the judgment amount within 28 days after the jury renders a verdict, subject to any high/low parameters established before the trial. After payment, the prevailing party shall submit an Order of Dismissal with Prejudice for entry by the court.

If payment is not made within 28 days after entry of the verdict, an Order of Judgment based upon the jury verdict, subject to any high/low agreement, shall be entered by the circuit court consistent with MCR 2.602.

(15) Waiver of Costs and Sanctions: Except in the case of fraud, the parties agree to waive taxation of costs and sanctions.

(16) No Right to Appeal and Costs: Except in the case of fraud, the parties agree to waive the right to appeal the jury's verdict. Any appeals shall be taken in accordance with the Appellate Rules found at MCR 7.201-7.219.

(17) Modification of Procedures: Any of the above described procedures may be modified by stipulation of the parties with approval of the judge or special hearing officer.

ADMINISTRATIVE ORDER No. 2015-2

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 52D CIRCUIT COURT, THE 73B DISTRICT COURT, AND THE HURON COUNTY PROBATE COURT

Entered April 29, 2015, effective immediately (File No. 2004-04)—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective immediately:

- The 52d Circuit Court, the 73B District Court, and the Huron County Probate Court.

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

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

ADMINISTRATIVE ORDER
No. 2015-3

ESTABLISHMENT OF MICHIGAN TRIAL COURT STANDARDS AND GUIDELINES FOR WEBSITES AND SOCIAL MEDIA

Entered April 29, 2015, effective immediately (File No. 2014-43)—REPORTER.

In order to guide trial courts that are considering the use of trial court websites and social media sites to improve their service to the public, other agencies, and the judiciary, and to meet the public's growing expectation that courts communicate directly with the public, while preserving fairness and judicial impartiality, it is ordered that the State Court Administrator establish Michigan Trial Court Standards and Guidelines for Websites and Social Media and that trial courts conform to the standards. The State Court Administrative Office shall enforce the standards and assist courts in adopting practices to conform to those standards.

ADMINISTRATIVE ORDER
No. 2015-4

AUTHORIZATION OF PILOT PROGRAM FOR AUTOMATED STATE INCOME TAX GARNISHMENT TO BE IMPLEMENTED IN THE 36TH, 46TH, AND 47TH DISTRICT COURTS

Entered May 27, 2015, effective immediately (File No. 2014-10)—REPORTER.

On order of the Court, effective immediately, the 36th, 46th, and 47th District Courts are each authorized to operate a pilot program for processing requests for writs of state income tax garnishment through the enhanced GarnIT system. Participation by plaintiffs in this pilot program is voluntary for 2015.

The courts and the State Court Administrative Office (SCAO) will track the effectiveness of the pilot programs and report the results to the Supreme Court after January 1, 2016.

1. Purpose and Construction.

The purpose of this second pilot project is to expand the use of GarnIT to multiple courts, develop a standard procedure for adding future courts, and enhance some of the features piloted in 2014. Except for matters related to the transmission of requests and writs for state income tax garnishments through GarnIT during the pilot, the Michigan Court Rules govern all other postjudgment proceedings concerning the cases involved in the pilot.

2. Definitions.

(a) "ACH" means Automated Clearing House, an electronic network for financial transactions in the United States.

(b) "Batch" means an electronic submission that contains one or more case records.

(c) "CEPAS" means Centralized Electronic Payment Authorization System.

(d) "Clerk" means the clerk of the court for the 36th, 46th, or 47th District Courts.

(e) "Court" means the 36th, 46th, or 47th District Courts.

(f) "Department" means the Department of Treasury.

(g) "Electronic submission" means the submission of one or more requests that result in the recording of data into the courts' case management systems.

(h) "File format" means the format for submitting batch income tax garnishment transactions to the GarnIT for processing.

(i) "GarnIT" means the web-based system for processing requests and writs for state income tax garnishments.

(j) "MCR" means the Michigan Court Rules.

(k) "Pilot" means the court innovation initiative tested in the 36th, 46th, and 47th District Courts and the Michigan Department of Treasury in conjunction with IBM and under the supervision of SCAO. This web-based application facilitates the electronic processing of income tax garnishments in the 36th, 46th, and 47th District Courts. The pilot program is expected to launch August 20, 2015, and will continue until Decem-

ber 31, 2015. If it is successful, the program will be evaluated for statewide use.

(l) "Transaction" means the request and writ for income tax garnishment electronically processed pursuant to the pilot.

3. Participation in GarnIT

Use of GarnIT for submitting requests for income tax garnishments to the courts begins on August 20, 2015, and shall be voluntary during the pilot.

4. Electronic Submission and Acceptance of Submission with the Court; Signatures; Statutory Service and Process Fees

(a) Plaintiffs who choose to use GarnIT will submit requests under the rules in this administrative order and agree to comply with GarnIT's technical requirements. GarnIT will reject requests that do not meet GarnIT's validation requirements and that do not conform to the technical requirements of GarnIT.

(b) Except when maintenance to the case management system or GarnIT is being performed, requests may be submitted to the court and will be processed 24 hours a day, seven days a week through GarnIT.

(c) A request submitted under these rules shall be deemed to have been signed by the plaintiff and filed with the clerk. Electronic signatures shall use the following form: /s/ *John L. Smith*.

(d) By using GarnIT, the plaintiff acknowledges compliance with the rules in this administrative order and acceptance of the business process as specified in this administrative order.

(e) The statutory service fee for issuing a writ (hereinafter referred to as the "filing fee") shall be paid electronically at the same time the writ is issued and in the same amount as required by statute.

(f) The court shall pay the fees associated with the use of credit cards or the cost of establishing Automated Clearing House (ACH) for payment of the filing fees.

(g) Each plaintiff shall provide one e-mail address with the functionality required for GarnIT.

5. Format and Form of Electronic Submission

(a) A plaintiff may file only one request per case per defendant.

(b) A plaintiff may submit multiple transactions within a single batch, subject to subrule 5(a).

(c) All submissions must comply with the technical requirements of GarnIT and MCR 1.109.

(d) The court will maintain a digital image of each order issued, in accordance with subrule 11.

6. Validation of Requests; Notice of Writs and Rejected Requests; Payment and Receipt

(a) GarnIT will compare data from submitted requests against data in the court's case management system and will validate:

(1) the party information,

(2) the name of the plaintiff's attorney, if one exists,

(3) the case number,

(4) the existence of an unsatisfied judgment on file,

(5) that the judgment has not expired,

(6) that the 21-day period required before enforcing the judgment has passed, and

(7) that there is no bankruptcy case pending.

(b) GarnIT will compare a plaintiff attorney name from a submitted request against data in the case management system, and if the name is validated, GarnIT will provide the address from the case management system. Judicial Information Systems will update

the case management system with address information provided by the State Bar of Michigan on a quarterly basis.

(c) If a plaintiff's attorney is designated to receive money from a garnished income tax refund on behalf of the plaintiff, GarnIT will omit the plaintiff's address from the validation requirements. The plaintiff's name will be validated and included in the request, but the plaintiff's address on file with the court, if any, will not be included in the request.

(d) If a request does not meet the validation criteria, GarnIT will display an error message to the filer indicating a validation failure in the writ field. Instructions to the plaintiff for handling validation failure will be available through GarnIT. The instructions will include what steps, if any, the plaintiff can take to correct discrepancies in data between the court's case management system and the official court documents on which the plaintiff is basing the request.

(e) GarnIT will apply a formula to the amount of costs supplied by the plaintiff, and if they exceed the programmed threshold, GarnIT will display a message to the filer indicating that the amounts appear to be inaccurate. Instructions for how to proceed will be available through GarnIT. The filer can correct the amounts and proceed with the submission or, if the filer believes that the amounts are accurate, may file the request with the court manually.

(f) Filing fees under MCL 600.2529(1)(h) will be collected through CEPAS on each validated request.

(g) GarnIT will notify the plaintiff regarding the submitted requests including payment receipt numbers and a link for printing the writs for purposes of service on the department and the defendant in accordance with Rule 8.

7. Format and Generation of Writs; Payment Processing

(a) For each validated request, GarnIT will produce a secure electronic equivalent of SCAO-approved form MC 52, Request and Writ for Garnishment (Income Tax Refund/Credit), which constitutes issuance of a signed writ.

(b) GarnIT will update the court's case management system with respect to each writ issued.

(c) GarnIT will update the court's case management system with respect to fees collected.

8. Service on the Department and the Defendant

(a) The plaintiff shall print all issued writs and serve them on the department and the defendant in accordance with existing court rules.

(b) After service is completed, the plaintiff shall record proof of service in GarnIT by completing an attestation for each recipient that service was completed, including the date of service and the amount of any fee charged.

(c) The plaintiff shall maintain the proof of service so that it can be produced upon request if necessary in further proceedings in the case.

9. Correcting Data in the Court's Case Management System

If the plaintiff receives an error message as indicated in Rule 6b, the following procedure shall be followed by the plaintiff and the court:

(a) If the error is the result of incorrect data provided by the plaintiff, the plaintiff may correct the data and resubmit the request through GarnIT in accordance with the instructions and requirements of GarnIT.

(b) If the plaintiff believes the error is the result of incorrect data in the court's case management system, the plaintiff shall submit an e-mail request to correct the data, along with supporting documentation, in accordance with the instructions and requirements of GarnIT. Within 24 hours after receipt of a request to correct data and supporting documentation, the court shall handle the request. If the court determines that the discrepancy is the result of clerical error by the court, the court will correct the data in the case management system and send an e-mail response to the plaintiff indicating what action was taken and informing the plaintiff that the request can be resubmitted in GarnIT. If the court determines that the discrepancy is not the result of clerical error by the court, the court will send an e-mail response to the plaintiff indicating that fact.

(c) If the plaintiff wants to request that data in a case be changed for a reason other than a data entry error, the plaintiff must file a notice of the change with the court.

10. Technical Malfunctions

The GarnIT website will provide instructions regarding what action to take if the plaintiff experiences a technical malfunction using GarnIT or has other technical difficulties using GarnIT that cannot be resolved by the plaintiff.

11. Official Court Record; Record Retention

(a) For purposes of this pilot program, the electronic data and the electronic equivalent of SCAO-approved form MC 52, Request and Writ for Garnishment (Income Tax Refund/Credit), produced by and through the GarnIT transaction and subsequently maintained in the case management system constitutes the official court record and meets the record retention and public

access requirements of the court rules and General Records Retention and Disposal Schedule #16 — Michigan Trial Courts.

(b) A request and writ processed by GarnIT can be generated or printed on demand by the clerk. The request and writ maintained by the court will not contain the social security numbers or federal identification numbers of the parties.

(c) If a request is made for a certified copy of a request and writ processed by GarnIT, the clerk shall print the document and certify it in compliance with the Michigan Trial Court Case File Management Standards.

12. Privacy Considerations

In each submission to GarnIT, the plaintiff shall provide the social security numbers and federal identification numbers of the parties for use in the data file and writs issued for service on the department. The social security numbers or federal identification numbers will not be retained by GarnIT or the court after requests are validated and writs are issued and printed in accordance with rules 6 and 7 of this order.

13. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot project will continue until December 31, 2015.

AMENDED ADMINISTRATIVE ORDER No. 2005-1

ELIMINATION OF THE CONCURRENT JURISDICTION PLAN FOR THE 32D CIRCUIT COURT AND THE ONTONAGON COUNTY PROBATE COURT

Entered August 26, 2014, effective immediately (File No. 2004-04)—REPORTER.

On order of the Court, effective immediately, to coincide with the adoption of Administrative Order No. 2014-16 that adopts a concurrent jurisdiction plan in the 32d Circuit Court, the 98th District Court, and the Gogebic and Ontonagon County Probate Courts, the following changes in this administrative order are necessary.

[Deletions are overstricken and additions are underlined.]

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

The Court hereby approves adoption of the following concurrent jurisdiction plans effective September 1, 2005:

41st Circuit Court, 95B District Court, and Iron County Probate Court

~~32nd Circuit Court and Ontonagon County Probate Court~~

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

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

It is further ordered that Administrative Order No. 1999-2 is rescinded effective September 1, 2005.

AMENDED ADMINISTRATIVE ORDER Nos. 2007-3, 2010-3, and 2011-1

EXTENSION OF E-FILING EXPIRATION DATES IN THE 6TH CIRCUIT COURT AND THE 3RD CIRCUIT COURT

Entered June 17, 2015, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2007-3 (relating to general Oakland Circuit Court proceedings) and Administrative Order No. 2010-3 (relating to Oakland Circuit Court family division cases) are amended to extend their expiration dates through September 30, 2015.

On further order of the Court, Administrative Order No. 2011-1 is amended to extend its expiration date through September 30, 2015.

AMENDED ADMINISTRATIVE ORDER No. 2014-12

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2014-12 CONCERNING THE MICHIGAN TRIBAL STATE FEDERAL JUDICIAL FORUM

Entered February 18, 2015, effective immediately (File No. 2014-33)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2014-12, the order that established the Michigan Tribal State Federal Judicial Forum, is amended to add two new federal members with terms as follows:

• Assistant U.S. Attorney Jeff J. Davis (Western District of Michigan) (for a term ending July 1, 2016)

• The Honorable Timothy P. Greeley (federal magistrate serving in Marquette) (for a term ending July 1, 2017)

AMENDED ADMINISTRATIVE ORDER No. 2014-18

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2014-18

Entered January 21, 2015, effective immediately (File No. 2014-36)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2014-18 is amended by replacing the current "March 31, 2015" deadline with an "October 1, 2015" date, allowing more time for the Appellate Defender Commission to submit its proposed order regarding the merger of the State Appellate Defender Office and the Michigan Appellate Assigned Counsel System.

RESCINDED ADMINISTRATIVE ORDER No. 2007-1

RESCISSION OF ADMINISTRATIVE ORDER NO. 2007-1
(RELATED TO EXPANDED USE OF VIDEO TECHNOLOGY)

Entered November 26, 2014, effective January 1, 2015 (File No. 2013-18)—REPORTER.

On order of the Court, Administrative Order No. 2007-1 is rescinded, effective January 1, 2015. Courts operating an approved expanded interactive video technology program under the terms of Administrative Order No. 2007-1 may continue the program in effect.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted August 26, 2014, effective January 1, 2015 (File No. 2010-32)—REPORTER.

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

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1) ~~Default cases are governed by MCR 2.603.~~This subrule applies to the entry of a default and a default judgment in all cases governed by this subchapter.

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.~~Entry of Default.

(a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth proof of service and failure to plead or otherwise defend, the clerk must enter a default of the party.

(b) The party who requested entry of the default must provide prompt notice, as provided by MCR 3.203, to the defaulted party and all other parties and persons entitled to notice that the default has been entered, and file a proof of service.

(c) Except as provided under subrule (B)(2)(d), after the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court under subrule (B)(3).

(d) The court may permit a party in default to participate in discovery as provided in Subchapter 2.300, file motions, and participate in court proceedings, referee hearings, mediations, arbitrations, and other alternative dispute resolution proceedings. The court may impose conditions or limitations on the defaulted party's participation.

(e) A party in default must be served with the notice of default and a copy of every paper later filed in the case as provided by MCR 3.203, and the person serving the notice or other paper must file a proof of service with the court.

(3) ~~If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court.~~Setting Aside Default Before Entry of Default Judgment. A motion to set aside a default, except when grounded on lack of jurisdiction over the defendant or subject matter, shall be granted only upon verified motion of the defaulted party showing good cause.

(4) ~~If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion.~~Notice of Hearing and Motion for Entry of Default Judgment.

(a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service when:

(i) the action involves entry of a judgment of divorce, separate maintenance, or annulment under subrule (B)(5)(a);

(ii) the proposed judgment involves a request for relief that is different from the relief requested in the complaint; or

(iii) the moving party does not have sufficient facts to complete the judgment or order without a judicial determination of the relief to which the party is entitled.

(b) If the action does not require a hearing under subrule (B)(4)(a) and if the relief can be determined based on information available to the moving party that is stated in or attached to the motion or complaint, the moving party for default judgment may either:

(i) schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service, or

(ii) serve a verified motion for default judgment supporting the relief requested and a copy of the proposed judgment upon the defaulted party, along with a notice that it will be submitted to the court for signing if no written objections are filed with the court clerk within 14 days. If no written objections are filed within 14 days after filing, the moving party shall submit the judgment or order to the court for entry. If objections

are filed, the moving party shall notice the entry of default judgment for hearing.

(c) Service under this subrule shall be made in the manner provided by MCR 3.203 or, as permitted by the court, in any manner reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.

(d) If the default is entered for failure to appear for a scheduled trial or hearing, notice under this subrule is not required.

(5) ~~If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it.~~Entry of Default Judgment.

(a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. Nonmilitary affidavits required by law must be filed before a default judgment is entered in cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

(c) The moving party may be required to present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence.

(d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.

(e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment under MCR 2.602(B)(3), in conformity with the court's ruling, or as otherwise directed by the court.

(f) Upon entry of a default judgment and as provided by MCR 3.203, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, and promptly file a proof of service.

(6) Setting Aside Default Judgment.

(a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by subrule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for the entry of the judgment under subrule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.

(b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.

(7) Costs. An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions, including imposition of a reasonable attorney fee.

(C)-(D) [Unchanged.]

(E) Consent Judgment.

(1) At a hearing that involves entry of a judgment of divorce, separate maintenance, or annulment under subrule (B)(5)(a), or at any time for all other actions, any party may present to the court for entry a judgment approved as to form and content and signed by all parties and their attorneys of record.

(2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.

(3) Upon entry of a consent judgment and as provided by MCR 3.203, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered and promptly file a proof of service.

Staff Comment: The amendments of MCR 3.210 clarify default and default judgment procedures to be used in domestic relations cases. The amendments also allow parties to reach agreement on issues related to property division, custody, parenting time, and support, and enter a consent judgment on those issues if the court approves.

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

Adopted October 1, 2014, effective January 1, 2015 (File No. 2012-02)—REPORTER.

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

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3) [Unchanged.]

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

(b)-(d) [Unchanged.]

(5)-(7) [Unchanged.]

(C)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 2.302 allows any party to schedule a discovery-only deposition without the need to obtain stipulation of the other party or parties or approval of the court.

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

Adopted October 1, 2014, effective January 1, 2015 (File No. 2013-09)—REPORTER.

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

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A) Scope and Applicability of Rule, Definitions.

(1) All domestic relations cases, as defined in MCL 552.502(m), and actions for divorce and separate maintenance that involve the distribution of property are subject to mediation under this rule, unless otherwise provided by statute or court rule.

(2)-(4) [Unchanged.]

(B)-(K) [Unchanged.]

Staff Comment: The amendment clarifies that distribution of property in divorce or separate maintenance actions is subject to domestic relations mediation.

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

Entered October 1, 2014, effective immediately (File No. 2013-21)—REPORTER.

By order dated April 23, 2014, the Court adopted amendments of MCR 6.112 and MCR 6.113, effective immediately, but pending a public comment period and a public hearing. 495 Mich ccxx (2014). Notice and an opportunity for comment at a public hearing having been provided, the amendments of MCR 6.112 and MCR 6.113 are retained.

Adopted October 1, 2014, effective January 1, 2015 (File No. 2013-27)—REPORTER.

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

RULE 2.203. JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS.

(A)-(F) [Unchanged.]

(G) Joining Additional Parties

(1) Persons Who May be Joined. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim, subject to MCR 2.205 and 2.206.

(2) Summons. On the filing of a counterclaim or cross-claim adding new parties, the court clerk shall issue a summons for each new party in the same manner as on the filing of a complaint, as provided in MCR 2.102(A)-(C). Unless the court orders otherwise, the summons is valid for 21 days after the court issues it.

Staff Comment: These amendments of MCR 2.203, submitted by the State Bar of Michigan Representative Assembly, add explicit language allowing parties to be added to a counterclaim or cross-claim as otherwise provided by rule, and require that a court clerk issue a summons for those added parties.

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

Adopted October 1, 2014, effective January 1, 2015 (File No. 2013-29)—REPORTER.

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

RULE 5.108. TIME OF SERVICE.

(A) [Unchanged.]

(B) Mail.

(1) Petition or Motion. Service by mail of a petition or motion must be made at least 14 days before the date set for hearing, or an adjourned date.

(2) Application by a Guardian or Conservator Appointed in Another State.

(a) A court may appoint a temporary guardian or conservator without a hearing pursuant to MCL 700.5202a, MCL 700.5301a, or MCL 700.5433.

(b) If a court appoints a temporary guardian or conservator pursuant to MCL 700.5202a, MCL 700.5301a or MCL 700.5433, the temporary guardian or conservator must, not later than 14 days after the appointment, serve notice of the appointment by mail to all interested persons.

(C)-(E) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1) [Unchanged.]

(2) Devisee. Only a devisee whose devise remains unsatisfied, or a trust beneficiary whose beneficial interest remains unsatisfied, need be notified of specific proceedings under subrule (C).

(3)-(5) [Unchanged.]

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

(1)-(5) [Unchanged.]

(6) The persons interested in a proceeding for examination or approval of an account of a fiduciary are ~~the~~:

(a) for a testate estate, the devisees under the will (and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3)),

(b) for an intestate estate, the heirs,

(c) for a conservatorship, the protected individual (if he or she is 14 years of age or older), the presumptive heirs of the protected individual, and the guardian ad litem, if any,

(d) for a final conservatorship or guardianship account following the death of the protected person, the personal representative, if one has been appointed,

(e) for a guardianship, the ward (if he or she is 14 years of age or older), the presumptive heirs of the ward, and the guardian ad litem, if any,

(f) for a revocable trust, the settlor (and if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2)), the current trustee, and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(g) for an irrevocable trust, the current trustee, the qualified trust beneficiaries, as defined in MCL 700.7103(g), and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(h) in all matters described in this subsection (6), any person whose interests would be adversely affected by the relief requested, including a claimant or an insurer or surety who might be subject to financial obligations as the result of the approval of the account.

~~(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),~~

~~(b) heirs of an intestate estate,~~

~~(c) protected person and presumptive heirs of the protected person in a conservatorship,~~

~~(d) ward and presumptive heirs of the ward in a guardianship,~~

~~(e) claimants,~~

~~(f) settler of a revocable trust,~~

~~(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),~~

~~(h) current trustee,~~

~~(i) qualified trust beneficiaries described in MCL 700.7103(g)(i), for a trust accounting, and~~

~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.~~

(7)-(18) [Unchanged.]

(19) The persons interested in an application for appointment of a guardian of a minor by a guardian appointed in another state and in a petition for appointment of a guardian ~~for~~of a minor are

(a) the minor, if 14 years of age or older;

(b) if known by the petitioner or applicant, each person who had the principal care and custody of the minor during the 63 days preceding the filing of the petition or application;

(c) the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor~~, and~~;

(d) the nominated guardian~~.~~, and

(e) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of a minor.

(20)-(21) [Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are

(a) the alleged incapacitated individual or the incapacitated individual,

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

(c) the alleged incapacitated individual's spouse or the incapacitated individual's spouse,

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

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

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

(g) the nominated guardian~~.~~, and

(h) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual.

(23) [Unchanged.]

(24) The persons interested in an application for appointment of a conservator for a protected individual by a conservator appointed in another state or for the ~~a~~ petition for the appointment of a conservator or for a protective order are:

(a) the individual to be protected if 14 years of age or older,

(b) the presumptive heirs of the individual to be protected,

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

(d) the nominated conservator, ~~and~~

(e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending~~.~~, and

(f) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to manage the protected individual's finances.

(25)-(26) [Unchanged.]

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

(a) the protected individual or ward, if he or she is 14 years of age or older ~~and can be located~~,

(b) the presumptive heirs of the protected individual or ward,

(c) the claimants, ~~and~~

(d) the guardian ad litem~~.~~, and

(e) the personal representative, if any.

(28)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A)-(B) [Unchanged.]

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

(1) The name, and, if known, ~~last known address,~~ date of death, and date of birth of the trust's deceased settlor;

(2)-(5) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP.

(A) Limitation. The court may appoint a temporary guardian ~~only~~ in the course of a proceeding for permanent guardianship or pursuant to an application to appoint a guardian serving in another state to serve as guardian in this state.

(B)-(D) [Unchanged.]

Staff Comment: These Chapter 5 rule amendments, submitted to the Court by the Probate and Estate Planning Section of the State Bar of Michigan, comport to recent legislation regarding guardianships and conservatorships.

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

Adopted October 1, 2014, effective January 1, 2015 (File No. 2014-06)—REPORTER.

[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) [Unchanged.]

(B) The party seeking an order regarding a minor child shall

(1)-(2) [Unchanged.]

(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number

and location; the caption of the petition or motion shall state that a telephonic or video hearing is required by this rule.

(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 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, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

(D) [Unchanged.]

(E) The purpose of the telephone call or video conference described in this subrule is to determine

(1)-(3) [Unchanged.]

(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 additional telephone calls or video conferences, and

(5) [Unchanged.]

(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call or video

conference, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child.

(G) [Unchanged.]

Staff Comment: The amendments of MCR 2.004 allow an inmate's participation by video or videoconferencing.

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

Entered October 1, 2014, effective immediately (File No. 2014-08)—REPORTER.

By order dated April 2, 2014, the Court adopted an amendment of MCR 3.221, effective immediately, but pending a public comment period and a public hearing. 495 Mich ccxix (2014). Notice and an opportunity for comment at a public hearing having been provided, the amendment of MCR 3.221 is retained.

Adopted October 1, 2014, effective January 1, 2015 (File No. 2014-18)—REPORTER.

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

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

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 ~~-6.800~~ govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 6.001(B) includes additional rules and subrules that are found in Chapter 6 that govern procedural issues relevant to criminal cases falling under the jurisdiction of district courts.

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

Adopted October 22, 2014, effective January 1, 2015 (File No. 2005-19)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.507. CONDUCT OF TRIALS.

(A)-(C) [Unchanged.]

(D) Court View. On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred.

(D)-(F) [Relettered (E)-(G), but otherwise unchanged.]

Staff Comment: This amendment allows a court view when a court is sitting as trier of fact instead of a jury. The provision, which had been included in former MCR 2.513, was eliminated with the adoption of various jury reform proposals in 2011.

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

Adopted November 26, 2014, effective January 1, 2015 (File No. 2013-18)—REPORTER.

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

RULE 3.210. HEARINGS AND TRIALS.

(A) In General.

(1)-(3) [Unchanged.]

(4) Testimony must be taken in person, except that the court may allow testimony to be taken by telephone ~~or other electronically reliable means,~~ in extraordinary circumstances, or under MCR 2.407.

(B)-(D) [Unchanged.]

RULE 3.215. DOMESTIC RELATIONS REFEREES.

(A)-(C) [Unchanged.]

(D) Conduct of Referee Hearings.

(1)-(2) [Unchanged.]

(3) Testimony must be taken in person, except that~~,~~ ~~for good cause,~~ a referee may allow testimony to be taken by telephone for good cause, or under MCR 2.407.~~or other electronically reliable means.~~

(4) [Unchanged.]

(E)-(G) [Unchanged.]

[Because MCR 2.407 is a new rule, there is no underlined text.]

RULE 2.407. VIDEOCONFERENCING.

(A) Definitions. In this subchapter:

(1) "Participants" include, but are not limited to, parties, counsel, and subpoenaed witnesses, but do not include the general public.

(2) "Videoconferencing" means the use of an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers.

(B) Application.

(1) Subject to standards published by the State Court Administrative Office and the criteria set forth in subsection (C), a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court-scheduled civil proceeding.

(2) Subject to State Court Administrative Office standards, courts may determine the manner and extent of the use of videoconferencing technology.

(3) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(C) Criteria for Videoconferencing. In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

(1) The capabilities of the court's videoconferencing equipment.

(2) Whether any undue prejudice would result.

(3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.

(4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.

(5) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.

(6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

(7) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.

(9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.

(10) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.

(11) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.

(12) The proximity of the videoconferencing request date to the proposed appearance date.

(13) Any other factors that the court may determine to be relevant.

(D) Request for videoconferencing.

(1) A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by the State Court Administrative Office.

(2) A participant who requests the use of videoconferencing technology must provide the court with the videoconference dialing information and the participant's contact information in advance of the court date when videoconferencing technology will be used.

(3) There is no motion fee for requests submitted under this rule.

(E) Objections. The court shall rule on an objection to the use of videoconferencing under the factors set forth under subsection C.

(F) Mechanics of Videoconferencing. The use of any videoconferencing technology must be conducted in accordance with standards published by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.

Staff Comment: The new court rule allows courts to use videoconferencing in civil court proceedings (including domestic relations proceedings) upon request of a participant or sua sponte by the court, subject to specified criteria and standards published by the State Court Administrative Office (SCAO). Amendments of MCR 3.210 and MCR 3.215 provide cross references to the new court rule. Adoption of MCR 2.407 does not affect MCR 3.904, MCR 5.738a, and MCR 6.006. In addition, as relevant to the rule amendments in this order, Administrative Order No. 2014-25, also issued today, requires SCAO to adopt videoconferencing standards, and requires courts to comply with those standards.

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

Adopted December 22, 2014, effective January 1, 2015 (File No. 2014-42)—REPORTER.

On order of the Court, to coincide with the January 1, 2015, effective date of recent legislation, the Court has adopted amendments of Rules 6.006, 6.104, 6.110, and 6.111 of the Michigan Court Rules and new Rule 6.108 of the Michigan Court Rules to also take effect on January 1, 2015. Concurrently, the Court invites interested persons to comment on the form or the merits of the amendments 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 on the Administrative Matters & Court Rules page.

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

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

(B)-(D) [Unchanged.]

RULE 6.104. ARRAIGNMENT ON THE WARRANT OR COMPLAINT.

(A)-(D) [Unchanged.]

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

(1)-(3) [Unchanged.]

(4) set a date ~~within~~ for a probable cause conference not less than 7 days or more than ~~the next~~ 14 days after the date of arraignment and set a date for preliminary examination not less than 5 days or more than 7 days after the date of the probable cause conference;~~for the accused's preliminary examination and inform the accused of the date;~~

(5)-(6) [Unchanged.]

(F)-(G) [Unchanged.]

RULE 6.108. THE PROBABLE CAUSE CONFERENCE.

(A) Right to a probable Cause Conference. The

state and the defendant are entitled to a probable cause conference, unless waived by both parties. If the probable cause conference is waived, the parties shall provide written notice to the court and indicate whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.

(B) A district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking felony pleas and felony sentencings.

(C) The probable cause conference shall include discussions regarding a possible plea agreement and other pretrial matters, including bail and bond modification.

(D) The district court judge must be available during the probable cause conference to take felony pleas and consider requests for modification of bond.

(E) The probable cause conference for codefendants who are arraigned at least 72 hours before the probable cause conference shall be consolidated and only one joint probable cause conference shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

RULE 6.110. THE PRELIMINARY EXAMINATION.

(A) Right to Preliminary Examination. Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. If the court permits the defendant to waive the preliminary examination, it must bind the

defendant over for trial on the charge set forth in the complaint or any amended complaint. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. The preliminary examination for codefendants shall be consolidated and only one joint preliminary examination shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

(B) Time of Examination; Remedy.

(1) Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. If the parties consent, the court may adjourn the preliminary examination for a reasonable time. If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

(2) Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present. If victim testimony is taken as provided under this rule, the preliminary examination may proceed at the date originally set for that event.

(C) Conduct of Examination. A verbatim record must be made of the preliminary examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. ~~Except as otherwise provided by law, the court must conduct the examination in accordance with the~~

~~rules of evidence. A verbatim record must be made of the preliminary examination.~~

(D) Exclusionary Rules.

(1) The court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant.

(2) If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of

(~~1~~a)a prior evidentiary hearing, or

(~~2~~b)a prior evidentiary hearing supplemented with a hearing before the trial court, or

(~~3~~c)if there was no prior evidentiary hearing, a new evidentiary hearing.

(E) [Unchanged.]

(F) ~~Discharge of Defendant~~ No Finding of Probable Cause. If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial

officer and the prosecutor must present additional evidence to support the charge.

(G)-(I) [Unchanged.]

RULE 6.111. CIRCUIT COURT ARRAIGNMENT IN DISTRICT COURT.

(A) ~~If the defendant, the defense attorney, and the prosecutor consent on the record, t~~The circuit court arraignment may be conducted ~~and a plea of not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity may be taken~~ by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken.

(B)-(C) [Unchanged.]

~~(D) Each court intending to utilize this rule shall submit a local administrative order to the State Court Administrator pursuant to MCR 8.112(B) to implement the rule.~~

Staff Comment: The amendments of MCR 6.006, 6.104, 6.110, and 6.111 and adoption of new Rule 6.108 create procedural rules for conducting probable cause conferences and amend current provisions of the preliminary examination court rules to coordinate with 2014 PA 123 and 124.

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, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-42. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Adopted February 4, 2015, effective May 1, 2015 (File No. 2013-22)—REPORTER.

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

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(L) [Unchanged.]

(M) Postjudgment Motions. Except as provided in MCR 2.612, any postjudgment motion must be filed no later than 10 days after judgment enters.

(1) If the motion challenges a judgment for possession, the court may not grant a stay unless

(a) the motion is accompanied by an escrow deposit of 1 month's rent, or

(b) the court is satisfied that there are grounds for relief under MCR 2.612(C), and issues an order that waives payment of the escrow; such an order may be ex parte.

If a stay is granted, a hearing shall be held within 14 days after it is issued.

(2) If the judgment does not include an award of possession, the filing of the motion stays proceedings, but the plaintiff may move for an order requiring a bond to secure the stay. If the initial escrow deposit is believed inadequate, the plaintiff may apply for continuing adequate escrow payments in accord with sub-

rule (H)(2). The filing of a postjudgment motion together with a bond, bond order, or escrow deposit stays all proceedings, including an order of eviction issued but not executed.

(3) If a motion is filed to set aside a default money judgment, except when grounded on lack of jurisdiction over the defendant, the court may not grant the motion unless

(a) the motion is accompanied by an affidavit of facts showing a meritorious defense, and

(b) good cause is shown.

(N)-(O) [Unchanged.]

Staff Comment: This amendment of MCR 4.201 clarifies that a motion to set aside a default money judgment in a landlord/tenant case must be accompanied by an affidavit of facts showing a meritorious defense, and good cause must be shown. This is the standard for setting aside a default judgment under MCR 2.603(D)(1).

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 March 25, 2015, effective immediately (File No. 2014-49)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendments of Rules 3.903, 3.920, 3.961, and 3.965 of the Michigan Court Rules are adopted, effective immediately but pending public comment. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendments or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

RULE 3.903. DEFINITIONS.

(A) [Unchanged.]

(1)-(26) [Unchanged.]

(27) "Trial" means the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court. "Trial" also means a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court.

(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1) "Agency" means a public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of a child.

(2) "Amended petition" means a petition filed to correct or add information to an original petition, as defined in A(21), after it has been authorized, but before it is adjudicated.

(~~2~~-6) [Renumbered as (3) through (7) but otherwise unchanged.]

(8) "Nonrespondent parent" means a parent who is not named as a respondent in a petition filed under MCL 712A.2(b).

(~~7~~9)"Offense against a child" means an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code.

(8~~1~~0)"Placement" means court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency.

(9~~1~~1) "Prosecutor" or "prosecuting attorney" means the prosecuting attorney of the county in which the court has its principal office or an assistant to the prosecuting attorney.

(~~1~~0~~1~~2) Except as provided in MCR 3.977(B), "respondent" means the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child.

(13) "Supplemental petition" means:

(a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or

(b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or

(c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H).

(D)-(F) [Unchanged.]

RULE 3.920. SERVICE OF PROCESS.

(A) [Unchanged.]

(B) Summons.

(1) [Unchanged.]

(2) When Required. Except as otherwise provided in these rules, the court shall direct the service of a summons in the following circumstances:

(a) [Unchanged.]

(b) In a child protective proceeding, a summons must be served on ~~the~~any respondent and any nonrespondent parent. A summons may be served on a person having physical custody of the child directing such person to appear with the child for hearing. A ~~parent,~~guardian~~,~~ or legal custodian who is not a respondent must be served with notice of hearing in the manner provided by subrule (D).

(c) [Unchanged.]

(3) Content. The summons must direct the person to whom it is addressed to appear at a time and place specified by the court and must:

(a) identify the nature of hearing;

(b) explain the right to an attorney and the right to trial by judge or jury, including, where appropriate, that there is no right to a jury at a termination hearing;

(c) if the summons is for a child protective proceeding, include ~~a prominent~~ notice that the hearings could result in termination of parental rights of a respondent parent; and

(d) have a copy of the petition attached.

(4)-(5) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Amended and Supplemental Petitions.

(1) If a nonrespondent parent is being added as an additional respondent to a petition that has been authorized by the court under MCR 3.962 or MCR 3.965 against the first respondent parent, and the first respondent parent has not made a plea under MCR 3.971

or a trial has not been conducted under MCR 3.972, the allegations against the second respondent shall be filed in an amended petition.

(2) If a nonrespondent parent is being added as an additional respondent in a case in which a petition has been authorized under MCR 3.962 or MCR 3.965, and adjudicated by plea under MCR 3.971 or by trial under MCR 3.972, the allegations against the second respondent shall be filed in a supplemental petition.

(3) If either an amended or supplemental petition is not accompanied by a request for placement of the child or the child is not in protective or temporary custody, the court shall conduct a preliminary inquiry to determine the appropriate action to be taken on a petition. If either the amended or supplemental petition contains a request for removal, the court shall conduct a preliminary hearing to determine the appropriate action to be taken on the petition consistent with MCR 3.965(B). If the amended petition is authorized, the court shall proceed against each respondent parent in accordance with MCR 3.971 or MCR 3.972.

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(7) [Unchanged.]

(8) The court must advise a nonrespondent parent of his or her right to seek placement of his or her children in his or her home.

(~~8~~-13) [Renumbered as (9)-(14), but otherwise unchanged.]

(C)-(D) [Unchanged.]

Staff Comment: The amendments of MCR 3.903, 3.920, 3.961, and 3.965 were prompted by the Michigan Supreme Court's decision in *In re*

Sanders, 495 Mich 394 (2014), to provide clarification and procedural provisions consistent with the Court's holding in that case.

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 July 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-49. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Adopted May 27, 2015, effective September 1, 2015 (File No. 2013-35)—REPORTER.

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

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a)-(b) [Unchanged.]

(c) In a case tried without a jury, the appellant need not file a motion for remand or a motion for a new trial to challenge the great weight of the evidence in order to preserve the issue for appeal.

(d) [Unchanged.]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 7. 211(C)(1)(c) clarifies that an appellant, in a case tried without a jury, is not required to file a motion for remand or a motion for a new trial to challenge the great weight of the evidence to preserve the issue for appeal.

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 27, 2015, effective September 1, 2015 (File No. 2013-36)—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 current rules of Subchapter 7.300 of the Michigan Court Rules are rescinded and the following new rules are adopted to replace them, effective September 1, 2015.

RULE 7.301. ORGANIZATION AND OPERATION OF SUPREME COURT.

(A) Chief Justice. At the first meeting of the Supreme Court in each odd-numbered year, the justices shall select by majority vote one among them to serve as Chief Justice.

(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 pursuant to an order upon a showing of special cause.

(C) Supreme Court Clerk

(1) Appointment; General Provisions. The Supreme Court will appoint a clerk who shall keep the clerk's office in Lansing under the direction of the Court. Where the term "clerk" appears in this subchapter without modification, it means the Supreme Court clerk. The clerk may not practice law other than as clerk while serving as clerk.

(2) Duties. The clerk shall perform the following duties:

(a) Furnish bond before taking office. The bond must be in favor of the people of the state and in the penal sum of $10,000, approved by the Chief Justice and filed with the Secretary of State, and conditioned on the faithful performance of the clerk's official duties. The fee for the bond is a Court expense.

(b) Collect the fees provided for by statute or court rule.

(c) Deposit monthly with the State Treasurer the fees collected, securing and filing a receipt for them.

(d) Provide for the recording of Supreme Court proceedings as the Court directs.

(e) Care for and maintain custody of all records, seals, books, and papers pertaining to the clerk's office and filed or deposited there.

(f) Return the original record as provided in MCR 7.310(B) after an appeal has been decided by the Court.

(D) Deputy Supreme Court Clerks. The Supreme Court may appoint deputy Supreme Court clerks. A deputy clerk shall carry out the duties assigned by the clerk and perform the duties of the clerk if the clerk is absent or unable to act.

(E) Reporter of Decisions. The Supreme Court will appoint a reporter of decisions. The reporter shall

(1) prepare the decisions, including concurring and dissenting opinions, of the Supreme Court for publication;

(2) write a brief statement of the facts of each case and headnotes containing the points made;

(3) publish each opinion in advance sheets as soon as practicable; and

(4) publish bound volumes 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) Supreme Court Crier. The Supreme Court will appoint a court crier. The court crier shall

(1) have charge of the Supreme Court courtroom and the offices and other rooms assigned to the Supreme Court justices; and

(2) have the power to serve an order, process, or writ issued by the Supreme Court; collect the fee for that service allowed by law to sheriffs; and deposit monthly with the State Treasurer all the fees collected, securing a receipt for them.

RULE 7.303. JURISDICTION OF THE SUPREME COURT.

(A) Mandatory Review. The Supreme Court shall review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223 to 9.226).

(B) Discretionary Review. The Supreme Court may

(1) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305);

(2) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(3) issue an advisory opinion (see Const 1963, art 3, § 8 and MCR 7.308(B));

(4) respond to a certified question (see MCR 7.308(A));

(5) exercise superintending control over a lower court or tribunal (see MCR 7.306);

(6) exercise other jurisdiction as provided by the constitution or by law.

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A) What to File. To apply for leave to appeal, a party must file

(1) 4 copies of an application for leave to appeal (1 signed) prepared in conformity with MCR 7.212(B) and consisting of the following:

(a) a statement identifying the judgment or order appealed and the date of its entry;

(b) the questions presented for review related in concise terms to the facts of the case;

(c) a table of contents and index of authorities conforming to MCR 7.212(C)(2) and (3);

(d) a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6);

(e) a concise argument, conforming to MCR 7.212(C)(7), in support of the appellant's position on each of the stated questions and establishing a ground for the application as required by subrule (B); and

(f) a statement of the relief sought.

(2) 4 copies 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 copies of the

opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(3) proof that a copy of the application was served on all other parties, and that a notice of the filing of the application was served on the clerks of the Court of Appeals and the trial court or tribunal; and

(4) the fee provided by MCR 7.319(C)(1).

(B) Grounds. The application must show that

(1) the issue involves a substantial question about the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves a legal principle of major significance to the state's jurisprudence;

(4) in an appeal before a decision of the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from 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 branches of state government is invalid;

(5) in an appeal of a decision of the Court of Appeals,

(a) the decision is clearly erroneous and will cause material injustice, or

(b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

(C) When to File.

(1) Before Court of Appeals Decision. In an appeal before the Court of Appeals decision, the application must be filed within 42 days after

(a) a claim of appeal is filed in the Court of Appeals;

(b) an application for leave to appeal is filed in the Court of Appeals;

(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) After Court of Appeals Decision. 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 appeal,

(b) the Court of Appeals order denying a timely filed motion for reconsideration, or

(c) the Court of Appeals order granting a motion to publish an opinion that was originally released as unpublished.

(3) Attorney Discipline Board Decision. In an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board, the application must be filed within the time provided in MCR 9.122(A)(1).

(4) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and the appellant is an inmate in the custody of the Michigan Department of

Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.

(5) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave to appeal may be filed within 28 days in termination of parental rights cases, 42 days in other civil cases, and 56 days in criminal cases, after the date of

(a) the Court of Appeals order or opinion remanding the case,

(b) the Court of Appeals order denying a timely filed motion for reconsideration of a decision remanding the case, or

(c) the Court of Appeals order or opinion disposing of the case following the remand procedure, in which case an application may be made on all issues raised initially in the Court of Appeals, as well as those related to the remand proceedings.

(6) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(7) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal the decision on the merits.

(D) Answer. Any party may file 4 copies of an answer (1 signed) within 28 days of service of the application. The party must file proof that a copy of the answer was served on all other parties.

(E) Reply. A reply may be filed as provided in MCR 7.212(G).

(F) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a party who filed a pleading 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.

(G) Submission and Argument. Applications for leave to appeal may be submitted for a decision after the reply brief has been filed or the time for filing such has expired, whichever occurs first. There is no oral argument on an application for leave to appeal unless ordered by the Court under subrule (H)(1).

(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 copies to the parties and to the Court of Appeals clerk.

(2) Appeal Before Court of Appeals Decision. If leave to appeal is granted before a decision of the Court of Appeals, the appeal is thereafter pending in the Supreme Court only, and subchapter 7.300 applies.

(3) Appeal After Court of Appeals Decision. If leave to appeal is denied after a decision of the Court of Appeals, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms. If leave to appeal is granted, jurisdiction over the case is vested in the Supreme Court, and subchapter 7.300 applies.

(4) Issues on Appeal.

(a) Unless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal.

(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 briefs and appendixes.

(I) Stay of Proceedings. MCR 7.209 applies to appeals in the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(4), it operates to stay proceedings pending

disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or the Court of Appeals.

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 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 copies 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 copies 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 was served on the defendant; and

(4) the fee provided by MCR 7.319(C)(1).

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 days of notice of the complaint:

(1) Four copies of an answer and a brief (1 signed) conforming 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) Proof that a copy of the answer was served on the plaintiff.

(D) Reply. 4 copies of a reply brief (1 signed) may be filed as provided in MCR 7.212(G).

(E) Actions Against Attorney Grievance Commission; Confidentiality. The clerk shall keep the file in an action against the Attorney Grievance Commission or the grievance administrator confidential and not open to the public if it appears that the complaint relates to matters that are confidential under MCR 9.126. In the answer to a complaint, the grievance administrator shall certify to the clerk whether the matters involved in the action are deemed confidential under MCR 9.126. The protection provided in MCR 9.126 continues unless and until the Court orders otherwise.

(F) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a plaintiff who filed a 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.

(G) Submission and Argument. Original proceedings may be submitted for a decision after 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 original complaints unless ordered by the Court.

(H) Decision. The Court may set the case for argument as on leave granted, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted.

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 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) Alternative arguments; new or different relief. A party is not required to file a cross-appeal to advance alternative arguments in support of the judgment or order appealed. A cross-appeal is required to seek new or different relief than that provided by the judgment or order appealed.

RULE 7.308. CERTIFIED QUESTIONS AND ADVISORY OPINIONS.

(A) Certified Questions.

(1) From Michigan Courts.

(a) Whenever a 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) If any question is not properly stated or if sufficient facts are not given, the Court may require a further and better statement of the question or of the facts.

(c) The Court shall render its decision on a certified question in the ordinary form of an opinion, to be published with other opinions of the Court.

(d) After the decision of the Court has been sent, the court or tribunal will proceed with or dispose of the case in accordance with the Court's answer.

(2) From Other Courts.

(a) When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.

(b) A certificate may be prepared by stipulation or at the certifying court's direction, and must contain

(i) the case title;

(ii) a factual statement; and

(iii) the question to be answered.

The presiding judge must sign it, and the clerk of the federal, other state, or tribal court must certify it.

(c) With the certificate, the parties shall submit

(i) briefs conforming with MCR 7.312;

(ii) a joint appendix conforming with MCR 7.312(D); and

(iii) a request for oral argument on the title page of the pleading, if oral argument is desired.

(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.

(3) Submission and Argument. Certified questions may be submitted for a decision after receipt of the question. Oral argument of 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.

(B) Advisory Opinion.

(1) Form of 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 copies of the request (1 signed) and supporting documents are to be filed.

(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 copies of the brief (1 signed), which must conform as nearly as possible to MCR 7.212(B) and (C).

(3) Submission and Argument. Advisory opinions may be submitted for a decision after the brief in support of the advisory opinion request has been filed. There is no oral argument on a request for an advisory opinion unless ordered by the Court.

(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 clerk all papers 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 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 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 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) Stipulations. The parties may stipulate in writing regarding any matter constituting the basis for an application for leave to appeal or regarding any matter relevant to a part of the record on appeal.

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 copies of a motion (1 signed), except as otherwise provided in this rule, stating briefly but distinctly the grounds on which it 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 opposing party; and

(3) the fee provided by MCR 7.319(C)(2) or (3).

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 on Tuesday of each week at least 14 days after they are filed, but administrative orders (e.g., on 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 answer may be filed at any time before an order is entered on the motion.

(D) Motion to Seal File. Except as otherwise provided by statute or court rule, the procedure for sealing a Supreme Court file is governed by MCR 8.119(I). Materials that are subject to a motion to seal a file in whole or in part shall be held under seal pending the Court's disposition of the motion.

(E) Motion for Immediate Consideration or to Expedite Proceedings. A party may move for immediate consideration of a motion or to expedite any proceeding before the Court. The motion or an accompanying affidavit must identify the manner of service of the motion on the other parties and explain why immediate consideration of the motion or expedited scheduling of

the proceeding is necessary. If the motion is granted, the Court will schedule an earlier hearing or render an earlier decision on the matter.

(F) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed

(a) 14 copies of a motion (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.

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 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 copies of the motion (1 signed), in accordance with subrule (F)(1)(a); and

(b) proof that a copy was served on the other parties.

(4) Unless ordered by the Court, there is no oral argument on a motion for rehearing.

(5) The clerk shall refuse to accept for filing a late-filed motion for rehearing or a motion for reconsideration of an order denying a motion for rehearing.

(G) Motion for Reconsideration. To move for reconsideration of a court order, a party must file the items required by subrule (A) within 21 days after the date of certification of the order. The motion shall include all facts, arguments, and citations to authorities in a single document and shall not exceed 10 double-spaced pages. A copy of the order for which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3). The clerk shall refuse to accept for filing a late-filed motion or a motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

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). 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) Citation of Record; Summary of Arguments; Length of Briefs.

(1) A party's statement of facts or counterstatement of facts shall provide the appendix page numbers of the transcript pages, pleadings, or other documents being cited or referred to.

(2) If the argument of any one issue in a brief exceeds 20 pages, a summary of the argument must be included. The summary must be a succinct, accurate, and clear condensation of the argument actually

made in the body of the brief and may not be a mere repetition of the headings under which the argument is arranged.

(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]

_____

Plaintiff-[Appellant or Appellee],

v Docket No. _____

_____

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.

(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 court or tribunal and the Court of Appeals arranged in a single column;

(b) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order being appealed;

(c) any relevant finding or opinion of the trial court;

(d) any relevant portions of the pleadings or other parts of the record; and

(e) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction.

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) The stipulation to use a joint appendix may provide that either party may file, as a supplemental appendix, any additional portion of the record not covered by the joint appendix.

(4) Appellee's Appendix. An appendix, entitled "Appellee's Appendix," may be filed. The appellee's appendix must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due within 56 days after the leave to appeal is granted;

(2) the appellee's brief and appendixes, if any, are due within 35 days after the appellant's brief is served on the appellee; and

(3) the reply brief is due within 21 days after the appellee's brief is served on the appellant.

(F) What to File. The parties shall

(1) file 14 copies of a brief (1 signed) and appendixes with the clerk;

(2) serve 2 copies on each attorney who has appeared in the case for a separate party or group of parties and on each party who has appeared in person;

(3) serve 1 copy on the Attorney General in a criminal case or in a case in which the state is a named or interested party; and

(4) file a proof of service with the clerk.

(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 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 of the cross-appellant's brief. A reply to the cross-appeal may be filed within 21 days of the responsive brief.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2).

(2) A motion for leave to file an amicus curiae brief is not required if the brief is presented by the Attorney General on behalf of the people of the state of Michigan, the state of Michigan, or an agency or official of the state of Michigan; on behalf of any political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and must be filed within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired, or at any other time the Court directs.

(4) An amicus curiae may not participate in oral argument except by Court order.

(I) Supplemental Authority. A party may file a supplemental authority as provided in MCR 7.212(F).

(J) Extending or Shortening Time; Failure to File; Forfeiture of Oral Argument.

(1) The time provided for filing and serving the briefs and appendixes may be shortened or extended by order of the Court on its own initiative or on motion of a party.

(2) If the appellant fails to file the brief and appendix within the time required, the Court may dismiss the case and award costs to the appellee or affirm the judgment or order appealed.

(3) A party filing a brief late forfeits the right to oral argument.

RULE 7.313. SUPREME COURT CALENDAR.

(A) Definition. A case in which leave to appeal has been granted, or a case initiated in the Supreme Court that the Court determines will be argued at a monthly session, is termed a "calendar case."

(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 will be argued 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) Except on order of the Court, a party who has not specifically requested oral argument on the title page of its brief or has forfeited argument by not timely filing

its brief is not entitled to oral argument unless it files a motion for oral argument at least 21 days before the first day of the monthly session. If neither party is entitled to oral argument, the clerk will list the case as submitted on briefs. The Court may direct that a case be submitted on briefs without oral argument even when a party would otherwise be entitled to oral argument.

(C) Arrangement of Calendar. At least 21 days before the first day of the monthly session, the clerk will place cases on the session calendar and arrange the order in which they are to be heard. The cases will be called and heard in that order except as provided in subrule (D).

(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 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 party may file a supplemental brief. 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 7.314. CALL AND ARGUMENT OF CASES.

(A) Call; Notice of Argument; Adjournment From Call. The Court, on the first day of each monthly session, will call the cases for argument in the order they stand on the calendar as arranged in accordance with MCR 7.313(C), and proceed from day to day during the session in the same order. A case may not be adjourned after being placed on the call, except on a showing of extreme emergency. A case may be submitted on briefs by stipulation at any time.

(B) Argument.

(1) In a calendar case in which both sides are entitled to oral argument, the time allowed for argument is 30 minutes for each side unless the Court orders otherwise. When only one side is scheduled for oral argument, 15 minutes is allowed unless the Court orders otherwise.

(2) In a case being argued on the application for leave to appeal under MCR 7.305(H)(1), each side that is entitled to oral argument is allowed 15 minutes to argue unless the Court orders otherwise.

The time for argument may be extended by Court order on motion of a party filed at least 14 days before the session begins or by the Chief Justice during the argument.

RULE 7.315. OPINIONS, ORDERS, AND JUDGMENTS.

(A) Opinions of Court. An opinion must be written and bear the authoring justice's name or the label "Per Curiam" or "Memorandum Opinion." Each justice deciding a case must sign an opinion. Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Court must be made by concurrence of a majority of the justices voting.

(B) Filing and Publication. The Court shall file a signed opinion with the clerk, who shall stamp the date of filing on it. The reporter of decisions is responsible for having the opinions printed in a form and under a contract approved by the Court in accordance with MCR 7.301(E).

(C) Orders or Judgments Pursuant to Opinions.

(1) Entry. The clerk shall enter an order or judgment pursuant to an opinion as of the date the opinion is filed with the clerk.

(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 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 or judgment.

(b) If a motion for rehearing is timely filed, the clerk shall fulfill the responsibilities under subrule (C)(2)(a) promptly after the Court denies the motion or, if the motion is granted, enter a new order or judgment after the Court's decision on rehearing.

(3) Exceptional Issuance. The Court may direct the clerk to dispense with the time requirement of subrule (C)(2)(a) and issue the order or judgment when its opinion is filed. An order or judgment issued under this subrule does not preclude the filing of a motion for rehearing, but the filing of a motion does not stay execution or enforcement.

(4) Execution or Enforcement. Unless otherwise ordered by the Court, an order or judgment is effective when it is issued under subrule (C)(2)(a) or (b) or (C)(3), and enforcement is to be obtained in the trial court.

(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 certified copy to each party, to the Court of Appeals, and to the lower 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. The Supreme Court may, at any time, in addition to its general powers

(1) exercise any or all of the powers of amendment of the court or tribunal below;

(2) on reasonable notice as it may require, allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause; allow new parties to be added or parties to be dropped; or allow parties to be rearranged as appellants or appellees;

(3) permit the reasons or grounds of appeal to be amended or new grounds to be added;

(4) permit the transcript or record to be amended by correcting errors or adding matters that should have been included;

(5) adjourn the case until further evidence is taken and brought before it;

(6) draw inferences of fact;

(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.

(B) Allowing Act After Expiration of Time. When, under the practice relating to appeals or stay of proceedings, a nonjurisdictional act is required to be done within a designated time, the Court may at any time, on motion and notice, permit it to be done after the expiration of the period on a showing that there was good cause for the delay or that it was not due to the culpable negligence of the party or attorney. The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C), a late application for leave to cross-appeal under MCR 7.307(A), a late motion for rehearing under MCR 7.311(F), or a late motion for reconsideration under MCR 7.311(G).

(C) Vexatious Proceedings.

(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 any of the proceedings in an appeal was vexatious because

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case 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.

(2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the

vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The Court may remand the case to the trial court or tribunal for a determination of actual damages.

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 the time for filing the brief, or if the appellant fails to 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 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 an order dismissing an action under this rule will be sent to the parties and the 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 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) Dismissal for Lack of Jurisdiction. The Court may dismiss an appeal, application, or an original proceeding for lack of jurisdiction at any time.

RULE 7.318. VOLUNTARY DISMISSAL.

The parties may file with the clerk a stipulation agreeing to the 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) Rules Applicable. The procedure for taxation of costs in the Supreme Court is as provided in MCR 7.219.

(B) Expenses Taxable. Unless the Court otherwise orders, a prevailing party may tax only the reasonable costs incurred in the Supreme Court, including an amount not to exceed $2 per original page for the necessary expense of printing the briefs and appendixes required by these rules.

(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) $375 for an application for leave to appeal or an original action;

(2) $150 for a motion for immediate consideration or a motion to expedite appeal, except that a prosecuting attorney is exempt from paying a fee under this subdivision in an appeal arising out of a criminal proceeding if the defendant is represented by a court-appointed lawyer;

(3) $75 for all other motions;

(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) $5 for certified docket entries; and

(6) $1 for certification of a copy presented to the clerk.

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) Violation of Rules. The Supreme Court may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules.

Staff Comment: These new rules of the Michigan Supreme Court were designed to more closely follow the style of rules used in the Court of Appeals, thereby making practice and procedure more similar in the two 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.

Adopted May 27, 2015, effective September 1, 2015 (File No. 2014-37)—REPORTER.

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

RULE 3.963. ACQUIRING PHYSICAL CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1) Order to Take Child into Protective Custody. The court may issue a written order, electronically or otherwise, authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, after presentment of a petition or affidavit of facts to

the court, the court has reasonable cause to believe that all the following conditions exist, together with specific findings of fact:

(a) [Unchanged.]

(b) The circumstances warrant issuing an order pending ~~the~~a hearing in accordance with:

(i) MCR 3.965 for a child who is not yet under the jurisdiction of the court, or

(ii) MCR 3.974(C) for a child who is already under the jurisdiction of the court under MCR 3.971 or 3.972.

(c)-(e) [Unchanged.]

(2) [Unchanged.]

(3) The court shall inquire whether a member of the child's immediate or extended family is available to take custody of the child pending a preliminary hearing, or an emergency removal hearing if the court already has jurisdiction over the child under MCR 3.971 or MCR 3.972, whether there has been a central registry clearance, and whether a criminal history check has been initiated.

(4) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.966. OTHER PLACEMENT REVIEW PROCEEDINGS.

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

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

(2) If the child is removed from the home and

disposition is not completed, the ~~progress of the child must be reviewed no later than 182 days from the date the child was removed from the home~~court shall conduct a dispositional hearing in accordance with MCR 3.973.

(B)-(C) [Unchanged.]

RULE 3.974. ~~Post-Dispositional~~ Procedures~~:~~ for Child at Home; Petition Authorized.

(A) Review of Child's Progress.

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

(2) Time. If the child was never removed from the home, the progress of the child must be reviewed no later than 182 days from the date the petition was ~~filed~~authorized and no later than 91 days after that for the first year that the child is subject to the jurisdiction of the court. After that first year, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding hearing until the court terminates its jurisdiction. The review shall occur no later than 182 days after the child returns home when the child is no longer in foster care. If the child was removed from the home and subsequently returned home, review hearings shall be held in accordance with MCR 3.975.

(3) Change of Placement. Except as provided in subrule (~~B~~C), the court may not order a change in the placement of a child ~~solely on the basis of a progress review~~without a hearing. If the child ~~over~~for whom the court has ~~retained jurisdiction~~authorized a petition remains at home ~~following the initial dispositional hearing~~ or has otherwise returned home from foster

care, and it comes to the court's attention at a review hearing held pursuant to subrule (A)(2), or as otherwise provided in this rule, that the child should be removed from the home, the court ~~must conduct a hearing before it~~ may order the placement of the child. If the court orders the child to be placed out of the home following a review hearing held pursuant to subrule (A)(2), the parent must be present and the court shall comply with the placement provisions in MCR 3.965(C). If the parent is not present, the court shall proceed under subrule (C) before it may order removal.~~Such a hearing must be conducted in the manner provided in MCR 3.975(E), except as otherwise provided in this subrule for Indian children.~~ If the child is an Indian child, in addition to ~~the~~a hearing ~~prescribed by this~~held in accordance with this rule~~subrule~~, the court must also conduct a removal hearing in accordance with MCR 3.967 before it may order the placement of the Indian child.

(B) Hearing on Petition for Out-of-Home Placement.

(1) Preadjudication. If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965 is not yet under the jurisdiction of the court and an amended petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition in accordance with MCR 3.965.

(2) Postadjudication. If a child is under the jurisdiction of the court and a supplemental petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921. Unless the child remains in the home, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied. If the

court orders that the child be placed out of the home, the court shall proceed under subrule (D).

(~~B~~C)Emergency Removal; Protective Custody.

(1) General. If ~~the~~a child~~; over~~for whom the court has ~~retained jurisdiction~~authorized an original petition remains at home ~~following the initial dispositional hearing~~ or ~~has otherwise~~ is returned home ~~from foster care~~following a hearing pursuant to the rules in this subchapter, the court may order the child to be taken into protective custody pending an emergency removal hearing pursuant to the conditions listed in MCR 3.963(B)(1) and upon receipt, electronically or otherwise, of a petition or affidavit of fact. If the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical damage or harm to the child.

(2) Notice. The court shall ensure that the parties are given notice of the emergency removal hearing as provided in MCR 3.920 and MCR 3.921.

(3) Emergency Removal Hearing. If the court orders the child to be taken into protective custody ~~pursuant to~~under MCR 3.963, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian.

(a) Preadjudication. If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965 is not

yet under the jurisdiction of the court, the emergency removal hearing shall be conducted in the manner provided by MCR 3.965.

(b) Postadjudication. If a child is under the jurisdiction of the court, ~~Unless~~unless the child is returned to the parent pending disposition or~~the~~ dispositional review, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied. The parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian.

~~(a) At the emergency removal hearing, t~~The respondent parent, guardian, or legal custodian from whom the child is removed must receive a written statement of the reasons for removal and be advised of the following rights at a hearing to be held under subrule (D):

(i) to be represented by an attorney at the ~~dispositional review~~ hearing;

(ii) to contest the continuing placement at the ~~dispositional review~~ hearing within 14 days; and

(iii) to use compulsory process to obtain witnesses for the ~~dispositional review~~ hearing.

~~(b) At an emergency removal hearing, the parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian.~~

(~~C~~D)~~Dispositional Review Hearing;~~ Procedure Following Postadjudication Out-of-Home Placement. If the

child is in placement ~~pursuant to~~under subrule (B)(2) or (C)(3)(b), the court shall proceed as follows:

(1) If the court has not held a dispositional hearing under MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.

(2) If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

Staff Comment: The amendments of MCR 3.963, 3.966, and 3.974 provide clarity regarding procedures to be followed when an emergency removal of a child has occurred but a dispositional hearing has not been held.

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 27, 2015, effective immediately (File No. 2014-42)—REPORTER.

By order dated December 22, 2014, the Court adopted an order amending Rules 6.006, 6.104, 6.110, and 6.111 of the Michigan Court Rules and adopted new Rule 6.108 of the Michigan Court Rules, effective January 1, 2015. Notice and an opportunity for public comment having been provided, the amendments of these rules and new Rule 6.108 are retained.

On further order of the Court, effective immediately, the Court adopted additional amendments of Rules 6.108 and Rule 6.110 of the Michigan Court Rules.

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

RULE 6.108 THE PROBABLE CAUSE CONFERENCE.

(A) [Unchanged.]

(B) A district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking ~~felony~~ pleas and ~~felony sentencings~~ imposing sentences unless permitted by statute to take pleas or impose sentences.

(C) [Unchanged.]

(D) The district court judge must be available during the probable cause conference to take ~~felony~~ pleas~~, and~~ consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim.

(E) [Unchanged.]

RULE 6.110. THE PRELIMINARY EXAMINATION.

(A) Right to Preliminary Examination. Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. ~~If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint.~~ The defendant may waive the preliminary examination with the consent of the prosecuting attorney. Upon waiver of the preliminary examination, the

court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint. The preliminary examination for codefendants shall be consolidated and only one joint preliminary examination shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

(B) Time of Examination; Remedy.

(1) [Unchanged.]

(2) Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination ~~may proceed~~ will be continued at the date originally set for that event.

(C) Conduct of Examination. A verbatim record must be made of the preliminary examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence.

(D)-(I) [Unchanged.]

Staff Comment: The Court retained the amendments that became effective January 1, 2015, and adopted additional amendments of MCR 6.108 and MCR 6.110 to provide further clarification as suggested in comment letters received by the 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.

AMENDMENTS OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted February 4, 2015, effective immediately (File No. 2015-03)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendment of Rule 1.15 of the Michigan Rules of Professional Conduct is adopted, effective immediately and pending public comment. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

[The revised text is indicated in underlining.]

RULE 1.15. SAFEKEEPING PROPERTY.

(a) Definitions.

(1) [Unchanged.]

(2) An "eligible institution" for IOLTA accounts is a bank<u>, credit union,</u> or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and

Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.

(3)-(5) [Unchanged.]

(b)-(j) [Unchanged.]

Staff Comment: The amendment of MRPC 1.15 adds "credit union" to the definition of "eligible institution" for deposit of IOLTA funds. This change reflects a recent federal statutory amendment that extends federal insurance protection to IOLTA deposits held in credit unions. PL 113-252.

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 June 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

SUPREME COURT CASES

DUPREE v AUTO-OWNERS INSURANCE CO

Docket No. 147647. Decided November 18, 2014.

Michele Dupree brought an action in the Wayne Circuit Court against Auto-Owners Insurance Company, seeking to recover, under her homeowners' insurance policy, the full cost of repair or replacement for the personal property that was destroyed in a fire at her home. Because the parties did not agree on the extent of the personal property loss, the parties submitted separate appraisals to an umpire under the process set forth in the insurance policy as mandated by MCL 500.2833(1)(m). The umpire issued an appraisal award that set forth the full replacement cost, the applicable depreciation, and the actual cash value loss of the property. Defendant paid plaintiff the actual cash value of the property but refused to pay the full replacement cost on the ground that plaintiff had failed to submit proof, in accordance with the replacement-cost provision of her insurance policy, that she had actually replaced the damaged property. The court, Daniel P. Ryan, J., denied defendant's motion for summary disposition and granted summary disposition to plaintiff under MCR 2.116(I)(2), and defendant appealed as of right. The Court of Appeals, STEPHENS, P.J., and WILDER and OWENS, JJ., affirmed in an unpublished opinion per curiam issued July 18, 2013 (Docket No. 310405), holding that the umpire's appraisal award under MCL 500.2833(1)(m) was conclusive with regard to the amount of loss and that, because the award constituted a judgment, it superseded the policy's replacement-cost provision. Defendant appealed.

In an opinion per curiam signed by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Plaintiff was not entitled to the full replacement cost of her property. Although judicial review of appraisal awards under MCL 500.2833(1)(m) is generally limited to instances of bad faith, fraud, misconduct, or manifest mistake, that deference was inapplicable because the award at issue could not be read as a conclusive judgment for replacement cost. Therefore, the terms of the replacement-cost provision in plaintiff's homeowners' policy con-

trolled the scope of her appraisal award. Because plaintiff failed to submit proof of actual loss in accordance with that provision, defendant was liable for only the actual cash value of plaintiff's damaged personal property.

Court of Appeals' judgment reversed; case remanded to the Wayne Circuit Court for entry of an order vacating its ruling in plaintiff's favor and granting summary disposition in favor of defendant.

Justice CAVANAGH would have denied the application for leave to appeal.

INSURANCE — FIRE INSURANCE CONTRACTS — MANDATORY PROVISIONS — APPRAISALS — JUDICIAL REVIEW.

An award issued pursuant to an appraisal that was conducted under the provision of a fire insurance policy mandated by MCL 500.2833(1)(m) is conclusive with regard to the amount of loss and, absent bad faith, fraud, misconduct, or manifest mistake, the terms of the appraisal award will supersede the terms of the insurance policy; if an appraisal award is judicially determined to be inconclusive with regard to the amount awarded, the terms of the insurance policy control the scope of the award.

Mark Granzotto, PC (by *Mark Granzotto*), for plaintiff.

Conlin, McKenney & Philbrick, PC (by *W. Daniel Troyka*), for defendant.

PER CURIAM. After her home and much of its contents were damaged by fire, plaintiff sought coverage under the terms of a homeowners insurance policy issued by defendant. Although the parties were able to settle plaintiff's claim for damages to her dwelling, they were unable to agree on the extent of the loss incurred to plaintiff's personal property. Consequently, the parties invoked the policy's fire loss appraisal provision, which provided in relevant part as follows:

> If **you** and **we** [defendant] fail to agree on the actual cash value or amount of loss covered by this policy, either party may make written demand for an appraisal. . . .

> The appraisers shall then appraise the loss, stating separately the actual cash value and loss to each item. If the appraisers submit a written report of an agreement to **us** [defendant], the amount agreed upon shall be the actual cash value or amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the actual cash value or amount of loss.[1]

After the parties' respective appraisers submitted their differences, the umpire issued an appraisal award, which read in pertinent part:

> We the undersigned, pursuant to the within appointment, DO HEREBY CERTIFY that we truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined and do hereby award as the Actual Cash Value of said property on the 12th day of August 2005 and the amount of loss thereto by the fire on the [sic] that day, the following sums, to wit:
>
> (1) THE FULL COST OF REPAIR OR REPLACEMENT IS $167,923.60
>
> (2) APPLICABLE DEPRECIATION $39,673.48
>
> (3) THE ACTUAL CASH VALUE LOSS IS ... $128,250.12

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[1] This appraisal process is statutorily mandated by MCL 500.2833(1)(m), which states:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
>
> * * *
>
> (m) That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. . . . The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. . . .

Defendant compensated plaintiff $128,250.12 for the actual cash value of her damaged personal property, but it refused to pay the additional depreciation amount of $39,673.28 on the basis that plaintiff had failed to comply with the policy's replacement cost provision, which provided that, as a prerequisite to payment, plaintiff submit proof that she actually replaced her damaged personal property:

> If the full cost to replace all damaged covered property under the provisions of this section exceeds $500, **we** [defendant] will pay no more than the actual cash value of such property until actual repair or replacement of such property is completed. Actual cash value includes a deduction for depreciation.[2]

Plaintiff sued to recover the additional depreciation amount and the circuit court granted summary disposition in her favor. The Court of Appeals affirmed. *Dupree v Auto-Owners Insurance Company*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2013 (Docket No. 310405).

The sole issue before this Court is whether plaintiff's appraisal award entitled her to only the actual cash value of her damaged personal property or whether defendant is liable for the full replacement cost of that property, i.e., actual cash value plus the applicable depreciation amount.

To determine the extent of defendant's liability, it is necessary to ascertain the scope of the appraisal award. While matters of *coverage* under an insurance agree-

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[2] The propriety of this provision is not in dispute as it was authorized by MCL 500.2826, which reads in pertinent part:

> A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site.

ment are generally determined by the courts, the *method* of determining the loss is a matter reserved for the appraisers.[3] And because the statutorily mandated appraisal process set forth in MCL 500.2833(1)(m) is regarded as a "substitute for judicial determination of a dispute concerning the amount of a loss,"[4] "the amount of loss attributable to personal property damage, as determined by the appraisers, is conclusive."[5] Given this conclusiveness, judicial review of an appraisal award is therefore "limited to instances of bad faith, fraud, misconduct, or manifest mistake."[6] Applying these principles to the facts in this case, if the appraisal award is read as awarding plaintiff the replacement cost of her damaged property, then the award is conclusive in that respect and, absent bad faith, fraud, misconduct, or manifest mistake, it will supersede the insurance policy's replacement cost provision. If, however, the appraisal award is viewed as involving a matter of coverage under the insurance contract, then the award is not afforded conclusive effect, the policy language is not beyond the scope of judicial review, and the limiting terms of the insurance policy's replacement cost provision will remain determinative.

A plain reading of the appraisal award does not support the lower courts' determination that plaintiff is entitled to the full replacement cost of her damaged personal property, particularly where the informing

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[3] See *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 487; 476 NW 2d 467 (1991); MCL 500.2833(1)(m).

[4] *Kwaiser*, 190 Mich App at 486, quoting *Thermo-Plastics R & D, Inc v Gen Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972).

[5] *Kwaiser*, 190 Mich App at 488.

[6] *Id*. at 486, citing *Port Huron & N R Co v Callanan*, 61 Mich 22, 26; 34 NW 678 (1887); *Davis v Nat'l American Ins Co*, 78 Mich App 225, 232; 259 NW2d 433 (1977).

language states, "We . . . do hereby award as *the Actual Cash Value* of said property . . ." (emphasis added). Indeed, if any part of the appraisal award constitutes a binding and conclusive judgment, it is the part that awards plaintiff the actual cash value of her damaged property. While we are mindful that review of appraisal awards is especially limited, that deference is inapplicable because the issue here pertains to a condition *precedent* that has not been met under the terms of the insurance policy, namely, submission of proof of actual loss. Accordingly, before it can be determined that the appraisal award constituted a conclusive judgment for replacement cost that superseded the insurance policy's replacement cost provisions, there is the preliminary question concerning whether the appraisal award entitled plaintiff to the replacement cost or the actual cash value of her damaged personal property.

Because the appraisal award cannot be read as a "conclusive" judgment for replacement cost, the terms of the replacement cost provision under the insurance policy control the scope of plaintiff's appraisal award. Consequently, plaintiff's failure to submit proof of actual loss in accordance with that provision entitles her to only the actual cash value of her damaged personal property. In lieu of granting defendant's application for leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order vacating its ruling in plaintiff's favor and granting summary disposition in favor of defendant.

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

CAVANAGH, J. I would deny the application for leave to appeal.

YOUNKIN V ZIMMER

Docket No. 149355. Decided November 18, 2014.

Lawrence Younkin brought an action in the Genesee Circuit Court against Michael Zimmer, who was at that time the Executive Director of the Michigan Administrative Hearing System, and Steven Hilfinger, who was at that time the Director of the Department of Licensing and Regulatory Affairs. Plaintiff had injured his back while working in Flint and sought workers' compensation benefits. In September 2012, Zimmer had announced new efforts to reorganize the Michigan Administrative Hearing System, including closing the Flint office that previously handled workers' compensation claims in that area and transferring those claims to an office in Dimondale, approximately 70 miles away in Eaton County. In his action, plaintiff sought a writ of mandamus compelling defendants to maintain the Genesee County hearing site. The court, Geoffrey L. Neithercut, J., issued the writ, and defendants appealed. The Court of Appeals, M. J. KELLY, P.J., and FORT HOOD, J. (CAVANAGH, J., dissenting), affirmed, holding that the trial court had not abused its discretion. 304 Mich App 719 (2014). Defendants sought leave to appeal.

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

The trial court abused its discretion by issuing a writ of mandamus compelling defendants to hold the hearing in Genesee County. To obtain a writ of mandamus, the plaintiff must show that he or she has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform it. MCL 418.851 provides that a workers' compensation hearing must be held at the locality where the injury occurred. Defendants, in their official capacities as administrators of the workers' compensation hearing system, interpreted the term "locality" as meaning a district or a definite region. This interpretation was entitled to respectful consideration. Because it did not conflict with the Legislature's intent, there were no cogent reasons to overrule it. In accordance with their interpretation of the term, defendants divided the state into 11 reasonably located hearing districts, and workers' compensa-

tion claims were assigned from definite regions of the state to one of those hearing district offices depending on where the injury occurred. Nothing in the Worker's Disability Compensation Act, MCL 418.101 *et seq*., requires that there be a hearing site in every county. While the hearing should be held at a place convenient for parties and their witnesses, it was not unreasonable to conclude that the locality where the injury occurred in this case was Dimondale given the injury occurred in Genesee County and that county falls within the Dimondale district. Although having the hearing in the latter rather than in the former venue would doubtlessly be less convenient for plaintiff, this would not constitute an unreasonable inconvenience. Accordingly, plaintiff did not have a clear legal right to a hearing in Genesee county, and defendants did not have a clear legal obligation to hold the hearing there.

Reversed and remanded.

WORKERS' COMPENSATION — HEARINGS — LOCATION — PLACE WHERE THE INJURY OCCURRED.

MCL 418.851 provides that a workers' compensation hearing must be held at the locality where the injury occurred, but the Worker's Disability Compensation Act, MCL 418.101 *et seq*., does not require that there be a hearing site in every county; rather, the state may be divided into several reasonably located hearing districts, with workers' compensation claims assigned from definite regions of the state to one of those hearing district offices depending on where the injury occurred.

MacDonald & MacDonald, PLLC (by *Robert J. MacDonald*), for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Thomas D. Warren* and *Dennis J. Raterink*, Assistant Attorneys General, for defendants.

MEMORANDUM OPINION. The issue here is whether the trial court abused its discretion by issuing a writ of mandamus compelling defendants to ensure that hearings in workers' compensation cases are held in the county in which the alleged injury occurred. The Court of Appeals held that the trial court did not abuse its discretion. Because we respectfully disagree, we reverse

the judgment of the Court of Appeals and remand to the trial court for the entry of an order denying relief on plaintiff's complaint for mandamus.

Plaintiff, who was injured while working in Genesee County, filed a workers' compensation claim. While his claim was pending, defendants, in their capacity as administrators of the workers' compensation hearing system, advised plaintiff that the Genesee County hearing site where plaintiff's case was assigned would be closed and that all pending cases from the county, including plaintiff's, would be transferred to the State Secondary Complex in Dimondale, which is about 70 miles from Genesee County and located in Eaton County. Plaintiff brought this mandamus action to compel defendants to maintain the Genesee County hearing site. The trial court granted mandamus relief, and in a divided and published opinion, the Court of Appeals affirmed. *Younkin v Zimmer*, 304 Mich App 719; 848 NW2d 488 (2014).

To obtain a writ of mandamus, the plaintiff must show that he or she has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform that duty. *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999). A trial court's decision regarding a writ of mandamus is reviewed for an abuse of discretion. *Id*. at 443. However, underlying questions of statutory interpretation are questions of law that are reviewed by this Court de novo. *Id*.

MCL 418.851 provides that "[t]he [workers' compensation] hearing shall be held at the locality where the injury occurred." As the Court of Appeals recognizes, the term "locality" is defined as "a place or district." *Younkin*, 304 Mich App at 729, quoting *The Oxford English Dictionary* (2d ed, 1999). See also *Younkin*, 304

Mich App at 737-738 (CAVANAGH, J., dissenting), quoting *Webster's New World Dictionary* (2d college ed, 1974) (defining "locality" as "a place; district"), *Random House Webster's Unabridged Dictionary* (1998) (defining "locality" as "a place, spot, or district"), *Black's Law Dictionary* (7th ed) (defining "locality" as "[a] definite region"). Defendants, in their official capacities as administrators of the workers' compensation hearing system, interpreted the term "locality" to mean "district" or "a definite region." Their interpretation is "entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).[1] Because defendants' interpretation does not "conflict with the Legislature's intent as expressed in the language of the statute at issue," *id*. at 103, there are no such "cogent reasons" to overrule it.

In accordance with defendants' interpretation of "locality" as meaning "district" or "a definite region," "defendants divided the state into several reasonably located hearing districts and workers' compensation claims are assigned from definite regions of the state to particular hearing district offices" depending on "where the injury occurred." *Younkin*, 304 Mich App at 738 (CAVANAGH, J., dissenting). The 11 hearing districts designated by defendants are found in the cities of

[1] Defendant Michael Zimmer, as the Executive Director of the Michigan Administrative Hearing System, and defendant Steven Hilfinger, as the Director of the Michigan Department of Licensing and Regulatory Affairs, accorded meaning to the term "locality." Given that defendants were indisputably acting in their official capacities as heads of governmental agencies when they gave meaning to the term, and given that a governmental "agency's interpretation is entitled to respectful consideration," defendants' interpretation of "locality" is entitled to "respectful consideration."

Baraga, Escanaba, Sault Ste. Marie, Detroit, Dimondale, Gaylord, Grand Rapids, Kalamazoo, Pontiac, Saginaw, and Traverse City. There are 83 counties in Michigan. To the extent that the Court of Appeals held that because the injury occurred in Genesee County the hearing must also be held in Genesee County, we note that if this were required, there would have to be a hearing site in every county of our state, and there obviously is not. Nothing within the Worker's Disability Compensation Act, MCL 418.101 *et seq*., requires that there be a hearing site in every county. As the dissenting Court of Appeals judge explained:

> [I]n designating the appropriate venue for hearings in workers' compensation cases, the Legislature did not specifically state that the hearing must be held in the "city" or "county" where the injury occurred. If that was the Legislature's intention, it could have used those terms. See, e.g., MCL 600.1621 and 600.1629. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998). [*Younkin*, 304 Mich App at 738 (CAVANAGH, J., dissenting).]

MCL 418.851 simply requires the hearing to be held "at the locality where the injury occurred." In *Crane v Leonard*, *Crossette & Riley*, 214 Mich 218, 230; 183 NW 204 (1921), this Court held that although the hearing "should be held at a convenient place for parties and their witnesses," "the hearing need not be held at the very spot the accident occurred." We do not find it unreasonable to conclude that the "locality where the injury occurred" in this case was Dimondale when the injury occurred in Genesee County and that county falls within the Dimondale district. Although having the hearing in the latter rather than in the former venue will doubtlessly be less convenient for plaintiff, we do not believe that this constitutes an unreasonable inconvenience.

For these reasons, plaintiff does not have a clear legal right to a hearing in Genesee County and defendants do not have a clear legal obligation to hold the hearing in Genesee County. Thus, we believe the trial court abused its discretion by issuing a writ of mandamus compelling defendants to hold the hearing in that county. Accordingly, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand to the trial court for the entry of an order denying relief on plaintiff's complaint for mandamus.

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

AUTO-OWNERS INSURANCE CO v ALL STAR LAWN SPECIALISTS PLUS, INC

Docket No. 149036. Decided November 25, 2014.

Joseph M. Derry initially brought an action in the Macomb Circuit Court against All Star Lawn Specialists Plus, Inc., and Jeffery A. Harrison (a coowner of All Star), seeking damages for injuries sustained while working on a lawn maintenance crew run by Harrison when a leaf vacuum machine that Derry was using to load leaves into a truck owned by All Star fell over, causing part of the machine to strike him. Derry claimed that Harrison had negligently failed to secure the machine to the truck. Derry also filed an action in the Macomb Circuit Court against Auto-Owners Insurance Company, seeking no-fault benefits under a commercial automobile insurance policy issued by Auto-Owners to All Star that insured the truck. Auto-Owners then brought the present action in the Macomb Circuit Court against All Star, Harrison, and Derry, seeking a declaratory judgment to determine the parties' rights and obligations under the automobile policy and two other policies issued by Auto-Owners to All Star, a commercial general liability policy and a workers' compensation policy. The court, John C. Foster, J., denied Auto-Owners' motion for summary disposition and granted summary disposition in favor of Derry, holding that Derry was an independent contractor at the time of his injury and that he was not an employee within the meaning of any of the insurance contracts. The court held that Derry was not entitled to coverage under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., and, therefore, not entitled to coverage under the workers' compensation policy, that the general liability policy provided coverage for Derry's negligence claim against All Star and Harrison, and that the automobile policy provided coverage for Derry's claim against Auto-Owners for no-fault benefits. Auto-Owners appealed. The Court of Appeals, JANSEN, P.J., and SAWYER and SERVITTO, JJ., affirmed in part, reversed in part, and remanded the case to the circuit court, concluding that when determining employee status under the WDCA for purposes of this case, MCL 418.161(1)(*l*) and (n) had to be read together as separate and necessary qualifications. Because

Derry was an employee within the meaning of subdivision (*l*), it was necessary to determine whether he was also an employee under subdivision (n), which sets forth three criteria for determining whether a person performing services for an employer qualifies as an independent contractor rather than an employee. *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569 (1992), held that if a person meets any of the three statutory criteria in MCL 418.161(1)(n), that person is an independent contractor and not an employee. The panel was required under MCR 7.215(J) to follow *Amerisure*. Had it not been obligated to do so, the panel would have reached a different interpretation of the statute and held that all three criteria must be met in order to determine that a person is an independent contractor. 301 Mich App 515 (2013). The Court of Appeals convened a special panel to resolve the conflict between this case and *Amerisure* and vacated part I, the second paragraph of part II, and the second paragraph of part III of its prior opinion in this case. 301 Mich App 801 (2013). After consideration by the special panel, the Court of Appeals, K. F. KELLY, P.J., and CAVANAGH, O'CONNELL, and STEPHENS, JJ. (BORRELLO, FORT HOOD, and M. J. KELLY, JJ., dissenting), overruled *Amerisure*, holding that all three criteria must be satisfied for an individual to be divested of employee status under subdivision (n), and that the trial court erred by entering summary disposition in favor of Derry. Because Derry met only two of the three criteria in MCL 418.161(1)(n), he remained an employee at the time of his injury and his exclusive remedy was under the WDCA. 303 Mich App 288 (2013). Derry sought leave to appeal.

In an opinion per curiam signed by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Under MCL 418.161(1)(n), as used in the WDCA, the word "employee" means every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to the WDCA. The Court of Appeals properly interpreted this statute in *Amerisure*. Each criterion of MCL 418.161(1)(n) must be satisfied for an individual to be considered an employee; conversely, failure to satisfy any one of the three criteria will exclude an individual from employee status. By requiring that all three statutory criteria be met for an individual to be divested of employee status, the special panel majority's interpretation ignored the word "not" contained in each criterion.

Reversed and remanded to the Macomb Circuit Court for further proceedings.

Justice CAVANAGH would have granted leave to appeal.

WORKERS' COMPENSATION — EMPLOYEE STATUS — INDEPENDENT CONTRACTOR STATUS.

MCL 418.161(1)(n) defines "employee," in relevant part, as every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to the Worker's Disability Compensation Act; each criterion of MCL 418.161(1)(n) must be satisfied for an individual to be considered an employee; conversely, failure to satisfy any one of the three criteria will exclude an individual from employee status.

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*) for Auto-Owners Insurance Company.

Mark Granzotto, PC (by *Mark Granzotto*), and *Metro Detroit Injury Law PLLC* (by *Daniel P. Beck*) for Joseph M. Derry.

PER CURIAM. In this case, we are called upon to interpret the definition of "employee" as found in MCL 418.161(1)(n), prior to being amended in 2011, which is a provision in the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. By a special panel convened to hear this case under MCR 7.215(J), the Court of Appeals rejected that Court's previous interpretation of this definition in *Amerisure Ins Cos v Time Auto Transp, Inc*.[1] Because we believe the term "employee" as defined in the WDCA was properly interpreted in *Amerisure*, we reverse the Court of Appeals.

[1] *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569; 493 NW2d 482 (1992).

While working on a fall clean-up job for defendant All Star Specialists Plus, Inc., defendant Joseph Derry was loading leaves into a truck using a leaf vacuum machine when the machine tipped over, injuring him. At the time, All Star had three insurance policies issued by Auto-Owners Insurance Company: (1) a commercial general liability policy, (2) a commercial automobile insurance (no-fault) policy, and (3) a commercial workers' compensation policy. The general liability policy excludes from coverage "[a]ny obligation of the insured under a workers[']compensation . . . law," and the no-fault policy excludes coverage for "any expenses that would be payable under any workers[']compensation law . . . ."

Derry brought a negligence suit against All Star and one of its owners, Jeffery Harrison, for his injuries and sued Auto-Owners for no-fault benefits. Plaintiff Auto-Owners later filed the present declaratory judgment action, seeking a determination that Derry was an employee of All Star and, thus, that the only insurance coverage available was under the workers' compensation policy. Plaintiff Auto-Owners moved for summary disposition pursuant to MCR 2.116(C)(10). Derry contended that because he was an independent contractor, the general liability policy and no-fault policy applied to his negligence and no-fault claims, respectively. The trial court concluded that because it was uncontroverted that Derry held himself out to the public to perform the same services as the work he performed for All Star, Derry was an independent contractor at the time of his injury and not an employee, and that Derry was therefore entitled to coverage under Auto-Owners' general liability and no-fault policies. The court denied Auto-Owners' motion for summary disposition and granted summary disposition in favor of Derry.

Auto-Owners appealed in the Court of Appeals, and the panel affirmed in part and reversed in part in a published opinion.[2] The panel affirmed the trial court's conclusion that Derry was an independent contractor for purposes of the WDCA. However, the panel only reached this conclusion because it was bound under MCR 7.215(J)(1) to follow the Court of Appeals' prior decision in *Amerisure*, which held that each criterion of MCL 418.161(1)(n) must be satisfied for an individual to be an employee, and otherwise would have held that Derry was an employee. The panel called for a special panel to resolve the conflict.

A special panel was convened,[3] and in a published 4-3 decision, the majority reversed the trial court's order granting summary disposition in favor of Derry and, thus, its determination that Derry was an independent contractor.[4] The special panel majority overruled *Amerisure* and held "that all three of the statutory criteria in MCL 418.161(1)(n) must be met before an individual is *divested* of 'employee' status."[5] The majority concluded that because Derry only met two of the three criteria, Derry remained an employee at the time of his injury.[6] The majority concluded that only the workers' compensation policy provided coverage and that the trial court had erred by entering summary disposition in favor of Derry.[7]

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[2] *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 301 Mich App 515; 838 NW2d 166 (2013).

[3] *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 301 Mich App 801 (2013).

[4] *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 303 Mich App 288; 845 NW2d 744 (2013).

[5] *Id*. at 301 (emphasis added).

[6] *Id*.

[7] *Id*.

Derry sought leave to appeal in this Court, specifically seeking reversal of the special panel majority's ruling that he was an employee under MCL 418.161(1)(n).

The workers' compensation policy at issue provides insurance for certain bodily injuries when benefits are required by the WDCA.[8] The issue before this Court is the proper interpretation of the definition of "employee" in § 161 of the WDCA, specifically subsection (1)(n), prior to being amended in 2011.[9] That subsection provided:

> (1) As used in this act, *"employee" means*:
>
> * * *
>
> (n) *Every person* performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, *if* the person in relation to this service *does not* maintain a separate business, *does not* hold

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[8] As this Court summarized in *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 570; 592 NW2d 360 (1999):

> Michigan's Worker's Disability Compensation Act requires that employers provide compensation to employees for injuries suffered in the course of the employee's employment, regardless of who is at fault. MCL 418.301 . . . . In return for this almost automatic liability, employees are limited in the amount of compensation they may collect, and, except in limited circumstances, may not bring a tort action against the employer. See MCL 418.131 . . . . The statute also defines who is an "employee" in § 161, and by doing so determines which individuals have essentially traded the right to bring a tort action for the right to benefits.

[9] Subsection (1)(n) must also be read along with subsection (1)(*l*), but the interpretation of that subsection's language is not at issue. See *id*. at 573 (holding that "once an association with a private employer is found under § 161(1)(b) [a prior version of § 161(1)(*l*)], the characteristics of that association must meet the criteria found in § 161(1)(d) [a prior version of § 161(1)(n)]").

> himself or herself out to and render service to the public, and *is not* an employer subject to this act. [Emphasis added.]

The Court of Appeals correctly interpreted this provision in its decision in *Amerisure*, stating, "By so employing the word 'not,' the Legislature intended that once one of these three provisions occurs, the individual is not an employee. Thus, each provision must be satisfied for an individual to be an employee."[10] Therefore, the three criteria that must be met for a person "performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury" to be considered an employee are that a person, "in relation to this service": (1) does *not* maintain a separate business, (2) does *not* hold himself or herself out to and render service to the public, and (3) is *not* an employer subject to this act. As a result, if a person, in relation to the service in question, maintains a separate business *or* holds himself or herself out to and renders service to the public *or* is an employer subject to this act (i.e., if the person fails to satisfy any one of the three criteria), then that person is excluded from employee status.

By requiring that all three statutory criteria be met for an employee to be divested of employee status, the special panel majority's interpretation ignored the word "not" contained in each criterion. This interpretation contravenes the principle of statutory interpretation that "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."[11] We instead agree with dissenting Judge BORRELLO, who correctly concluded that *Amerisure* was properly de-

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[10] *Amerisure Ins Cos*, 196 Mich App at 574.

[11] *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

cided. Contrary to the majority's assertions, the *Amerisure* interpretation does not ignore the word "and" in MCL 418.161(1)(n); it takes into consideration *both* the word "and" connecting the three criteria *and* the word "not" within each criterion. Each criterion of MCL 418.161(1)(n) must be satisfied for an individual to be considered an employee; conversely, failure to satisfy any one of the three criteria will *exclude* an individual from employee status.

When overruling *Amerisure*, the special panel majority expressly adopted the reasoning of the prior panel,[12] which relied in part on a paraphrase of MCL 418.161(1)(n) in Chief Justice TAYLOR's lead opinion in *Reed v Yackell*.[13] However, to the extent that the special panel relied on this paraphrase by adopting the reasoning of the original panel, their reliance was misplaced. Chief Justice TAYLOR attempted to paraphrase the cumbersome language of MCL 418.161(1)(n) as follows:

> [MCL 418.161(1)(n)] provides that every person performing a service in the course of an employer's trade, business, profession, or occupation is an employee of that employer. However, the statute continues by excluding from this group any such person who: (1) maintains his or her own business in relation to the service he or she provides the employer, (2) holds himself or herself out to the public to render the same service that he or she performed for the employer, and (3) is himself or herself an employer subject to the WDCA. [*Reed*, 473 Mich at 535 (opinion by TAYLOR, C.J.).]

Chief Justice TAYLOR thus sought to replace the confusing negative definition of an employee created by MCL 418.161(1)(n) with a positive definition of people who are excluded from the statutory class of employees by

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[12] *Auto-Owners Ins Co*, 303 Mich App at 291, 296-299.

[13] *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005).

operation of the statute. This statement may not, however, be interpreted as an indication that this Court believed all three criteria of MCL 418.161(1)(n) must be met for a person to be *excluded* from employee status.

As an initial consideration, *Reed* was a plurality opinion and does not constitute binding precedent of this Court.[14] Therefore, even if Chief Justice TAYLOR's paraphrase indicated that he had favored the special panel majority's interpretation of MCL 418.161(1)(n), the statement could not be taken as guidance from this Court because the lead opinion only represented the views of three justices.

Chief Justice TAYLOR's paraphrase in *Reed* was also dictum and, again, is not binding precedent.[15] The differences between the statutory language and the paraphrase had no impact on the decision in *Reed* because the question before this Court was the meaning of the statutory phrase "this service."[16] *Reed* never addressed whether a person is excluded from employee status if he or she fails to meet only one criterion in MCL 418.161(1)(n).

Lastly, to the extent that the plurality in *Reed* did contemplate this question, it demonstrated no intention of changing *Amerisure*'s settled interpretation. To the contrary, it was undisputed throughout *Reed* that the plaintiff was not an employer under the WDCA.[17] Under

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[14] *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 115 n 7; 595 NW2d 832 (1999) (explaining that "plurality opinions are not binding precedent because they did not garner a majority of the Court").

[15] *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (quotation marks and citation omitted).

[16] *Reed*, 473 Mich at 535-538.

[17] See *Reed*, 473 Mich at 536 (the plaintiff argued that he was an independent contractor *only* because "he maintained a separate business

the interpretation of MCL 418.161(1)(n) adopted by the original panel and special panel majority in this matter, this in itself would have been sufficient to conclude that the plaintiff retained his status as an "employee." This Court in *Reed*, however, found it necessary to explore whether the other two statutory criteria were also satisfied before making this determination, as *Amerisure* requires. *Reed* was thus considered and decided in a manner fully consistent with *Amerisure*'s interpretation of MCL 418.161(1)(n), and it is readily apparent that the plurality did not intend to disrupt that interpretation.

Because the special panel majority of the Court of Appeals incorrectly interpreted MCL 418.161(1)(n), we reverse that decision and remand this matter to the Macomb Circuit Court for further proceedings consistent with this opinion and the Court of Appeals' July 9, 2013 opinion.

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

CAVANAGH, J. I would have granted leave to appeal.

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and held himself out to the public as a day laborer"); see also *Reed v Yackell*, 469 Mich 960 (2003) (remanding to the trial court to make factual findings only with regard to these arguments, but not regarding whether the plaintiff was an employer under the WDCA).

PEOPLE v WOOLFOLK

Docket No. 149127. Decided December 2, 2014.

Deandre M. Woolfolk was convicted following a jury trial in the Wayne Circuit Court of first-degree murder and possession of a firearm during the commission of a felony for his part in a fatal shooting that took place one to two hours before defendant's 18th birthday. The court, Vera Massey Jones, J., sentenced defendant to life in prison without the possibility of parole for the murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appealed, alleging, among other things, that sentencing him to life in prison without the possibility of parole violated the Eighth Amendment under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), because he had not yet turned 18 when the crime was committed. The Court of Appeals, BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ., affirmed the convictions but remanded for resentencing, holding that defendant did not attain the age of 18 until the anniversary date of his birth and that the common-law rule, under which one becomes of full age the first moment of the day before the anniversary of his or her birth, did not apply to defendant. 304 Mich App 450 (2014). The prosecutor applied for leave to appeal, and defendant applied for leave to cross-appeal.

In a memorandum opinion signed by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A defendant is a juvenile for the purposes of *Miller* when he or she is under the age of 18 as determined by his or her anniversary of birth. By this calculation, defendant remained under the age of 18 at the time he committed the instant homicide offense and is therefore entitled to be treated in accordance with the rule in *Miller*.

Court of Appeals' judgment affirmed; leave to appeal as cross-appellant denied.

Justice CAVANAGH concurred in the result only.

CRIMINAL LAW — SENTENCES — MINORS — CALCULATING AGE — BIRTHDAY RULE.

A defendant is a juvenile, for the purposes of determining whether he or she may be sentenced to mandatory life imprisonment without the possibility of parole, when he or she is under the age of 18 as determined by his or her anniversary of birth.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Daniel E. Hebel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Jessica L. Zimbelman*) for defendant.

MEMORANDUM OPINION. The issue before this Court concerns the matter of age calculation for the purposes of *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), in which the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " The Court of Appeals in a very thorough and thoughtful opinion held that such calculation must be made with reference to a person's anniversary of birth. We agree and affirm the judgment of the Court of Appeals.

Between 10:00 and 11:00 p.m. on January 28, 2007, defendant took part in a fatal shooting. Defendant was born on January 29, 1989, so the shooting occurred one to two hours before the 18th anniversary of his birthday. A jury found defendant guilty of first-degree murder, MCL 750.316, and the trial court sentenced defendant to mandatory life in prison without the possibility of parole for the conviction. On direct appeal, defendant argued that he was entitled to resentencing in accordance with *Miller* because he was "under the age of 18"

when the shooting occurred. While affirming defendant's convictions, the Court of Appeals remanded for resentencing on the grounds asserted by defendant. *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169 (2014).

"[T]he common law prevails except as abrogated by the Constitution, the Legislature, or this Court." *People v Stevenson*, 416 Mich 383, 389; 331 NW2d 143 (1982). This state's common law is adopted from England, *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 219; 821 NW2d 503 (2012), and to identify such law this Court may consider original English cases and authorities, *People v Duffield*, 387 Mich 300, 314; 197 NW2d 25 (1972).

In *Nichols v Ramsel*, 2 Mod 280; 86 Eng Rep 1072 (KB, 1677), the court of common pleas in England stated:

> So in a devise the question was, whether the testator was of age or not? And the evidence was, that he was born the first day of January in the afternoon of that day, and died in the morning on the last day of December: and it was held by all the Judges that he was of full age; for there shall be no fraction of a day.

Furthermore, the English jurist and expositor of the common law, William Blackstone, has written:

> So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law. [Blackstone, Commentaries on the Laws of England (Jones ed, 1976), p 661.]

Given these authorities, as well as additional ones cited by the Court of Appeals, we agree that under English common law, an individual reaches the next year of age on the day preceding his or her anniversary of birth.

This common law was adopted as the law of this state upon statehood and has since remained the law of this state.

However, this Court "[has] not hesitated to examine common-law doctrines in view of changes in society's mores, institutions, and problems, and to alter those doctrines where necessary." *Adkins v Thomas Solvent Co*, 440 Mich 293, 317; 487 NW2d 715 (1992). Our role when doing so is "to determine which common-law rules best serve the interests of Michigan citizens." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 607; 614 NW2d 88 (2000). More particularly, our role in such circumstances is to determine the "prevailing customs and practices of the people" in this state. *Woodman v Kera, LLC*, 486 Mich 228, 278; 785 NW2d 1 (2010) (MARKMAN, J., concurring in part and dissenting in part).

As recognized by the Court of Appeals, this Court at times has seemingly employed language consistent with calculating age by anniversary of birth. See, e.g., *Bay Trust Co v Agricultural Life Ins Co*, 279 Mich 248, 253; 271 NW 749 (1937) (arguably set forth in dicta). Compare *People v Aaron*, 409 Mich 672, 722; 299 NW2d 304 (1980) ("It is a well-settled principle that a 'point assumed without consideration is of course not decided.' "). Notwithstanding that dicta cannot establish the basis for a change in common law, the language in *Bay Trust* is consistent with this Court's present understanding of the prevailing customs and practices of the people to determine the next year of age by anniversary of birth, not by the day preceding the anniversary of birth as at English common law. In addition, we are persuaded by the Court of Appeals' recitation of statutes referring to year of age by date of birth. See, e.g., MCL 380.1561(1). These statutes express legisla-

tive policy that this Court may also consider in discerning the common law. *Moning v Alfono*, 400 Mich 425, 453-454; 254 NW2d 759 (1977). We therefore take this opportunity to make clear that the common law of this state should now be understood to provide that a defendant is a juvenile for the purposes of *Miller* when he or she is under the age of 18, *as determined by his or her anniversary of birth*. By this calculation, defendant remained "under the age of 18" at the time he committed the instant homicide offense and is therefore entitled to be treated in accordance with the United States Supreme Court's rule in *Miller*.

We thus affirm the Court of Appeals. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

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

CAVANAGH, J. I concur in the result only.

AMBERG v CITY OF DEARBORN

Docket No. 149242. Decided December 16, 2014.

James Amberg brought an action in the Wayne Circuit Court against the city of Dearborn and the Dearborn Police Department, seeking copies of video surveillance recordings created by private entities, Tim Hortons, Inc., and The Wendy's Company, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Plaintiff, an attorney, sought the recordings in relation to pending misdemeanor criminal proceedings against a client. Defendants initially refused to turn over the recordings, asserting that they were not subject to FOIA because the recordings were not public records. After plaintiff brought suit, defendants produced the recordings and moved for summary disposition. The court, Daniel P. Ryan, J., granted summary disposition in favor of defendants. Plaintiff appealed. The Court of Appeals, STEPHENS and RIORDAN, JJ. (BECKERING, P.J., concurring), affirmed in an unpublished opinion per curiam, issued March 25, 2014 (Docket No. 311722). Plaintiff sought leave to appeal.

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

Except under certain specifically delineated exceptions, a person who provides a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record is entitled to inspect, copy, or receive copies of the requested public record. A public record is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it is created. The word "writing" is defined in FOIA as any means of recording, including pictures, sounds, or combinations thereof. In this case, the parties did not dispute that the recordings were writings within the meaning of FOIA and that the recordings were retained by or in the possession of defendants, who are public bodies. Rather, the parties disputed whether the recordings were possessed or retained by defendants in the performance of an official function from the time they were created. The phrase "from the time it is created" in the definition of a public record

under FOIA was included to make clear that FOIA applied to records created before FOIA took effect. And the fact that the documents were created by private entities does not insulate them from FOIA. Defendants collected the recordings as evidence to support their decision to issue a citation. Accordingly, the recordings were public records because they were in the possession of or retained by defendants in the performance of an official function, and the circuit court erred by granting defendants' motion for summary disposition. The fact that plaintiff's substantive claim was rendered moot by disclosure of the records after plaintiff commenced the circuit court action was not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6). Contrary to the conclusion of the Court of Appeals, plaintiff did not abandon his claim for fees and costs. On remand, plaintiff's action can proceed in the circuit court for consideration, on a proper motion, of whether he is entitled to costs and fees under MCL 15.240(6).

Reversed and remanded for entry of an order denying defendants' motion for summary disposition and for further proceedings. Leave to appeal denied in all other respects.

STATUTES — FREEDOM OF INFORMATION ACT — VIDEO SURVEILLANCE RECORDINGS CREATED BY PRIVATE ENTITIES.

A video surveillance recording created by a private entity but collected and retained or in the possession of a public body as evidence to support a decision to issue a criminal citation is a public record in the possession of or retained by the public body in the performance of an official function and is subject to the Freedom of Information Act, MCL 15.231 *et seq*., unless a specific statutory exemption applies.

Maze Legal Group, PC (by *William J. Maze*), for plaintiff.

Laurie M. Ellerbrake and *Debra A. Walling* for defendants.

MEMORANDUM OPINION. We consider in this case whether copies of video surveillance recordings created by third parties but received by defendants during the course of pending criminal misdemeanor proceedings constitute "public records" within the meaning of the

Freedom of Information Act (FOIA), MCL 15.231 *et seq*., thus requiring their disclosure by defendants. For the reasons stated in this opinion, we conclude that, contrary to the lower courts' opinions, the video surveillance recordings are public records within the meaning of FOIA. Accordingly, and in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion.

The purpose of FOIA is to provide to the people of Michigan "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees," thereby allowing them to "fully participate in the democratic process." MCL 15.231(2). As a result, except under certain specifically delineated exceptions, see MCL 15.243, a person who "provid[es] a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record" is entitled "to inspect, copy, or receive copies of the requested public record of the public body." MCL 15.233(1). See also *Coblentz v City of Novi*, 475 Mich 558, 573; 719 NW2d 73 (2006) ("A FOIA request must be fulfilled unless MCL 15.243 lists an applicable specific exemption."). The FOIA further defines "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. . . ." MCL 15.232(e). "Writing," in turn, is defined broadly to include any "means of recording," including "pictures" and "sounds . . . or combinations thereof . . . ." MCL 15.232(h).

In this case, plaintiff initiated a FOIA request, and ultimately this FOIA lawsuit, to receive materials related to pending criminal proceedings that were in

defendants' possession, including video surveillance recordings created by private businesses. Defendants assert that the surveillance recordings are not public records within the meaning of FOIA and, as a result, did not need to be disclosed to plaintiff under MCL 15.233(1). The Wayne Circuit Court agreed with defendants and granted summary disposition in their favor. Plaintiff appealed by right, and the Court of Appeals affirmed in a split decision. *Amberg v Dearborn*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2014 (Docket No. 311722).

The parties do not dispute that video recordings are "writings" within the meaning of FOIA. Nor do they dispute that these particular video surveillance recordings are "in the possession of" and "retained by" defendants, both of which are public bodies. What is in dispute is whether the recordings were in the possession of or retained by defendants "in the performance of an official function, from the time [they were] created." MCL 15.232(e).[1] This requirement makes clear that the mere possession of the recordings by defendants is not sufficient to make them public records. *Detroit News, Inc v Detroit*, 204 Mich App 720, 724-725; 516 NW2d 151 (1994). However, because FOIA "does not require that the record[s] be created by the public body," that the recordings were created by private entities does not necessarily insulate the records from FOIA. *Id*. at 724.

[1] The language "from the time it is created" in the definition of the term "public record" was initially included in MCL 15.232(e) to make clear that FOIA applied to records "irrespective of the date the document[s] [were] prepared," i.e., to records created before FOIA took effect. OAG, 1979-1980, No. 5500, pp 255, 263-264 (July 23, 1979). See also *Detroit News, Inc v Detroit*, 204 Mich App 720, 725; 516 NW2d 151 (1994) ("A writing can become a public record after its creation. We understand the phrase 'from the time it is created' to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward.").

In short, what ultimately determines whether records in the possession of a public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function. On this question, we agree with the dissenting Court of Appeals judge that the recordings at issue in this case were public records because they were in the possession of or retained by defendants "in the performance of an official function, from the time [they were] created." MCL 15.232(e). The undisputed facts show that defendants received copies of the recordings as relevant evidence in a pending misdemeanor criminal matter.[2] The Court of Appeals majority claimed that the defendants did not use the recordings in the performance of an official function—specifically, their issuance of a criminal misdemeanor citation—because they did not obtain the recordings until after they issued the citation. While this may be true, the citation nevertheless remained pending when defendants received the recordings, and the issuance of the citation is not the only official function that we must consider. In other words, even if the recordings did not factor into defendants' decision to *issue* a citation, they were nevertheless collected as evidence by defendants *to support that decision*. Indeed, that the relevant police file (which *was* disclosed to plaintiff) referred to the recordings (and to how defendants acquired them) underscores defendants' official purpose in acquiring them. As a result,

[2] MCL 15.243(1)(b) provides an exemption to the disclosure requirement for "[i]nvestigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would" interfere with law enforcement proceedings, deprive a person of the right to a fair trial, constitute an unwarranted invasion of personal privacy, disclose confidential sources, disclose investigative techniques, or endanger the life or safety of law enforcement personnel. Defendants do not claim that the law-enforcement exemption applies to these recordings.

the recordings are public records within the meaning of FOIA, and defendants were required to produce them in response to plaintiff's FOIA request.[3] The circuit court, therefore, erred when it granted defendants' motion for summary disposition.

Defendants also claim that this case has been rendered moot by their eventual release of the recordings to plaintiff. However, "[t]he mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6)." *Thomas v New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002).[4] MCL 15.240(6) allows a plaintiff to recover "reasonable attorneys' fees, costs,

[3] The Court of Appeals considered the fact that the Wayne County prosecutor subpoenaed the recordings to be of importance because it believed that the same mechanism would have been available to plaintiff in his role as defense counsel in the underlying misdemeanor proceedings. But see MCR 6.001(D) ("Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter."). Nevertheless, whether the recordings were available to plaintiff by another method is irrelevant to whether the recordings are public records: FOIA does not define public records by reference to their potential availability by other methods, only by reference to the public body's use of the records. Consequently, it was improper for the Court of Appeals to rely on this fact in support of its conclusion that the recordings were not public records.

[4] The fact that fees and costs remain available to a plaintiff in spite of the intervening release of public records is consistent with FOIA's stated purpose of ensuring that people have "complete information regarding the affairs of government . . . ." MCL 15.231(2). The Legislature has determined that people who successfully assert their right to access public records that have been withheld by a public body in violation of FOIA should not bear the *additional* burden of shouldering the cost of a lawsuit to obtain that access. To penalize successful litigants simply because that success comes in the form of nonjudicial relief would hinder the ability of people who lack the resources to sustain their successful FOIA actions to receive complete information regarding the affairs of

and disbursements" in the event "a person asserting the right to . . . receive a copy of all or a portion of a public record prevails" in a FOIA action. To "prevail" in a FOIA action within the meaning of MCL 15.240(6), a court must conclude that "the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002) (emphasis omitted).

The Court of Appeals unanimously agreed that plaintiff is precluded from recovering under MCL 15.240(6) for allegedly abandoning those claims. Contrary to the Court of Appeals' assertion, however, plaintiff never abandoned his claim for fees and costs under MCL 15.240(6). Indeed, he sought fees and costs in his complaint, in his brief in opposition to defendants' motion for summary disposition, in his brief in the Court of Appeals, and in his application for leave to appeal in this Court. Now that this Court orders defendants' motion for summary disposition to be denied, plaintiff's action can proceed in the Wayne Circuit Court for consideration, on a proper motion, of whether he is entitled to costs and fees under MCL 15.240(6).[5]

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government in the face of a public body's intransigence. *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 733-734; 415 NW2d 292 (1987).

[5] Additionally, MCL 15.240(7) provides for punitive damages if "the public body has arbitrarily and capriciously violated [FOIA] by refusal or delay in disclosing or providing copies of a public record." Although plaintiff's complaint sought punitive damages under MCL 15.240(7), plaintiff has abandoned this claim for relief because his brief in opposition to defendants' motion for summary disposition only asserted a claim of attorney fees and costs under MCL 15.240(6) and he did not otherwise develop his argument that he was entitled to punitive damages under MCL 15.240(7) over and above attorney fees and costs under MCL 15.240(6).

We therefore reverse the judgments of the lower courts and remand this case to the Wayne Circuit Court for entry of an order denying defendants' motion for summary disposition and for further proceedings not inconsistent with this opinion, including, on a proper motion, a determination whether plaintiff is entitled to reasonable attorney fees, costs, and disbursements under MCL 15.240(6). 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.

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

WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM v WAYNE CHARTER COUNTY

Docket No. 147296. Argued October 8, 2014 (Calendar No. 8). Decided December 18, 2014.

The Wayne County Employees Retirement System and the Wayne County Retirement Commission brought an action in the Wayne Circuit Court against Wayne Charter County and the Wayne County Board of Commissioners, alleging that a county ordinance defendants enacted in 2010 concerning the retirement system, Wayne County Enrolled Ordinance No. 2010-514, violated Const 1963, art 9, § 24 and the Public Employment Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*. The ordinance placed a $12 million limit on the balance of the retirement system's reserve for inflation equity known as the Inflation Equity Fund (IEF), which was funded by investment earnings on pension assets. The ordinance also placed a $5 million limit on a discretionary distribution of money from the IEF known as the "13th check," which had been made annually in varying amounts to eligible retirees and survivor beneficiaries to help fight the effects of inflation. The ordinance required any amount in the IEF exceeding the $12 million cap to be debited from the IEF and credited to the assets of the defined benefit plan, where it would be used to offset or reduce the annual required contribution (ARC) that the county was required to make to the defined benefit plan under Const 1963, art 9, § 24. The county filed a counterclaim alleging, among other things, that the retirement commission had violated its fiduciary duties by mismanaging the retirement system's assets. The court, Michael F. Sapala, J., granted defendants' motion for summary disposition regarding plaintiffs' constitutional and statutory objections to the ordinance, and plaintiffs appealed. The court granted summary disposition in favor of plaintiffs on the fiduciary-duty count of the county's counterclaim, and the county cross-appealed. The Court of Appeals, MURPHY, C.J., and O'CONNELL and BECKERING, JJ., reversed, holding that the transfer of funds from the IEF and the offset against the county's ARC obligation violated the requirement in MCL 38.1133(6) that the funds be for the exclusive benefit of the retirement system's participants and their beneficiaries and that the county had used

the IEF funds in violation of the prohibited transaction rule set forth in MCL 38.1133(6)(c). 301 Mich App 1. Defendants appealed.

In a unanimous opinion per curiam, the Supreme Court *held*:

1. The Court of Appeals correctly held that the $32 million offset against the county's ARC violated PERSIA for the reasons stated in the Court of Appeals opinion. The county must satisfy its ARC obligations absent consideration of that $32 million, and the transferred funds must be returned to the IEF. The $12 million limitation on the IEF can operate prospectively.

2. The portion of the Court of Appeals opinion concluding that the intrasystem transfer of retirement system assets would violate PERSIA without the corresponding offset to the ARC was vacated, as were the portions of the opinion discussing the constitutional implications of the amended ordinance in relation to Const 1963, art 9, § 24 and the determination that the transferred funds, once returned to the IEF, must be used only for the purposes of that fund. The Court of Appeals' rulings that were not challenged in the Supreme Court were left intact.

Court of Appeals decision affirmed in part and vacated in part; case remanded to the trial court for further proceedings.

Racine & Associates (by *Marie T. Racine* and *Jennifer A. Cupples*) and *Jaffe, Raitt, Heuer & Weiss, PC* (by *Brian G. Shannon*), for the Wayne County Retirement Commission and the Wayne County Employees Retirement System.

Dickinson Wright PLLC (by *Francis R. Ortiz*, *K. Scott Hamilton*, *Phillip J. DeRosier*, *Scott A. Petz*, and *Jeffrey E. Ammons*) for Wayne Charter County and the Wayne County Board of Commissioners.

Amici Curiae:

Vanoverbeke, Michaud & Timmony, PC (by *John P. Timmony* and *Francis E. Judd*), for the Michigan Association of Public Employee Retirement Systems.

Klausner, Kaufman, Jensen & Levinson (by *Robert D. Klausner*, pro hac vice, and *Adam P. Levinson*, pro hac

vice) and *The Smith Appellate Law Firm* (by *Michael F. Smith*) for the National Conference on Public Employee Retirement Systems.

PER CURIAM. The Wayne County Employees Retirement System ("retirement system") was established in 1944 "for the purpose of providing retirement income to eligible employees and survivor benefits." Wayne County Charter § 6.111. Currently, the retirement system consists of five defined benefit plans, one defined contribution plan, and the Inflation Equity Fund (IEF). Each year, the county is required by Const 1963, art 9, § 24, to make an "annual required contribution" (ARC). An annual actuarial valuation determines the ARC amount. MCL 38.1140m.

The IEF was created in 1985 by county ordinance to provide a pool of money for discretionary payments to eligible retirement system participants and beneficiaries in addition to those payments required by the pension system, as a method to counteract the effect of inflation. Payments from the IEF are known as the "13th check." The IEF is funded by investment profits earned on the assets held in the defined benefit plans and the IEF, to the extent those profits exceed a certain rate of return.

In 2010, Wayne County faced a substantial fiscal obligation in order to satisfy its actuarially determined ARC. In order to satisfy its ARC obligation, the county passed an ordinance amendment, Wayne County Code of Ordinances (WCCO), §§ 141-32 and 141-36, as amended by Wayne County Enrolled Ordinance No. 2010-514. As is relevant here, the amended ordinance limited the IEF to a maximum balance of $12 million, and directed that IEF funds exceeding that amount be transferred to the retirement system's defined benefit plans. Because the IEF balance at the time was significantly greater than $12

million, the ordinance resulted in a transfer of $32 million from the IEF into the defined benefit plans. The amended ordinance further permitted the county to use the $32 million transfer from the IEF to the defined benefit plans as an offset against its ARC obligation.

The retirement system challenged the 2010 ordinance amendment, claiming, *inter alia*, that the transfer and corresponding ARC offset violated Const 1963, art 9, § 24, and various provisions of the Public Employee Retirement Systems Investment Act (PERSIA), MCL 38.1132 *et seq*. The county moved for summary disposition, which the trial court granted, ruling that the IEF did not amount to an "accrued financial benefit" as considered in Const 1963, art 9, § 24, and that the amended ordinance's transfer and offset did not violate PERSIA.

The Court of Appeals reversed the trial court, holding that the transfer of funds from the IEF and offset against the county's ARC obligation violated the requirement in MCL 38.1133(6) that the funds be for the "exclusive benefit" of the retirement system's participants and their beneficiaries and that the county used the IEF funds in violation of the "prohibited transaction rule," MCL 38.1133(6)(c).[1] *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1; 836 NW2d 279 (2013).

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[1] When the complaint in this case was filed, MCL 38.1133(6) stated in relevant part:

> The system shall be a separate and distinct trust fund and the assets of the system shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system. With respect to a system, an investment fiduciary shall not cause the system to engage in a transaction if he or she knows or should know that the transaction is any of the following, either directly or indirectly:
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> * * *

We affirm the Court of Appeals in part. Except as noted later in this opinion, we agree with the Court of Appeals that, in this case, the transfer of funds from the IEF to the retirement system's defined benefit plans, coupled with the offset against the county's ARC obligation, violated PERSIA for the reasons stated in the Court of Appeals opinion. *Id*. at 30-46 (finding a violation of the "exclusive benefit rule" in MCL 38.1133(6)), and *id*. at 46-48 (finding a violation of the "prohibited transaction rule" in MCL 38.1133(6)(c)). Accordingly, we affirm the Court of Appeals' holding that the $32 million that was offset against the county's ARC violates PERSIA, and the county must satisfy its ARC obligations absent consideration of that $32 million. *Id*. at 52.

However, we also vacate two aspects of the Court of Appeals opinion. First, we vacate footnote 29 and corresponding portions of the Court of Appeals opinion in which the panel reasoned that, because the transfer of IEF funds, even without a corresponding offset to the county's ARC, would violate PERSIA, the transferred funds must be returned to the IEF account and used "for the purpose intended." See *Wayne Co Retirement Sys*, 301 Mich App at 51 n 29. Although the county raised the theory that the transfer of IEF funds without an offset is valid under PERSIA in Count II of its counterclaim, the trial court did not rule on this alter-

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> (c) A transfer to, or use by or for the benefit of, the political subdivision sponsoring the system of any assets of the system for less than adequate consideration. . . .

PERSIA was recently amended, effective March 28, 2013. 2012 PA 347. As amended, the relevant portions of the statute are found in MCL 38.1133(8). However, because the current complaint was filed before the effective date of the amendments, we refer to the preamendment version of PERSIA.

native claim because it ruled that the county's ordinance was "legal as written." It was therefore unnecessary for the Court of Appeals to rule on this issue, and since this issue received only cursory treatment by the parties in the Court of Appeals, the preferable course would have been to remand for further proceedings on this claim. The Court of Appeals nonetheless addressed the matter, and although we invited further development of it in this Court, the county failed to pursue it in its brief and at oral argument, instead taking the position that the presence of the corresponding offset had no bearing on the validity of the transfer under PERSIA. The county's abandonment of the issue on appeal has rendered it unnecessary, and has left us ill equipped to address the merits of whether the amended ordinance's transfer would be permissible under PERSIA without the corresponding offset. Accordingly, we express no opinion on the issue of whether the intrasystem transfer of retirement system assets without a corresponding offset to the plan sponsor's ARC violates PERSIA, and leave that question open for another day. Nonetheless, because the county has abandoned this issue in the instant case, we leave in place the Court of Appeals' determination that the transferred funds must be returned to the IEF. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."); *Horetski v American Sandblast Co*, 340 Mich 323, 327; 65 NW2d 702 (1954).

Thus, while we vacate footnote 29 in its entirety, to the extent that the remedy fashioned by the Court of Appeals was based on its conclusion that the transfer even without an offset violates PERSIA, we leave its remedy intact for purposes of this case because, as stated above, the county abandoned its argument that the transfer without the offset does not violate PERSIA.

Accordingly, we affirm the Court of Appeals' holding that "the $32 million that was offset against the county's ARC [must] be[] returned, restored, or credited to the IEF, with the county being required to satisfy its ARC obligations absent consideration of that $32 million." *Wayne Co Retirement Sys*, 301 Mich App at 52. Additionally, we affirm the Court of Appeals' conclusion that "the $12 million IEF limitation can operate prospectively" and that

> [a] proper prospective application of the $12 million IEF limitation would entail limiting future funding of the IEF until it dropped below $12 million, which is exactly how WCCO, § 141-32(b)(1), operates and is presently structured, where it provides the formula for annual funding of the IEF, subject to the $12 million IEF balance limit. Accordingly, WCCO, § 141-32(b)(1), remains wholly intact and WCCO, § 141-32(a)—the provision setting forth the $12 million IEF limit—also remains in effect, but with the caveat that the limit is inapplicable in regard to the previously existing $44 million (or $32 million excess) until those IEF assets are first reduced down to $12 million. With respect to the $5 million dollar IEF distribution limit found in WCCO, § 141-32(b)(2), it is already prospective in nature, operating to limit disbursements made after the 2010 ordinance became effective. [*Id*. at 52-53 (footnote omitted).][2]

Second, we vacate the portions of the Court of Appeals opinion discussing the constitutional implications of the amended ordinance in relation to Const

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[2] In keeping with our decision to leave open the question whether the mere transfer of retirement assets without a corresponding offset to a plan sponsor's ARC violates PERSIA, nothing in our decision to affirm the Court of Appeals remedy in this case should be read as necessarily allowing or precluding any municipality, including the county, from enacting an ordinance that directs the intrasystem movement of system assets. As stated within, we decline to determine whether, or under what conditions, such a transfer is permissible under PERSIA.

1963, art 9, § 24. As the Court of Appeals expressly acknowledged, it is not necessary to consider any potential constitutional implications of the amended ordinance because this case can be decided by applying PERSIA alone. See *Wayne Co Retirement Sys*, 301 Mich App at 35 n 23. Because "questions of constitutionality are not decided where a case may be disposed of without such a determination," *MacLean v Mich State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940) (citation omitted), the Court of Appeals' analysis of the issue is dicta. Accordingly, we vacate as unnecessary all portions of the Court of Appeals opinion that considered whether the IEF benefits constitute "accrued financial benefits" for purposes of Const 1963, art 9, § 24, including all discussion of "group" accrued benefits.

In summary, we affirm the portions of the Court of Appeals opinion holding that the transfer of $32 million from the IEF to the retirement system's defined benefit plans and corresponding offset against the county's ARC obligation in this case violated PERSIA for the reasons stated in the Court of Appeals opinion. We likewise affirm the Court of Appeals' determination that the transferred funds must be returned to the IEF. However, we vacate as beyond the scope of the instant appeal the reasoning underlying that determination—namely, the portions of the Court of Appeals opinion concluding that the transfer at issue would violate PERSIA without the corresponding offset against the county's ARC obligation, and the determination that the transferred funds, once returned to the IEF, must be used only for the purposes of that fund going forward. The net effect of our decision is that the issue whether the transfer without a corresponding offset violates PERSIA remains an open one, but the remedy fashioned by the Court of Appeals in this case is left

undisturbed for purposes of this case. Finally, we vacate as unnecessary the portions of the Court of Appeals opinion discussing the constitutional implications of the amended ordinance in relation to Const 1963, art 9, § 24.[3] We remand to the trial court for proceedings and entry of judgment not inconsistent with this opinion.

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

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[3] The Court of Appeals also ruled on the validity of a number of other aspects of the amended ordinance; these rulings have not been challenged before this Court, and thus remain intact.

HANNAY v DEPARTMENT OF TRANSPORTATION

HUNTER v SISCO

Docket Nos. 146763 and 147335. Argued October 8, 2014 (Calendar Nos. 3 and 7). Decided December 19, 2014.

Heather L. Hannay brought an action in the Court of Claims against the Department of Transportation (MDOT), seeking damages for injuries she suffered when a salt truck driven by one of MDOT's employees ran a stop sign and struck her car. After a bench trial, the court, Rosemarie E. Aquilina, J., awarded Hannay $474,904 in noneconomic damages, $767,076 for work-loss benefits, and $153,872 in expenses for ordinary and necessary services. MDOT appealed, and Hannay cross-appealed. The Court of Appeals, HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., affirmed. 299 Mich App 261 (2013). The Supreme Court granted MDOT's application for leave to appeal in order to consider whether economic loss in the form of wage loss may qualify as a bodily injury under the motor vehicle exception to governmental immunity and whether Hannay incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity. 495 Mich 863 (2013).

Harold Hunter, Jr., brought an action in the Genesee Circuit Court against David Sisco, Auto Club Insurance Association, and the city of Flint Transportation Department (Flint), seeking damages for injuries suffered when a dump truck owned by Flint and driven by Sisco sideswiped Hunter's vehicle. Flint moved for summary disposition. The court, Joseph J. Farah, J., denied the motion. Flint appealed. The Court of Appeals, SAWYER, P.J., and SAAD and METER, JJ., reversed in part, holding that Hunter could not recover noneconomic damages for pain, suffering, shock, or emotional damage. 300 Mich App 229 (2013). The Court of Appeals denied Hunter's motion for reconsideration. Hunter sought leave to appeal and Flint sought leave to cross-appeal. The Supreme Court denied both applications. 495 Mich 898 (2013). Hunter moved for reconsideration. The Supreme Court granted the motion, vacating that part of its previous order denying Hunter's application for leave to appeal and granting leave to appeal to consider whether damages for pain and suffering, emotional

distress, or both may qualify as a bodily injury under the motor vehicle exception to governmental immunity. 495 Mich 960 (2014).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, MCCORMACK, and VIVIANO, the Supreme Court *held*:

The phrase "liable for bodily injury" contained in the motor vehicle exception to governmental immunity, MCL 691.1405, means legally responsible for damages flowing from a physical or corporeal injury to the body. The restrictions on damages recoverable in third-party tort actions involving motor vehicle accidents set forth in MCL 500.3135 of the no-fault act apply to cases permitted by the waiver of governmental immunity provided for in the motor vehicle exception. A plaintiff, therefore, may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements of MCL 500.3135 have been met.

1. The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., limits the exposure of the state, its agencies, and its political subdivisions to tort liability. The GTLA provides six exceptions to its broad grant of governmental immunity, including the motor vehicle exception, which states that governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. To be "liable" means to be legally responsible. "Bodily injury" means a physical or corporeal injury to the body. Accordingly, the phrase "liable for bodily injury" means legally responsible for a physical or corporeal injury to the body. In order to prevail in a negligence action, in addition to the traditional elements—duty, breach, causation, and damages—a plaintiff must also demonstrate an actual injury to person or property. Therefore, "liable for bodily injury" in this context means legally responsible for damages flowing from a physical or corporeal injury to the body. In other words, "bodily injury" is the category of harm for which the government waives immunity under the motor vehicle exception, and tort damages naturally flowing from that injury are compensable. It is a longstanding principle that tort damages generally include damages for all the legal and natural consequences of the injury, including damages for loss of the ability to work and earn money, as well as pain and suffering and mental and emotional distress damages. Therefore, a plaintiff who suffers a bodily injury may recover under the motor vehicle exception tort damages that naturally flow from the injury,

including economic and noneconomic damages. Bodily injury is not, however, a threshold requirement that opens all doors of potential liability. Accordingly, a plaintiff cannot seek damages for a bodily injury when the requested damages resulted from the bodily injury of another.

2. The no-fault act, MCL 500.3101 *et seq*., generally abrogates tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle unless the damages fall under an enumerated exception. To the extent that the no-fault act narrows the damages available in a third-party tort action, those restrictions apply when the tortfeasor is a governmental entity. MCL 500.3135(1), (2), and (3)(b) allow third-party tort actions for noneconomic damages if the death, serious impairment of body function, or permanent serious disfigurement threshold is met, while MCL 500.3135(3)(c) allows third-party tort actions for certain kinds of economic damages, specifically damages for allowable expenses, work loss, and survivor's loss in excess of the daily, monthly, and 3-year limitations contained in the sections applicable to those three types of no-fault benefits. Therefore, a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements of MCL 500.3135 have been met.

3. While work-loss damages are compensable under the no-fault act, loss-of-earning-capacity damages are not. MCL 500.3135(3)(c) allows third-party tort actions seeking damages for allowable expenses, work loss, and survivor's loss in excess of the daily, monthly, and three-year limitations contained in those sections. In the context of no-fault benefits, work loss consists of the loss of income from work an injured person would have performed during the first three years after the date of the accident if he or she had not been injured. Work-loss damages are only available if the accident was the "but for" cause, i.e., the cause in fact, of the work loss. Put differently, work-loss damages compensate a plaintiff for wages that he or she would have earned in light of the specific facts of the case. Work-loss benefits are not restricted to a claimant's wage at the time of the accident, but prior wages generally are the most relevant and reliable evidence for determining what a plaintiff would have earned had the accident not occurred. The trial court found that but for the accident Hannay would have been accepted into a dental-hygienist program, would have graduated, and would have been employed at least 60% of the time, by the specific dental office where she was

already working, at a rate of $28 an hour. The trial court erred by awarding Hannay work-loss damages as a dental hygienist because Hannay did not establish by a preponderance of the evidence that she would have earned wages as a dental hygienist if not for the accident. The number of conditions that had to be satisfied before Hannay could have been employed as a dental hygienist indicated that this case involved more than the inherent uncertainty of work-loss claims in general, rendering the award impermissibly contingent and speculative.

In *Hannay*, Docket No. 146763, that portion of the decision of the Court of Appeals allowing recovery against a governmental entity of economic damages exceeding the statutory maximum affirmed; that portion of the decision of the Court of Appeals affirming the trial court's work-loss damages award reversed; case remanded to the trial court for recalculation of the work-loss award.

In *Hunter*, Docket No. 147335, the Court of Appeals' conclusion that noneconomic damages are not compensable under the motor vehicle exception reversed; case remanded to the trial court for further proceedings.

Justice CAVANAGH concurred in the result only.

1. GOVERNMENTAL IMMUNITY — MOTOR VEHICLE EXCEPTION — LIABLE FOR BODILY INJURY — DAMAGES — ECONOMIC AND NONECONOMIC DAMAGES — INSURANCE — NO-FAULT — REQUIREMENTS FOR THIRD-PARTY TORT ACTIONS.

Under the motor vehicle exception to the Governmental Tort Liability Act, MCL 691.1405, governmental agencies are liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner; the phrase "liable for bodily injury" means legally responsible for damages flowing from a physical or corporeal injury to the body; a plaintiff who suffers a bodily injury may recover under the motor vehicle exception tort damages that naturally flow from the injury, including economic and noneconomic damages; the restrictions on damages recoverable in third-party tort actions involving motor vehicle accidents set forth in MCL 500.3105 of the no-fault act apply to cases permitted by the waiver of governmental immunity in the motor vehicle exception; so a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements of MCL 500.3135 have been met.

2. INSURANCE — NO-FAULT — DAMAGES — WORK-LOSS.

Work-loss damages are compensable under the no-fault act, MCL 500.3101 *et seq*., but loss-of-earning-capacity damages are not; in the context of no-fault benefits, work loss consists of the loss of income from work an injured person would have performed during the first three years after the date of the accident if he or she had not been injured; work-loss damages are only available if the accident was the "but for" cause, i.e., the cause in fact, of the work loss; work-loss damages are not restricted to a claimant's wage at the time of the accident, but prior wages generally are the most relevant and reliable evidence for determining what a plaintiff would have earned had the accident not occurred; work-loss damages may not be remote, contingent, or speculative.

Docket No. 146763:

Mark Granzotto, PC (by *Mark Granzotto*), and *Gursten, Koltonow, Gursten, Christensen & Raitt, PC* (by *David E. Christensen*), for Heather L. Hannay.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *John P. Mack*, Assistant Attorney General, for the Department of Transportation.

Amici Curiae:

Cummings, McClorey, Davis & Acho, PLC (by *Karen M. Daley*), for the Michigan Municipal Risk Management Authority.

Johnson Law, PLC (by *Christopher P. Desmond*), for the State Bar of Michigan Negligence Law Section.

Henn Lesperance PLC (by *William L. Henn*) for the Michigan County Road Commission Self-Insurance Pool.

Kopka, Pinkus, Dolin & Eads, PLC (by *Kevin J. Plagens* and *Valerie Henning Mock*), for the Insurance Institute of Michigan.

Lacey & Jones, LLP (by *Carson J. Tucker*), for the Michigan Townships Association, Macomb County, Oakland County, and Wayne County.

Law Offices of Robert June, PC (by *Robert B. June*), for the Michigan Association for Justice.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for the Michigan Municipal League.

Docket No. 147335:

Allan Falk, PC (by *Allan Falk*), and *Law Office of Cy Weiner, PC* (by *Cyril V. Weiner* and *Nicholas M. Marchenia*), for Harold Hunter, Jr.

Crystal Olmstead and *Anthony Chubb* for the city of Flint Transportation Department.

Amici Curiae:

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for the Michigan Municipal League.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas*) for the Coalition Protecting Auto No-Fault, the Brain Injury Association of Michigan, and the Michigan Brain Injury Provider Council.

Barbara H. Goldman for the Michigan Association for Justice.

ZAHRA, J. In these cases, we are called upon to interpret a provision of the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, commonly referred to as the motor vehicle exception to governmental immunity, MCL 691.1405. The statute provides, in relevant part, that "[g]overnmental agencies shall be

liable for bodily injury . . . resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ."[1] Specifically, we must address whether the phrase "liable for bodily injury" allows for recovery of economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages. The Court of Appeals in *Hannay v Dep't of Transp* concluded that economic damages are compensable under the motor vehicle exception,[2] while the Court of Appeals in *Hunter v Sisco* concluded that noneconomic damages are not compensable under this exception.[3]

We conclude that the phrase "liable for bodily injury" contained in the motor vehicle exception means legally responsible for damages flowing from a physical or corporeal injury to the body. More simply, "bodily injury" is merely the category of harm for which governmental immunity from tort liability is waived under MCL 691.1405 and for which damages that naturally flow are compensable. Moreover, the restrictions on damages recoverable in third-party tort actions involving motor vehicle accidents set forth in MCL 500.3135 of the no-fault act, MCL 500.3101 *et seq.*, apply to cases permitted by the waiver of governmental immunity provided for in the motor vehicle exception. We therefore hold that a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements of MCL 500.3135 have been met.

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[1] MCL 691.1405.

[2] *Hannay v Dep't of Transp*, 299 Mich App 261; 829 NW2d 883 (2013).

[3] *Hunter v Sisco*, 300 Mich App 299; 832 NW2d 753 (2013).

Because we conclude that work-loss damages are compensable under the motor vehicle exception, we must also address a second issue presented in *Hannay*: whether the facts as found were sufficient to satisfy the statutory language defining work-loss damages with respect to plaintiff's claim of work loss as a dental hygienist. Plaintiff, a 22-year-old employed in a dental office, aspired to be a dental hygienist.[4] Plaintiff had previously applied for admission to a dental hygienist program at Lansing Community College (LCC), but she was not admitted to the program. Plaintiff intended to enhance her application and reapply to the program, but she had not been accepted at the time of her injury. Her employer and his wife, a hygienist in his office, testified that plaintiff would have gained admission to the program and that they would have employed plaintiff as a hygienist after she completed her education and obtained her license. Notwithstanding this testimony, we conclude that it is simply too tenuous a proposition to conclude that the work-loss damages in dispute were a legal and natural consequence of the tortious conduct. Instead, these damages are contingent and speculative, rendering plaintiff's claim for work-loss damages barred under Michigan law to the extent that her claim is based on potential wages as a dental hygienist.

In *Hannay* we affirm the Court of Appeals' holding with respect to the type of damages recoverable for bodily injury under the motor vehicle exception to governmental immunity, MCL 691.1405, but we reverse the Court of Appeals' holding that plaintiff presented sufficient evidence to support her claim for work-loss damages as a dental hygienist. In *Hunter* we reverse the Court of

[4] At the time of her accident, plaintiff was working part time as a dental assistant and part time as a clerk at a dime store, earning approximately $10 per hour at each of these jobs.

Appeals' holding with respect to the type of damages recoverable for bodily injury under the motor vehicle exception to governmental immunity, MCL 691.1405. We remand both cases to the respective trial courts for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. *HANNAY*

This matter arises from a February 13, 2007 motor vehicle accident involving a vehicle driven by plaintiff Heather Hannay and a salt truck owned by defendant Michigan Department of Transportation (MDOT) and driven by MDOT's employee, Brian Silcox. Silcox failed to stop at a stop sign, and the salt truck collided with plaintiff's vehicle. Plaintiff alleged that Silcox[5] and MDOT, as Silcox's employer and the owner of the salt truck, were liable for damages caused by Silcox's negligence. Plaintiff alleged injuries to her shoulders, neck, spine, back, head, chest, arms, knees, and other internal and external injuries to her body. Plaintiff claimed all economic damages compensable under the no-fault act, but specifically alleged allowable expenses and work loss in excess of the statutory limitations.[6] MDOT raised governmental immunity as an affirmative defense.

Following a bench trial, the trial court concluded that MDOT was liable for work-loss damages exceeding the

[5] Defendant Silcox is not involved in this appeal because plaintiff dismissed her complaint against him before trial began.

[6] Plaintiff also alleged all noneconomic damages compensable under the no-fault act for the serious impairment of a body function or permanent serious disfigurement. Defendant did not appeal the trial court's finding that plaintiff suffered a serious impairment of a body function or the trial court's award of noneconomic damages, and thus, those issues are not before this Court. Therefore, while the issue of noneconomic damages is at issue in *Hunter*, it is not at issue in *Hannay*.

statutory limitations under the no-fault act and that plaintiff was entitled to work-loss damages as a dental hygienist earning $28 per hour.[7] In reaching its conclusion, the court found that it was "more likely than not" that plaintiff would "have been admitted into the Dental Hygienist program at LCC," that it was "more likely than not [that she would] have successfully completed the program," and that plaintiff had proven part-time, but not full-time, employment of three days a week.

The Court of Appeals affirmed, concluding that the trial court did not err by awarding plaintiff economic damages and that the trial court's factual findings supported the calculation of plaintiff's work-loss award.[8] Regarding the trial court's conclusion that work-loss damages were recoverable against a governmental entity in light of the motor vehicle exception, the Court of Appeals held that "the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another."[9] Thus, the panel concluded that "work-loss benefits . . . that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental

[7] The trial court calculated plaintiff's work-damages based on a rate of 60% of full-time employment, i.e., part-time employment, in light of the testimony presented at trial that (1) plaintiff would have been hired to replace Mrs. Johnston, who worked part time, to allow her to retire and (2) Dr. Johnston did not have any full-time dental hygienists currently on staff.

[8] *Hannay*, 299 Mich App at 270, 273-274. The Court of Appeals rejected plaintiff's cross-appeal, in which plaintiff argued that the trial court erred by calculating her work-loss damages on the basis of part-time employment rather than full-time employment. *Id*. at 273.

[9] *Id*. at 270.

entities . . . ."[10] The panel characterized work-loss damages as "items of damages that arise from the bodily injuries suffered by plaintiff," and explained that "[t]o hold otherwise would conflate the actual bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury."[11]

B. *HUNTER*

This matter arises from a July 20, 2009 motor vehicle accident involving plaintiff Harold Hunter, Jr., and a dump truck owned by defendant City of Flint Transportation Department (Flint) and driven by Flint's employee, defendant David Sisco.[12] Flint's vehicle sideswiped plaintiff's vehicle.

Plaintiff sued Flint as the employer of Sisco and owner of the dump truck and independently for negligent entrustment of a motor vehicle. Plaintiff alleged that the injuries he suffered amounted to a serious impairment of a bodily function, a permanent and serious disfigurement, and a serious neurological defect (closed-head injury). According to plaintiff, he suffered injuries to his spine as a result of the accident. Plaintiff alleged noneconomic damages, namely, pain and suffering, as well as shock and emotional damages.[13] Flint raised governmental immunity as an affirmative defense.

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[10] *Id*.

[11] *Id*.

[12] Defendant Sisco is not involved in this appeal because the trial court granted summary disposition in his favor.

[13] Plaintiff also alleged economic damages. Flint did not challenge plaintiff's ability to recover economic damages. Therefore, while the issue of whether economic damages are compensable under the motor vehicle exception to governmental immunity is at issue in *Hannay*, it is not in *Hunter*.

Flint filed a motion for summary disposition under MCR 2.116(C)(7) and (10), asserting that plaintiff could not succeed in a claim against Flint because the damages he sought were not compensable under the motor vehicle exception to governmental immunity and that plaintiff failed to establish that he suffered a threshold injury under the no-fault act. Flint's position was that because plaintiff's no-fault provider was liable for economic damages under the no-fault act, and because the motor vehicle exception to governmental immunity does not allow for recovery of noneconomic damages, the claim against Flint should be dismissed. The trial court denied Flint's motion for summary disposition, concluding that "bodily injury" encompasses noneconomic damages associated with bodily injury and finding that there was a genuine issue of material fact regarding whether plaintiff suffered a serious impairment of a bodily function that was caused by the accident.

The Court of Appeals reversed the trial court's denial of the motion for summary disposition in part, holding that noneconomic damages "are precluded under MCL 691.1405 because a governmental agency may only be liable for 'bodily injury' and 'property damage,' " and noneconomic damages "do not constitute physical injury to the body and do not fall within the motor vehicle exception."[14] Plaintiff filed a motion for reconsideration

[14] *Hunter*, 300 Mich App at 235-236, 241. The panel, however, affirmed the trial court's ruling that a genuine issue of material fact remained regarding whether plaintiff suffered a serious impairment of a body function, and remanded "for the trial court to hold a full evidentiary hearing to determine whether plaintiff did, indeed, suffer a serious impairment of body function and whether the collision caused his injury." *Id*. at 243. We denied leave to appeal regarding these matters; therefore, they are not before this Court. As discussed at greater length later in this opinion, however, we take this opportunity to clarify the propriety of the panel's inclusion of the "serious impairment" question in its ordered

in light of the Court of Appeal's decision in *Hannay*, but the panel denied the motion.

II. STANDARD OF REVIEW

The meaning of the phrase "liable for bodily injury" is an issue of statutory interpretation, which this Court reviews de novo.[15] 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."[16] In doing so, "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."[17] This Court has explained:

> When construing a statute, we consider the statute's plain language, and we enforce clear and unambiguous language as written. While terms must be construed according to their plain and ordinary meaning, words and phrases as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.[18]

"[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole," and "a word or phrase should be given meaning by its context or setting."[19]

While this Court reviews a trial court's factual findings, such as those used to calculate a damages award,

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evidentiary hearing, given the interrelationship between that determination and the immunity issues now before us.

[15] *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

[16] *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[17] *Id*.

[18] *Bradley Estate*, 494 Mich at 377 (quotation marks and footnotes omitted).

[19] *Couzens*, 480 Mich at 249-250.

for clear error,[20] we review de novo the applicability of those facts to the law.[21]

Moreover, when a party files suit against a governmental agency, it is the burden of that party to plead "his or her claim in avoidance of governmental immunity."[22] A party can bring a motion for summary disposition under MCR 2.116(C)(7), as was the case in *Hunter*, on the ground that the claim is barred by governmental immunity.[23] Plaintiff Hunter also filed a motion for summary disposition under MCR 2.116(C)(10), which 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."[24] This Court reviews de novo decisions regarding motions for summary disposition.[25]

III. ANALYSIS

A. THE GOVERNMENTAL TORT LIABILITY ACT

Sovereign immunity and governmental immunity, while related concepts, are not synonymous.[26] "Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions."[27] As we recently explained in

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[20] MCR 2.613(C). See also *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014).

[21] *Cain v Mich Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

[22] *Bradley Estate*, 494 Mich at 377.

[23] *Id*. at 376-377.

[24] MCR 2.116(C)(10).

[25] *Bradley Estate*, 494 Mich at 376.

[26] *Ballard v Ypsilanti Twp*, 457 Mich 564, 567; 577 NW2d 890 (1998).

[27] *Id*. at 567-568.

In re Bradley Estate, the GTLA replaced and was preceded by Michigan jurisprudence, dating back to 1837, "recogniz[ing] the preexisting common-law concept of sovereign immunity, which immunizes the 'sovereign' state from all suits to which the state has not consented, including suits for tortious acts by the state."[28] MCL 691.1407(1) codifies this common-law sovereign immunity concept and "limits a governmental agency's exposure to tort liability."[29]

However, the GTLA not only provides immunity for the state and its agencies, like defendant MDOT in *Hannay*, but also provides immunity for the state's political subdivisions, such as defendant Flint in *Hunter*.[30] We explained in *Robinson v Lansing* that "[i]n Michigan, governmental immunity was originally a common-law doctrine that protected all levels of government."[31] However, this Court, in 1961, "abolished common-law governmental immunity with respect to municipalities."[32] The Legislature reacted by enacting the GTLA in 1964, "restoring immunity for municipalities and preserving this protection for the state and its agencies."[33] The GTLA provides six exceptions to gov-

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[28] *Bradley Estate*, 494 Mich at 377-378.

[29] *Id*. at 377-378. MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

[30] MCL 691.1401(a), (d), (e); MCL 691.1407(1).

[31] *Robinson v Lansing*, 486 Mich 1, 5; 782 NW2d 171 (2010).

[32] *Id*., citing *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961); *McDowell v State Hwy Comm'r*, 365 Mich 268; 112 NW2d 491 (1961).

[33] *Robinson*, 486 Mich at 5. See also MCL 691.1407(1) and *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 593-608; 363 NW2d 641 (1984) (providing a detailed history of sovereign immunity, governmental immunity, and the GTLA).

ernmental immunity, one of which is the motor vehicle exception—the subject of these cases.[34]

B. THE MOTOR VEHICLE EXCEPTION

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

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

This provision has remained unchanged from its original phrasing when enacted as part of the GTLA in 1964.[35] The heart of our inquiry is the interpretation of the phrase "liable for bodily injury," which contains two key components: (1) "liable for" and (2) "bodily injury."

1. "LIABLE FOR"

Our recent decision in *Bradley Estate* sheds light on the proper interpretation of the phrase "liable for," though the motor vehicle exception was not at issue in

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[34] The six statutory exceptions to governmental immunity contained within the GTLA precede and follow the general grant of immunity in MCL 691.1407(1): "the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008).

[35] 1964 PA 170. The motor vehicle exception existed before the GTLA was enacted, though the wording differed and there were separate statutes relating to the liability of the state's political subdivisions and the state itself. See 1945 PA 87, which became 1948 CL 691.141; 1945 PA 127, which became 1948 CL 691.151.

that case. Instead, we interpreted the phrase "tort *liability*" found in the GTLA's broad grant of immunity, MCL 691.1407(1),[36] which grants immunity to governmental entities from "tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Specifically, we were called on to decide whether a particular cause of action sought to impose "tort liability" within the meaning of MCL 691.1407(1), thus, triggering governmental immunity pursuant to that provision.[37] We concluded that " 'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."[38] Looking at the phrase as a whole, we explained:

> Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim," nor to a "tort action," but to "tort *liability*." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." *To be* "*liable*" *means to be* "*legally responsible*[.]" Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "*tort liability*" *to encompass legal responsibility arising from a tort.* We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.[39]

Because this Court concluded that "liable" means "legally responsible," our interpretation of "tort liability" in MCL 691.1407(1) informs how to interpret the

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[36] *Bradley Estate*, 494 Mich at 371.

[37] *Id*. at 371, 380-385.

[38] *Id*. at 385.

[39] *Id*. (footnotes omitted; some emphasis added; alteration in original).

phrase "liable for" in the motor vehicle exception. We see no reason why this Court's prior analysis of the word "liability," which stems from the word "liable," should not likewise apply in this case, particularly given that the phrases "tort liability" and "liable for" are contained within the same statute—the GTLA.[40] Thus, the phrase "liable for bodily injury" means *legally responsible* for bodily injury.

2. "BODILY INJURY"

We interpreted the phrase "bodily injury" in *Wesche v Mecosta Co Rd Comm*, specifically within the context of the motor vehicle exception.[41] The central issue in *Wesche* was "whether the motor vehicle exception . . . authorizes a claim for loss of consortium against a governmental agency."[42] In analyzing the language of the motor vehicle exception, we stated: "This language is clear: it imposes liability for 'bodily injury' and 'property damage' resulting from a governmental employee's negligent operation of a government-owned motor vehicle."[43] Because the GTLA does not define "bodily injury," this Court resorted to dictionary definitions, stating:

> The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id*. *Thus, "bodily injury" simply means a physical or corporeal injury to the*

[40] See *Robinson*, 486 Mich at 17 ("[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute.").

[41] *Wesche*, 480 Mich 75.

[42] *Id*. at 79.

[43] *Id*. at 84.

> *body*. It is beyond dispute that a loss of consortium is not a physical injury to a body. A claim for loss of consortium is simply one for loss of society and companionship. . . . Thus, because loss of consortium is a *nonphysical injury*, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity.[44]

We see no reason to deviate from our prior analysis. Thus, because we have interpreted "bodily injury" to mean "a physical or corporeal injury to the body," "liable for bodily injury" means legally responsible for *a physical or corporeal injury to the body*.

3. "LIABLE FOR BODILY INJURY"

Our final consideration in looking at the phrase "liable for bodily injury" as a whole is to determine the scope of the liability to which the government is exposed under the motor vehicle exception. Essential to this inquiry is the fundamental difference between an injury and the damages that arise from that injury. This Court's decision in *Henry* is instructive for determining the scope of liability in that it delineates this distinction.[45] There, we set forth the traditional elements of a negligence action—"(1) duty, (2) breach, (3) causation, and (4) damages"[46]—but explained that "it has always been implicit in this analysis that in order to prevail, a plaintiff must also demonstrate *an actual injury to person or property*."[47] We then made clear that "such

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[44] *Id*. at 84-85 (quotation marks and citations omitted; emphasis added; alteration in original). We point out that a prior decision of this Court, *Roberts v Detroit*, 102 Mich 64; 60 NW 450 (1894), effectively resolved the question whether a loss of consortium is a "bodily injury," within the context of an early version of the highway exception, concluding that it was not.

[45] *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005).

[46] *Id*. at 74.

[47] *Id*. (emphasis added).

injury constitutes the *essence of a plaintiff's claim*,"[48] and that "injury" and "damages" are distinct from one another, explaining:

> While the courts of this state may not have always clearly articulated this injury requirement, *nor finely delineated the distinction between an "injury" and the "damages" flowing therefrom*, the injury requirement has always been present in our negligence analysis. It has simply always been the case in our jurisprudence that plaintiffs alleging negligence claims have also shown that their claims arise from *present physical injuries*. We are not aware of any Michigan cases in which a plaintiff has recovered on a negligence theory without demonstrating some present physical injury. Thus, in all known cases in Michigan in which a plaintiff has satisfied the "damages" element of a negligence claim, he has also satisfied the "injury" requirement.[49]

Thus, "damages" and "injury" are not one and the same—damages *flow from* the injury.

In light of this Court's prior interpretation of "tort liability" in *Bradley Estate*, this Court's interpretation of "bodily injury" in *Wesche*, and this Court's delineation of the difference between "injury" and "damages" in *Henry*, "liable for bodily injury" in the present case means legally responsible *for damages flowing from* a physical or corporeal injury to the body. Stated differently, "bodily injury" is simply the category of harm (i.e., the type of injury) for which the government waives immunity under MCL 691.1405 and, thus, for which damages that naturally flow are compensable. Therefore, the legal responsibility that arises from "bodily injury" is responsibility for *tort damages* that flow from that injury. This conclusion is supported by

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[48] *Id*. (emphasis added).

[49] *Id*. at 75 (emphasis added).

the fact that the GTLA generally grants immunity from "tort liability,"[50] and to the extent that this immunity is waived, the resulting liability, logically, is liability for *tort damages*.

It is a longstanding principle in this state's jurisprudence that tort damages generally include damages for all the legal and natural consequences of the injury (i.e., the damages that naturally flow from the injury), which may include damages for loss of the ability to work and earn money, as well as pain and suffering and mental and emotional distress damages. For example, in *Sherwood v Chicago & WM R Co*,[51] this Court approved of a jury instruction that stated:

> In estimating the compensatory damages in cases of this character, *all the consequences of the injury*, future as well as past, are to be taken into consideration, including the bodily pain, which is shown by the proofs to be reasonably certain to have naturally resulted from the injury. The injured party, when entitled to recover, should be awarded compensation for all the injuries, past and prospective. These are intended to include and embrace indemnity for actual nursing and medical expenses; also for *loss of power, or loss of capability to perform ordinary labor, or capacity to earn money*, and reasonable satisfaction of physical powers. The elements of damages which the jury are entitled to take into account consist of all effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, the loss of time, *all bodily and mental suffering*, impairment of capacity to earn money, the pecuniary expenses, the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury; and, in considering what would be a just sum in compensation for the sufferings or injury, the jury are *not only at liberty to consider the*

[50] MCL 691.1407(1); *Bradley Estate*, 494 Mich at 378, 384-385.

[51] *Sherwood v Chicago & WM R Co*, 82 Mich 374, 383; 46 NW 773 (1890).

> *bodily pain, but the mental suffering, anxiety, suspense, and fright* may be treated as elements of the injury for which damages, by way of compensation, should be allowed. [Emphasis added.]

Thus, damages for both a loss of the ability to work and earn money as well as pain, suffering, and emotional distress have long been understood as consequences of an injury for which damages are compensable.[52] Additionally, in *Beath v Rapid R Co*, this Court concluded that "[t]he plaintiff was not confined in her recovery to damages sustained by reason of *physical pain and anguish suffered*, but had the right to recover for the *mental pain and anxiety* she was compelled to undergo by reason of the injuries sustained," because "the shame and mortification which the plaintiff had suffered by being obliged to use crutches" "was one of the *elements of damages which might naturally flow from the injury.*"[53]

Moreover, recent caselaw of this Court reiterates this longstanding principle. For example, in *Price v High Pointe Oil Co, Inc*,[54] we noted the general rule regarding recovery of damages in a tort action recognized in *Sutter v Biggs*[55] that "the tort-feasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the *damages are*

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[52] See also *Power v Harlow*, 57 Mich 107, 119; 23 NW 606 (1885) (involving an action for damages for injury caused by negligence and approving of jury instructions on damages, stating, "It was proper for the jury to take into account how the plaintiff might be restricted in his choice of occupation by the injury, and limited in his ability to work; and though the word 'humiliation' was not a fortunate one to make use of, there can be no supposition that its use was misleading").

[53] *Beath v Rapid R Co*, 119 Mich 512, 517-518; 78 NW 37 (1899) (emphasis added).

[54] *Price v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013).

[55] *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966).

the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated."[56] This body of caselaw collectively demonstrates the longstanding principle that tort damages generally include the damages that naturally flow from the injury, which may include both economic damages, such as damages incurred due to the loss of the ability to work and earn money, as well as noneconomic damages, such as pain and suffering and mental and emotional distress damages.[57]

As indicated by the *Hannay* Court of Appeals panel, concluding that "bodily injury" does not include dam-

[56] *Price*, 493 Mich at 255, quoting *Sutter*, 377 Mich at 86. We held in *Price*, however, that because no case in this state had permitted a plaintiff to recover for noneconomic damages resulting *only* from the destruction of property, the narrower common-law rule applicable to negligent destruction of property controlled. *Id.* at 254-256.

See also *Grenawalt v Nyhuis*, 335 Mich 76, 87; 55 NW2d 736 (1952) (holding that the trial court properly refused to charge the jury with an instruction that the plaintiff, who was injured at a beauty salon, "was not entitled to recover damages for annoyance, discomfiture[,] and humiliation suffered by her as the result of her inability to have her hair dyed or tinted").

[57] We note that, under the common law, a plaintiff might be able to recover damages for emotional distress even if that distress is not alleged to flow from an injury for which the plaintiff seeks compensation. We have limited recovery on that basis, however, to circumstances in which the alleged emotional distress is accompanied by physical symptoms. See *Henry*, 473 Mich at 79 (explaining that "our common law recognizes emotional distress as the basis for a negligence action only when a plaintiff can also establish *physical* manifestations of that distress"); *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970) (overruling caselaw imposing the "impact requirement" and holding "that where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock").

ages naturally flowing from that injury would conflate the requirement of a bodily injury (i.e., the injury requirement recognized in *Henry*) with the items of damages that are recoverable as a result of that injury (i.e., the damages that naturally flow from the bodily injury). Thus, the statutory language of MCL 691.1405 does not support a conclusion that the Legislature intended to restrict liability to certain items of damages resulting from a bodily injury. Instead, the language only indicates that the Legislature intended to restrict the *categories of injury* for which the tort damages that naturally flow are compensable. We therefore hold that the phrase "liable for bodily injury" within the motor vehicle exception means that a plaintiff who suffers a bodily injury may recover for items of tort damages that naturally flow from that physical or corporeal injury to the body, which may include both economic and non-economic damages. As discussed later in this opinion, however, the scope of these damages is limited by the no-fault act.[58]

4. "BODILY INJURY" IS A TERM OF ART IN MICHIGAN JURISPRUDENCE

Our analysis interpreting the phrase "liable for bodily injury" gains further support from our state's history of governmental-immunity legislation, which indicates that "bodily injury" is a term of art used by the Legislature in the context of governmental immunity to refer to a category of injury for which damages that naturally flow are compensable, as long as those damages are properly pleaded. As a legal term of art, "bodily injury" is a technical phrase that has "acquired a peculiar and appropriate meaning in the law" and,

[58] See Part III.B.6 of this opinion.

therefore, "shall be construed and understood according to such peculiar and appropriate meaning."[59]

This phrase appeared in the context of governmental immunity in 1861 in the first version of the highway exception. Public Act 197 of 1861 provided

> [t]hat any person or persons sustaining *bodily injury* upon any of the public highways in this State, by reason of neglect to keep in repair any bridge or culvert, by any township or corporation whose duty it is to keep such bridge or culvert in repair, such township or corporation *shall be liable to, and shall pay* to the person or persons so injured or disabled, *just damages*, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.[60]

The 1885[61] and 1887 versions of the highway exception added sidewalks to the list of structures for which there was a duty to keep in repair.[62] Therefore, as far back as 1861, the phrase "bodily injury" was used by the Legislature to connote a category of injury for which damages—specifically, "just damages"—were compensable.

Our decisions implicating these early versions of the highway exception urge a consistent interpretation in this case. For example, regarding damages because of

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[59] MCL 8.3a. See also *Bradley Estate*, 494 Mich at 377.

[60] 1861 PA 197 (emphasis added). See also several versions that followed that were materially the same with regard to imposing liability for "just damages" for "bodily injury": 1879 PA 244, 1885 PA 214, and 1887 PA 264. 1887 PA 264 ultimately became 1897 CL 3441.

[61] Public Act 214 of 1885 was ruled unconstitutional by this Court because the statute contained a provision abrogating common-law liability with regard to injuries covered by the statute and a provision setting dollar limitations on sidewalk claims that were not expressed in the title of the act. *Church v Detroit*, 64 Mich 571, 573-574; 31 NW 447 (1887). However, the sidewalk provision was included in the version that followed, 1887 PA 264.

[62] 1887 PA 264.

an inability to work, this Court's decision in *Moore v Kalamazoo* is instructive.[63] In that case, the plaintiff was injured due to a defective sidewalk, and the trial court instructed that the jury "should take into account her *past earnings . . . during the time that she has already been injured*, and the time that you find, from the evidence, that she will *remain incapable of earning anything in the future . . . .*"[64] This Court concluded that the allegations were sufficient to warrant admission of the proofs of damages and the instruction given.[65] This case made clear that the damages that were recoverable as a result of a bodily injury included damages resulting from an inability to work that flow from the injury, if properly alleged.[66]

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[63] *Moore v Kalamazoo*, 109 Mich 176; 66 NW 1089 (1896). The statute in effect at the time was 1887 PA 264, which became 1897 CL 3441, and provided

> [t]hat any person or persons sustaining *bodily injury* upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, cross-walks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, cross-walk or culvert, and whose duty it is to keep the same in reasonable repair, such township, village, city or corporation *shall be liable to and shall pay* to the person or persons so injured or disabled *just damages*, to be recovered in an action of trespass on the case before any court of competent jurisdiction. [Emphasis added.]

[64] *Moore*, 109 Mich at 178.

[65] *Id*. at 179.

[66] See also *Abbott v Detroit*, 150 Mich 245, 251-252; 113 NW 1121 (1907), a defective crosswalk case in which this Court approved of jury instructions regarding loss of earnings, stating:

> The charge is not subject to the criticism that it allowed the jury to speculate. It was confined to such damages arising from this injury as the jury from the evidence might find by reason of

In another example, this Court's 1894 decision in *Roberts v Detroit* demonstrated that pain and suffering damages, like damages resulting from an inability to work, were recoverable for a bodily injury in the context of the highway exception.[67] The plaintiff sought loss-of-consortium damages from the city of Detroit that resulted from injuries his wife incurred due to falling on a defective sidewalk. The issue was whether the highway exception applied to provide the plaintiff a cause of action in light of the fact that it was the plaintiff's *wife* who was physically injured, rather than the plaintiff himself.[68] This Court stated, "[s]o far as [the highway exception] is concerned, it limits the liability *to cases of bodily injury*," and concluded that:

> The plaintiff's case does not fall within [the highway exception] (1) because he has no right to recover for the *bodily injury—i.e., pain and suffering, etc*—of another; (2) because the statute in terms limits the recovery to the person so injured or disabled.[69]

It is clear from *Roberts* that had the plaintiff, rather than his wife, suffered a bodily injury, damages naturally flowing from that injury would have been recoverable under the highway exception, including damages for "pain and suffering." Further, this case demonstrates that while damages that naturally flowed from

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> the impairment of her earning capacity. There was evidence as to the wages she earned upon which the jury could base their judgment as to the amount of these damages. The small verdict returned is an indication that no speculation was indulged in by the jury.

The statute in effect at the time was 1887 PA 264, which became 1897 CL 3441.

[67] *Roberts v Detroit*, 102 Mich 64; 60 NW 450 (1894).

[68] *Id*. at 65-66.

[69] *Id*. at 67 (emphasis added).

the injury were compensable, the person seeking such damages must have had a *bodily injury*.

More generally, this Court's decision in *Hall v City of Cadillac* demonstrated that damages that were the natural consequence of a bodily injury were recoverable.[70] *Hall* involved a city's failure to keep a sidewalk in reasonable repair, which resulted in bodily injury to the plaintiff, and this Court reviewed the instructions to the jury.[71] This Court concluded in relevant part that the trial court properly instructed the jury that "*damages for the injury suffered and its natural consequences* were recoverable, up to the time of trial, together with such prospective damages of like character as were reasonably probable . . . ."[72] Thus, damages that were a natural consequence of the bodily injury were recoverable.

In light of the foregoing, by the time the phrase "bodily injury" appeared in the 1964 version of the motor vehicle exception,[73] that phrase long had a settled meaning in Michigan law. "Bodily injury" was understood to be a category of injury for which damages that were the natural consequence flowed, including both damages resulting from an inability to work, as well as pain and suffering, so long as those damages were properly pleaded.

5. THE *HUNTER* COURT'S RELIANCE ON *WESCHE* IS MISPLACED

The Court of Appeals in *Hunter* relied in part on *Wesche*'s definition of "bodily injury" in concluding that

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[70] *Hall v City of Cadillac*, 114 Mich 99, 100; 72 NW 33 (1897). The statute in effect at the time was 1887 PA 264, which became 1897 CL 3441.

[71] *Id*.

[72] *Id*. at 103.

[73] 1964 PA 170.

because noneconomic damages do not constitute a physical injury, such damages are not compensable under the motor vehicle exception.[74] The panel first looked to *Wesche* and agreed with this Court's conclusion that the term "liable for bodily injury" does not create a threshold requirement, explaining, "[h]ad the Legislature intended to simply create a threshold that, once established, would permit noneconomic or emotional damages, it would have done so explicitly . . . ."[75] The panel determined that the *Wesche* definition of "bodily injury" was correct, and based on that definition, concluded that damages for pain and suffering as well as shock and emotional-distress damages do not constitute a "bodily injury" that is compensable under the motor vehicle exception.[76]

We agree with the *Hunter* panel only to the extent that it concluded that *Wesche* correctly defined "bodily injury." We concluded in *Wesche* that the motor vehicle exception does not waive governmental immunity for loss-of-consortium claims, reasoning that "a loss of consortium is not a physical injury to a body," and while "a loss-of-consortium claim is derivative of the underlying bodily injury, it is nonetheless regarded as *a separate cause of action* and *not merely an item of damages*."[77] We concluded that the motor vehicle exception "does not state or suggest that governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury or property damage."[78] Unlike provisions of the no-fault act that create a statutory threshold, such as MCL 500.3135(1),

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[74] *Hunter*, 300 Mich App at 240-241.

[75] *Id*. at 236.

[76] *Id*. at 240-241.

[77] *Wesche*, 480 Mich at 85 (emphasis added).

[78] *Id*. at 85-86.

MCL 691.1405 "contains no such language."[79] Instead, "[i]t merely provides that governmental agencies 'shall be liable for bodily injury and property damage' and says nothing to suggest that *a separate cause of action*, such as one for loss of consortium, may be asserted once a threshold of 'bodily injury' has been met."[80] For these reasons, this Court held "that a loss of consortium is not a 'bodily injury,' " and therefore, governmental entities are entitled to governmental immunity for loss-of-consortium claims.[81]

We disagree with the *Hunter* panel's construction of *Wesche* because it conflates injury with damages. We stated in *Wesche* that "[t]he waiver of immunity is limited to two categories of *damage*: bodily injury and property damage."[82] Notably, the word "damage" in the singular has a very different meaning than the plural word "*damages*." *Black's Law Dictionary* defines "damage" as "[l]oss or injury to person or property <actionable damage resulting from negligence>," and "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury <the plaintiff seeks $8,000 in damages from the defendant>."[83] The Court of Appeals in *Hunter* ostensibly read the word "damage" in our opinion in *Wesche* to mean "damages," which was an error.[84] Moreover, our decision in *Wesche* focused on the fact that a loss of consortium does *not* constitute an "item of damages" because it is not a claim for bodily injury.[85]

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[79] *Id*. at 86.

[80] *Id*.

[81] *Id*. at 87.

[82] *Id*. at 84 (emphasis added).

[83] *Black's Law Dictionary* (9th ed).

[84] *Hunter*, 300 Mich App at 241 ("Such *damages* simply do not constitute physical *injury* to the body and do not fall within the motor vehicle exception.") (emphasis added).

[85] *Wesche*, 480 Mich at 85 ("It is beyond dispute that a loss of consortium is not a physical injury to a body."). This Court went on to expressly state that "loss of consortium is not merely an item of damages." *Id*.

Thus, it can be inferred from our decision that items of damages naturally flowing from a bodily injury are compensable. Our conclusion in *Wesche* that a bodily injury is not a threshold requirement that, once met, permits recovery of all potential damages and that, instead, a plaintiff seeking damages for a bodily injury must have actually suffered a bodily injury, is consistent with this Court's decision in *Roberts*.[86] The *Roberts* decision made clear that a plaintiff cannot seek damages for a bodily injury when the requested damages resulted from the bodily injury of *another*.[87] We therefore reaffirm that "bodily injury" in the motor vehicle exception is not a threshold requirement that opens all doors of potential liability for tort damages; rather, it is a *category* of injury for which items of tort damages that naturally flow are available, as confined by the limitations of the no-fault act.[88]

6. DAMAGES COMPENSABLE UNDER THE MOTOR VEHICLE EXCEPTION

Our analysis, however, does not end with our interpretation of the phrase "liable for bodily injury" within the motor vehicle exception. While governmental entities are legally responsible for damages naturally flowing from a physical or corporeal injury to the body under the language of the motor vehicle exception, this liability is *limited* by the no-fault act, which generally abrogates "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle," unless the damages come within an enumerated exception.[89] As we explained in *Hardy v Oakland Co*,

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[86] *Roberts*, 102 Mich 64.

[87] *Id*. at 67.

[88] See Part III.B.6 of this opinion.

[89] MCL 500.3135(3).

"the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute."[90] Thus, to the extent that the no-fault act narrows the damages available in a third-party tort action through its general abolition of tort liability and provision of certain enumerated exceptions, those restrictions likewise apply when the tortfeasor is a governmental entity.

Relevant to the present cases, MCL 500.3135(1), (2), and (3)(b) allow third-party tort actions for noneconomic damages if the "death, serious impairment of body function, or permanent serious disfigurement" threshold is met, while MCL 500.3135(3)(c) allows for third-party tort actions for certain kinds of economic damages, specifically "[d]amages for allowable expenses, work loss, and survivor's loss . . . in excess of the daily, monthly, and 3-year limitations contained in" the sections applicable to those three types of no-fault benefits.[91] Therefore, we hold that a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements under MCL 500.3135 have been met.[92] In this respect, we affirm the *Hannay* panel's conclusion that work-loss

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[90] *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000).

[91] MCL 500.3135(3)(c); *Johnson v Recca*, 492 Mich 169, 197; 821 NW2d 520 (2012).

[92] We note, however, that our holding in this regard is not intended to suggest that the no-fault act supersedes the GTLA. Rather, MCL 691.1405 and MCL 500.3135 may be read harmoniously to provide that a plaintiff may avoid governmental immunity if he suffers "bodily injury" under the motor vehicle exception, but he must also meet the requirements contained within the enumerated exceptions to the no-fault act's abolition of tort liability, such as the "death, serious impairment of body function, or permanent serious disfigurement" threshold pertaining to recovery of noneconomic damages.

benefits that exceed the statutory maximum are available against a governmental entity,[93] and we reverse the *Hunter* panel's conclusion that noneconomic damages "do not fall within the motor vehicle exception."[94]

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[93] *Hannay*, 299 Mich App at 270.

[94] *Hunter*, 300 Mich App at 241. The *Hunter* panel further erred in its analysis of plaintiff Hunter's claimed damages by conflating certain questions of liability under the no-fault act with questions of immunity under the GTLA. As previously noted, after the *Hunter* panel erroneously concluded that noneconomic damages were beyond the scope of the motor vehicle exception's waiver of immunity, it remanded for the trial court to conduct an evidentiary hearing to resolve outstanding factual issues bearing on whether the City was immune from plaintiff Hunter's claimed excess economic damages and, thus, entitled to summary disposition as to those damages under MCR 2.116(C)(7) as well. The *Hunter* panel included among these factual issues whether plaintiff Hunter suffered a "serious impairment of body function" as contemplated under MCL 500.3135, reasoning that "[a] plaintiff making a tort claim for excess damages under the motor vehicle exception must, as a threshold, show a serious impairment of body function." *Id*. at 241. This reasoning is flawed in two respects. First, while we agree a showing of "death, serious impairment of body function, or permanent serious disfigurement" is necessary under the no-fault act in order for a plaintiff to recover *noneconomic* damages in a third-party tort action against a governmental entity, see *Hardy*, 461 Mich at 565, neither the no-fault act nor the GTLA requires this for a plaintiff to recover excess *economic* damages. Second, and relatedly, while a plaintiff must demonstrate "death, serious impairment of body function, or permanent serious disfigurement" to recover noneconomic damages in a third-party tort action, whether that requirement has been met is a question of liability, not immunity. As discussed earlier, to demonstrate immunity has been waived as to a claim for such damages, the GTLA, by its plain language, requires a showing of "bodily injury." Accordingly, while plaintiff Hunter's path to recovery of noneconomic damages from defendant Flint requires him to demonstrate both a "bodily injury" under the GTLA and a "serious impairment of body function" under the no-fault act, he need only clear the first such hurdle in opposing defendant Flint's motion for summary disposition under MCR 2.116(C)(7). For these reasons, it was error for the *Hunter* panel to conclude that resolution of this motion with regard to excess economic damages would require an evidentiary hearing before the court to determine whether plaintiff Hunter suffered a "serious impairment of body function."

C. *HANNAY*: WORK-LOSS DAMAGES AWARDED

Because we have concluded that damages for work loss are compensable under the motor vehicle exception, we must now address whether the facts as found were sufficient to satisfy the statutory language defining work-loss damages with respect to plaintiff's claim of work loss as a dental hygienist. Damages in tort actions that are "[r]emote, contingent, or speculative" are not compensable because they are not in conformity with the general rule that a "tortfeasor is liable for all injuries resulting directly from his wrongful act," as long as "the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated."[95] This Court has elaborated on this point, stating:

> [T]o render a wrongdoer liable in damages in a tort action where the connection is not immediate between the injurious act and the consequences, such nearness in the order of events and closeness in the relation of cause and effect must subsist, so that the influence of the injurious act would predominate over that of other causes, and concur to produce the consequences or be traceable to those causes.[96]

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[95] *Sutter*, 377 Mich at 86. See also *Price*, 493 Mich at 254-255. For example, in *Sutter*, a medical malpractice case involving the wrongful excising of the plaintiff's right fallopian tube, this Court rejected the plaintiff's argument that by the trial court refusing the plaintiff's request for instructions pertaining to her claim of damages for the loss of the ability to bear children and resulting emotional suffering, "the jury was precluded by the trial judge from considering her full measure of damages." *Id*. at 83. This Court concluded, "[P]laintiff's loss of ability to bear children was not a legal and natural consequence of defendant's act, but, within the meaning of the rule, was contingent, that is, contingent upon the possibility that plaintiff *could* develop a cyst on her remaining tube which *could* require excision of the tube itself." We concluded that "[a]t best, the damages are contingent and, therefore, barred . . . ." *Sutter*, 377 Mich at 87.

[96] *Sutter*, 377 Mich at 86-87.

This Court does not, however, "preclude recovery [of damages] for lack of precise proof" or "require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable," particularly in circumstances in which the defendant's actions created the uncertainty.[97] The plaintiff bears the burden to prove the damages sought by a preponderance of the evidence.[98]

In addition to these overarching rules for recovery of damages in tort, we recognize that there is a distinction drawn between work loss and loss of earning capacity in the context of claims made under the no-fault act. This Court has made clear that while work-loss damages are compensable under the no-fault act, loss-of-earning-capacity damages are not.[99] This distinction is derived from the statutory language of the no-fault act, specifically MCL 500.3107.[100]

MCL 500.3135(3)(c) allows for third-party tort actions for "[d]amages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 and 3110 *in excess* of the daily, monthly, and 3-year limitations contained in those sections." (Emphasis added.) MCL 500.3107 defines "work loss" in the context of no-fault benefits, providing, in relevant part:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
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> * * *

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[97] *Fera v Village Plaza, Inc*, 396 Mich 639, 648; 242 NW2d 372 (1976) (quotation marks and citation omitted).

[98] *Washington v Jones*, 386 Mich 466, 472; 192 NW2d 234 (1971).

[99] *Ouellette v Kenealy*, 424 Mich 83, 88; 378 NW2d 470 (1985) ("Damages . . . are not recoverable for loss of earning capacity" under the no-fault act).

[100] *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 648; 513 NW2d 799 (1994).

> (b) Work loss consisting of loss of income *from work an injured person would have performed* during the first 3 years after the date of the accident if he or she had not been injured. . . .[101]

Importantly, the statutory language requires that work-loss damages consist of lost income from "work an injured person *would* have performed." We explained in *MacDonald v State Farm* that "work-loss benefits compensate the injured person for income he would have received *but for* the accident."[102] Thus, work-loss damages are only available if the accident was the "but for" cause—i.e., cause-in-fact—of the work loss. Indeed, this Court made clear in *Ouellette v Kenealy* that such economic damages "are recoverable in tort only . . . for 'actual' work loss," i.e., "actual loss of income from work an injured person would have performed if he had not been injured," "when the loss of income exceeds the daily, monthly, and three-year limitations."[103]

This Court has expressly recognized that in contrast to work-loss damages, loss of earning capacity damages are those arising from work that an injured person "could" have performed but for the injury.[104] Thus, damages for work loss consist of wages that a person

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[101] MCL 500.3107a adds that "work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident."

[102] *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984) (emphasis added) (concluding that because two weeks after the plaintiff was injured he suffered a heart attack that would have independently rendered him unable to work, the plaintiff was "ineligible for work-loss benefits after that date under § 3107(b)").

[103] *Ouellette*, 424 Mich at 87 (quotation marks omitted).

[104] *Marquis*, 444 Mich at 647-648. The *Marquis* Court quoted with approval a Court of Appeals decision that recognized that the earning capacity "could have earned" standard " 'contrasts sharply with the language' " of MCL 500.3107(1)(b) that uses the language "loss of income

"would" have earned but for the accident,[105] whereas loss-of-earning-capacity damages are wages a person "could" have earned but for the accident.[106] In other words, work-loss damages compensate a plaintiff for the specific wages that he or she would have earned in light of the specific facts of the case, while loss-of-earning-capacity damages compensate a plaintiff for his or her loss of unrealized potential for earning income, i.e., for possible wages a plaintiff could have earned if he or she pursued potential opportunities, education, etc.

Yet, "[w]ork-loss benefits are not necessarily restricted to a claimant's wage at the time of the accident."[107] That "a claimant is working a lower paying part-time job at the time of the accident" does not preclude the plaintiff "from proving that he would have taken a higher paying full-time job had he not been injured in a car accident."[108] Ultimately, however, "claimants are left to their proofs."[109] In the context of assessing work-loss benefits under the no-fault act, this Court has made clear that work loss should not overcompensate a claimant by, for instance, "bas[ing] his work loss, without any proof of actual loss, on the highest paying job he ever had"; instead, it is "intended to compensate claimants approximately dollar for dollar for the amount of wages lost because of the injury or disability."[110]

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from work an injured person would have performed . . . ." *Id*. at 648, quoting *Nawrocki v Hawkeye Security Ins Co*, 83 Mich App 135, 140-141; 286 NW2d 317 (1978).

[105] *MacDonald*, 419 Mich at 152.

[106] *Marquis*, 444 Mich at 648.

[107] *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472; 521 NW2d 831 (1994).

[108] *Id*.

[109] *Id*.

[110] *Id*.

Because work-loss damages are intended to replace the income a person would have received but for the accident, *prior* wages generally are the most relevant and reliable evidence for determining what a plaintiff actually would have earned had the accident not occurred.[111] Only in certain circumstances may a plaintiff recover work-loss damages for wages he or she could not have earned before the accident, i.e., wages that are not based on the plaintiff's wage history. While the statute by its terms does not limit a plaintiff's work-loss award to the plaintiff's wages at the time of the accident,[112] courts must be cautious in considering wages that the plaintiff could not have earned before the accident in calculating a work-loss award because of the risk that a calculation based on such wages will be contingent and speculative and, therefore, barred under Michigan law.

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[111] Moreover, in scenarios in which the injured person is "temporarily unemployed at the time of the accident," the Legislature expressly required that a work loss award "*shall* be based on earned income from the last month employed full time preceding the accident." MCL 500.3107a (emphasis added). In other words, the Legislature required that work-loss awards must be based on past wage history when the plaintiff was temporarily unemployed. This provision was "intended to remedy the situation in which a claimant is precluded from receiving any work-loss benefits because the claimant is unemployed at the time of the accident." *Popma*, 446 Mich at 469. While this provision does not apply to the plaintiff in this case because she was not temporarily unemployed at the time of the accident, it does provide insight into the Legislature's intent with regard to the meaning of "work loss" generally in that it looked to the wages received by the plaintiff. See *Couzens*, 480 Mich at 249 ("[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole."). As the Court of Appeals noted in *Gerardi v Buckeye Union Ins Co*, "By adopting actual past wages as the appropriate standard for [temporarily] unemployed workers, the Legislature merely emphasized that the thrust of the work loss provision in all cases was to calculate loss based on actual earnings, not on future possibilities." *Gerardi v Buckeye Union Ins Co*, 89 Mich App 90, 94; 279 NW2d 588 (1979).

[112] *Popma*, 446 Mich at 472.

Michigan caselaw provides some examples of circumstances under which it was appropriate to consider wages the plaintiff could not have earned before the subject accident in determining what wages a plaintiff would have earned but for the accident. In *Gobler v Auto-Owners Ins Co*, this Court interpreted a phrase contained in the survivor's benefits provision of the no-fault act, MCL 500.3108, the language of which is analogous to MCL 500.3107, providing:

> [A] survivor's loss . . . consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death *would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses* . . . .[113]

The decedent in that case died on the day that he completed his final requirements for a forestry degree from Michigan State University, had applied for forestry positions, was awarded a degree posthumously, and received what amounted to a job offer six months after he died.[114] The evidence presented also indicated that the decedent would have accepted the position. Thus, the evidence established that the decedent would have earned wages as an employee of the forestry service; but for his death, there was virtually nothing standing between the decedent and his earning the income at issue.[115] This Court concluded that it was not convinced that the trial court had made a mistake in finding that the deceased "would have been employed by the forestry service had he survived the accident."[116]

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[113] *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 60; 404 NW2d 199 (1987), citing MCL 500.3108(1) (emphasis altered).

[114] *Id*. at 55-57, 65-66.

[115] *Id*. at 65.

[116] *Id*. at 66.

In *Swartout v State Farm Mut*, the Court of Appeals reversed the trial court's decision to dismiss a plaintiff's claim for work-loss benefits.[117] At the time of the accident, the plaintiff was to graduate from nursing school in two months, but because of her injuries, she was unable to complete what would have been her final semester.[118] She was able to graduate the following year and obtain employment, but sought work-loss benefits because of the delay in her employment caused by the accident.[119] The plaintiff submitted the following evidence: (1) an affidavit from her school stating that but for her being forced to withdraw due to the accident, she would have graduated on time and (2) an affidavit from a hospital stating that plaintiff would have been employed there no later than July 27, 1981, if she had received her degree on time, and identifying the rate of pay she would have received.[120] The majority explained:

> [The] plaintiff . . . has alleged facts which, if believed, would establish the source of her employment, the exact date of employment and the exact wages that would have been received between July of 1981 and June of 1982. In other words, plaintiff has stated a claim for wages that would, rather than could, have been earned but for her injuries. We therefore conclude that plaintiff's claim should have survived defendant's motion for summary disposition.[121]

The Court of Appeals majority concluded that "whether plaintiff would have received income but for her injuries should be left to the trier of fact," as was the case in

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[117] *Swartout v State Farm Mut*, 156 Mich App 350, 352; 401 NW2d 364 (1987).

[118] *Id*. at 352.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 354.

Gobler.[122] Thus, when the evidence presented demonstrates that the wages at issue were inevitable but for the accident, a damages award based on such wages will not be barred as a matter of law on grounds of being contingent and speculative.

Unlike the plaintiffs in *Gobler* and *Swartout*, however, plaintiff Hannay was not on the brink of graduating from her professional degree program—indeed, she had not yet been *accepted* into the dental hygienist program. Moreover, plaintiff Hannay's application for admission was rejected twice, once on its merits. Conversely, in *Gobler* and *Swartout*, the plaintiffs had satisfied nearly every condition to employment. Plaintiff's situation is more akin to that of the plaintiff in *Gerardi*, a Court of Appeals case in which the plaintiff sought work-loss benefits because of a one-year delay in her nursing school studies caused by injuries she incurred in an automobile accident.[123] The plaintiff still had one year of nursing school remaining at the time of her injury.[124] The Court concluded that "[a] fair reading of the complaint reveals that the plaintiff is in fact alleging a loss of wages she could have earned in the future as a registered nurse, but for the delay in her studies," i.e., loss-of-earning-capacity damages, reasoning, in part, that "plaintiff would not have been able to work as a registered nurse prior to her accident."[125]

Plaintiff Hannay ostensibly pleaded her claim for damages as a claim for work-loss damages as a dental hygienist, and the trial court purported to award such damages. This was error. The evidence presented did not establish by a preponderance of the evidence that

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[122] *Id*. at 355.

[123] *Gerardi*, 89 Mich App at 92-93.

[124] *Id*. at 95.

[125] *Id*.

but for the accident, plaintiff Hannay ultimately *would* have earned wages as a dental hygienist.

In his deposition testimony, Mark Johnston (the dentist plaintiff worked for as a dental assistant) indicated that plaintiff was "destined to work in a dental office" and was "well on her way to getting into the [dental hygienist] program . . . ." Similarly, in her deposition testimony, Mary Johnston (a longtime dental hygienist who worked with plaintiff, who had been an instructor at the school where plaintiff applied, and who administered licensing exams for dentists and dental hygienists) testified that she thought plaintiff "absolutely . . . would have been admitted into the program." The Johnstons both indicated that they would have hired plaintiff as a hygienist in their office.

Clearly, the Johnstons were convinced that plaintiff Hannay would be successful in achieving her long-held dream of becoming a dental hygienist. The operative question here is not whether these witnesses were credible[126]—the operative question is *what exactly did the evidence presented demonstrate*? Did the evidence demonstrate that plaintiff Hannay *would* have earned wages as a dental hygienist but for her bodily injuries, or did it demonstrate merely that had she continued to apply herself and pursue the opportunity to become educated and licensed in that field she *could* have earned such wages, i.e., that she possessed a yet-unrealized potential for earning such wages?

We recognize that there is some degree of uncertainty inherent in work-loss awards generally,[127] but even

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[126] See MCR 2.613 (stating in part that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it").

[127] See *Voss v Adams*, 271 Mich 203, 205-206; 259 NW 889 (1935) (recognizing the natural uncertainty in damages inquiries generally,

assuming that the opportunity presented by the Johnstons did in fact constitute an offer of employment, the sheer number of conditions that were required to be satisfied before plaintiff could be employed by Dr. Johnston—namely, that plaintiff Hannay *would* have been accepted into the dental hygienist program, *would* have successfully completed the program, and *would* have passed the licensing exam—places this case outside the inherent uncertainty involved in work-loss claims.

We conclude that these unsatisfied conditions render the award of work-loss damages under the no-fault act contingent and speculative in this case and, therefore, barred under Michigan law to the extent that these damages were based on plaintiff's potential employment as a dental hygienist. In short, "it is too tenuous a proposition to say that the element of damages in dispute," namely, work-loss damages for loss of income as a dental hygienist, "is a legal and natural consequence of defendant's wrongful act."[128] The Johnstons' honestly held belief that plaintiff would have succeeded was simply not sufficient to prove that plaintiff would have satisfied the conditions necessary to earn wages as a dental hygienist, including the primary condition of being admitted into the dental hygienist program, a condition which neither they nor plaintiff had final control over. Accordingly, the facts as found by the trial

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stating, "uncertain damages are not always speculative" and that "[t]here is a difference between certainty as to the existence or cause of an injury and as to the measure or extent of the damage. It is a recognized rule that a wrongdoer will not go scot-free because his victim cannot prove his loss exactly. If the existence and cause of the injury are traced to a tort and damages are not susceptible of computation, the jury will allow such compensation as, under all the circumstances and in the exercise of sound conscience and good judgment, they shall deem just").

[128] *Sutter*, 377 Mich at 87.

court were not sufficient to satisfy the statutory language defining work-loss damages with respect to plaintiff's claim of work loss as a dental hygienist, namely that plaintiff *would* have earned income as a dental hygienist *but for* the accident.

For these reasons, we reverse the Court of Appeals' decision to affirm plaintiff Hannay's work-loss damages award, and remand to the trial court for recalculation of the work-loss award consistent with this opinion.

IV. CONCLUSION

In light of our holding that a plaintiff may bring a third-party tort action for both economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements under MCL 500.3135 have been met, we affirm the *Hannay* panel's conclusion that work-loss benefits that exceed the statutory maximum are available against a governmental entity, and we reverse the *Hunter* panel's conclusion that noneconomic damages do not fall within the category of damages compensable under the motor vehicle exception and remand to the trial court for further proceedings consistent with this opinion. With regard to the second issue in *Hannay*, we reverse the portion of the Court of Appeals' opinion that affirms the work-loss damages award and remand to the trial court for recalculation of the work-loss award consistent with this opinion.

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

CAVANAGH, J. I concur in the result only.

ADAIR v MICHIGAN

Docket No. 147794. Argued October 9, 2014 (Calendar No. 1). Decided December 22, 2014. Rehearing denied at 497 Mich 959.

Daniel Adair and more than 450 school districts, along with one individual taxpayer from each district, brought an original action under the Headlee Amendment in the Court of Appeals against the state of Michigan, the Michigan Department of Education, the state budget director, the state treasurer, and the state superintendent of public instruction, alleging that the amount of the appropriation under MCL 388.1752a for school year 2010-2011 was inadequate to compensate the school districts for the new and increased costs of collecting and reporting information to the Center for Educational Performance and Information (CEPI). Plaintiffs amended their complaint to include a similar challenge to the following school year's appropriation. The Court of Appeals assigned the case to a special master, Michael Warren, J. After discovery, defendants moved for summary disposition, claiming that plaintiffs could not produce any evidence of the amount of necessary increased costs and that in any case, an additional appropriation under MCL 388.1622b(1) had fully funded the mandates. The special master denied defendants' motion, finding that plaintiffs had presented sufficient evidence to show that the state had underfunded the mandates. He also ruled that plaintiffs had a higher burden of proof that required them to produce evidence of specific dollar-amount increases in the costs incurred. At trial, plaintiffs' counsel indicated that plaintiffs would not attempt to prove specific dollar amounts of underfunding, but would show through expert testimony that the Legislature's method of determining the requisite amount of funding was materially flawed and that the appropriation therefore could not be constitutionally adequate. In light of plaintiffs' refusal to present proofs on the specific amount of the shortfall, defendants moved for an involuntary dismissal. Although plaintiffs insisted that because they had brought a declaratory action, they did not need to quantify the underfunding, but only needed to show that an underfunding had occurred, the special master granted defendants' motion. The special master cited *Adair v Michigan*, 486 Mich 468 (2010) (*Adair I*), in which the Supreme Court affirmed a

declaratory judgment that the Legislature had violated the prohibition of unfunded mandates (POUM) provision of the Headlee Amendment, holding that when the state provides no funding at all for a mandate, a POUM claim does not require proof of the specific increased costs necessitated by the state mandate. Rather, the plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it. The special master observed, however, that plaintiffs had overlooked the factual distinction between *Adair I* (in which no appropriation had been made) and their case (in which appropriations were made). Both parties filed objections. The Court of Appeals, O'CONNELL, P.J., and TALBOT and OWENS, JJ., disagreed with the special master's ruling on the appropriate burden of proof but agreed with him in all other respects. The panel concluded that the special master had relied too heavily on the fact that *Adair I* involved no legislative funding while this case involved a claim for underfunding. According to the panel, *Adair I* stood for the proposition that neither Const 1963, art 9, § 29 nor the relevant provision of the Headlee implementing statutes required plaintiffs to prove how much their districts' costs had increased as a result of a new or increased mandate. Instead, plaintiffs had the burden to present sufficient evidence to allow the trier of fact to conclude that the Legislature's method of determining the amount of the appropriation was so flawed that it failed to reflect the actual cost to the state if the state were to provide the activity or service mandated. The panel concluded that plaintiffs were prepared to meet this burden through expert testimony. The Court of Appeals granted plaintiffs a declaratory judgment in part and remanded the case to the special master to reopen the proofs. 302 Mich App 305 (2013). Defendants applied for leave to appeal, and plaintiffs applied for leave to cross-appeal. The Supreme Court granted defendants' application but denied plaintiffs' application. 495 Mich 937 (2014).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

A plaintiff who brings a Headlee claim alleging that the Legislature's appropriation to a local unit of government failed to fully fund the cost of a new or increased service or activity required of that local unit must allege and prove the specific amount of the shortfall.

1. Const 1963, art 9, § 25 (part of the Headlee Amendment) provides that the state is prohibited from (1) requiring any new or expanded activities by local units of government without full state

financing, (2) reducing the proportion of state spending in the form of aid to local units, or (3) shifting the tax burden to local units. The maintenance of support (MOS) provision of Const 1963, art 9, § 29 prohibits the state from reducing the state financed proportion of the necessary costs of any existing activity or service required of local units by state law. The prohibition of unfunded mandates (POUM) provision of article 9, § 29 prohibits the Legislature or a state agency from requiring a new activity or service or an increase in the level of any activity or service beyond that required by existing law by a local units of government unless there is a state appropriation to pay the local unit for any necessary increased costs. Plaintiffs brought a POUM claim in this case, asserting that the state had failed to provide adequate funding for increased services under the CEPI mandates.

2. Defendants contended that the school districts' acceptance of the discretionary payments made under MCL 388.1622b(1) constituted a waiver of any claim that the Legislature has failed to fulfill its Headlee obligations. Waiver, however, is the intentional relinquishment of a known right. All that the appropriation requires is the district's compliance with the statute's reporting mandates. Nothing in the statute indicates that by accepting the appropriation, the districts relinquished their right to bring a constitutional challenge to the adequacy of funding.

3. Headlee jurisprudence requires a plaintiff making a MOS or POUM claim to show the type and extent of the alleged shortfall in order to prove its case, even when the plaintiff requested only declaratory relief. *Adair I* recognized a narrow exception to this requirement, holding that when the state failed to make any appropriation to fund an increased level of activity or service mandated by the state, the plaintiff need not establish the particular amount of increased costs. Instead, if the plaintiff proves that the state required a new or increased level of activity or service without providing any funding, the burden shifts to the state to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary. Both MOS and POUM claims require a close look at the Legislature's appropriation in comparison with the mandate to evaluate whether the appropriation is sufficient to meet Headlee obligations, but this is qualitatively different from a POUM claim in which the Legislature failed to appropriate any funding at all. When the Legislature has made some appropriation, it can argue that the appropriation was sufficient to meet its Headlee obligations. *Adair I* involved the complete absence of funding. For a POUM claim alleging no funding, all that a plaintiff

needs to show is that the mandate required some increased level of activity or service. Therefore, *Adair I* is limited to situations in which the Legislature has not made any appropriation to cover the cost of a new or increased mandate. It does not apply to article 9, § 29 claims in which some funding was appropriated to cover the cost of a new or expanded mandate, and the plaintiff must instead allege and prove the specific amount of the purported funding shortfall, i.e., the extent of the necessary increased costs of the new or increased activity or service, in order to establish the extent of the harm caused by the Legislature's inadequate funding.

Reversed in part; special master's order of involuntary dismissal reinstated.

Justice CAVANAGH, concurring in part and dissenting in part, agreed that the school districts did not waive their POUM claim by accepting the conditional appropriation under MCL 388.1622b(1). He disagreed, however, that a plaintiff alleging the state's failure to adequately measure and appropriate sufficient funding for the purpose of complying with the POUM provision must plead and prove a quantified dollar amount of underfunding. There is a meaningful factual difference between a per se POUM claim (which involves a mandate that was not accompanied by any appropriation) and a POUM claim alleging underfunding. Assuming that the state proceeded in good-faith compliance with its Headlee Amendment obligation, the state would have contemplated whether the mandate required an appropriation before it enacted that mandate. If no funds were appropriated, the state would necessarily have determined that (1) the mandate would not constitute a new activity or service or an increase in the level of any activities or services, (2) local governments would not have necessary increased costs, and (3) any increased cost was not a necessary cost as defined by the Headlee Amendment's implementing provisions, MCL 21.235(1) and MCL 21.233(6). Conversely, if the state appropriated funding to meet its Headlee Amendment obligations, those considerations would generally not be at issue. Instead, the issue would be whether the state properly measured the appropriation. Under MCL 21.233(6), part of the Headlee implementing legislation, the appropriation must be measured by the net cost of an activity or service provided by a local unit of government, and the net cost is the actual cost to the state if the state were to provide the activity or service mandated as a state requirement. The majority erroneously bypassed the import of MCL 21.233(6). The pertinent difference between a per se POUM claim and a claim of underfunding is that the latter only involves an inquiry into the sufficiency of the appropriation.

Because the appropriation is measured by the actual cost to the state if the state were to provide the new activity, the burden of showing that the Legislature's appropriation accurately reflects the state's costs is properly placed on the state. Justice CAVANAGH would have held that to overcome the state's motion for summary disposition, a plaintiff must show that there is a genuine issue of material fact that the state underfunded the appropriation. The Court of Appeals correctly determined that plaintiffs stood ready to present some evidence that, if credible to the trier of fact, would have undermined the validity of the method the Legislature used to determine the amount of the appropriations at issue and would have shifted the burden of going forward with evidence to the state to present some evidence that the appropriations fully funded the state's obligation under the POUM provision. Justice CAVANAGH would have affirmed the judgment of the Court of Appeals and allowed this case to continue in proceedings before the special master.

CONSTITUTIONAL LAW — HEADLEE AMENDMENT — PROHIBITION OF UNFUNDED MANDATES — UNDERFUNDED APPROPRIATIONS — BURDEN OF PROOF TO SHOW SHORTFALL.

A plaintiff who brings a claim under the prohibition of unfunded mandates provision of Const 1963, art 9, § 29 (part of the Headlee Amendment) alleging that the Legislature's appropriation to a local unit of government failed to fully fund the cost of a new or increased service or activity required of that local unit must allege and prove the specific amount of the shortfall.

Secrest Wardle (by *Dennis R. Pollard*, *William P. Hampton*, and *Mark S. Roberts*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Timothy J. Haynes*, *Jonathan S. Ludwig*, and *Travis M. Comstock*, Assistant Attorneys General, for defendants.

YOUNG, C.J.

I. INTRODUCTION

This Court is yet again faced with a challenge to the Legislature's education-related funding appropriation

for state-imposed mandates under the Headlee Amendment.[1] Plaintiffs are taxpayers and school districts seeking a declaratory judgment that the amount of funding appropriated by the Legislature to fund new and increased recordkeeping requirements is materially deficient. Consistent with our construction of the Headlee Amendment and our court rules, we have required that plaintiffs bringing an action charging inadequate funding of a legislative mandate under the Headlee Amendment must allege and prove not only that the funding was insufficient, but the type and extent of the harm. Today we make clear that this burden includes the requirement that the plaintiff show the specific amount of underfunding where the Legislature has made at least some appropriation of funds.

The special master applied this burden of proof and dismissed plaintiffs' claims when plaintiffs stated at trial that they would not provide proofs establishing the specific amount of underfunding. The Court of Appeals reversed, requiring plaintiffs only to provide evidence that the methodology used by the Legislature to determine the amount of the appropriation was materially flawed, and remanded the case to the special master for further proceedings. The Court of Appeals' standard is inconsistent with this Court's longstanding requirement that a plaintiff alleging inadequate funding must show the type and extent of the funding shortfall.

Plaintiffs were properly instructed regarding the burden of proof by the special master before trial and failed to offer proofs concerning the specific amount of the alleged shortfall. Thus, we reverse the judgment of the Court of Appeals and enter a judgment in favor of defendants.

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[1] Const 1963, art 9, §§ 25 to 34.

II. FACTS AND PROCEDURAL HISTORY

A. HISTORY OF *ADAIR* LITIGATION AND LEGISLATIVE ACTION

The legislatively imposed mandates at issue require that school districts collect and report certain information regarding school district performance to the Center for Educational Performance and Information (CEPI).[2] The CEPI was created through Executive Order 2000-9 and 2000 PA 297 and is entrusted to "[c]oordinate the collection of all data required by state and federal law from districts, intermediate districts, and postsecondary institutions"[3] and "provide information to school leaders, teachers, researchers, and the public," including "[r]esearch-ready data sets for researchers to perform research that advances this state's educational performance."[4]

Initially, the state did not make an appropriation to fund the CEPI mandate. As a result, in 2000 plaintiffs commenced a Headlee Amendment action in the Court of Appeals. In the first *Adair* case decided by this Court, we held that the *lack* of funding for CEPI reporting requirements presented a "colorable claim under Headlee" because the mandates "require[d] the districts to actively participate in maintaining data that the state requires for its own purposes," a requirement that had not existed before that time.[5]

After a few additional trips between this Court and the Court of Appeals, the case culminated in *Adair v*

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[2] MCL 388.1752.

[3] MCL 388.1694a(1)(a).

[4] MCL 388.1694a(1)(d)(*iii*).

[5] See *Adair v Michigan*, 470 Mich 105, 129-130; 680 NW2d 386 (2004). We held that the remaining claims of Headlee violations were barred by res judicata or release, or failed to implicate the Headlee Amendment. See *id*. at 133.

Michigan (*Adair I*).[6] In *Adair I*, this Court affirmed the Court of Appeals' declaratory judgment that the Legislature had violated the prohibition of unfunded mandates (POUM) provision of the Headlee Amendment. We held that, in a case in which the state provides *no funding at all* to fund a mandate, a POUM Headlee claim does not require proof by a plaintiff of specific increased costs necessitated by the state mandate. In that situation, "a plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it."[7]

In response to *Adair I*, the Legislature enacted MCL 388.1752a,[8] which appropriated about $25 million for the 2010-2011 school year to reimburse local school districts for the cost of the CEPI recordkeeping mandate.[9] The Legislature also added an additional CEPI mandate, the teacher-student data link (TSDL), which requires reporting of data to allow districts "to assess

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[6] *Adair v Michigan*, 486 Mich 468; 785 NW2d 119 (2010) (*Adair I*). See also *Adair v Michigan (On Remand)*, 267 Mich App 583; 705 NW2d 541 (2005); *Adair v Michigan (After Remand)*, 474 Mich 1073 (2006); *Adair v Michigan (On Second Remand)*, 279 Mich App 507; 760 NW2d 544 (2008).

[7] *Adair I*, 486 Mich at 486-487. That litigation ended in 2013 when this Court remanded, for a final time, on an issue concerning attorney fees. *Adair v Michigan*, 298 Mich App 383; 827 NW2d 740 (2012), rev'd 494 Mich 852 (2013). *Adair v Michigan (On Fourth Remand)*, 301 Mich App 547; 836 NW2d 742 (2013), lv den 495 Mich 914 (2013).

[8] See 2010 PA 217.

[9] This statute, which has been amended yearly, currently reads in part:

> As required by the court in the consolidated cases known as Adair *v* State of Michigan, Michigan supreme court docket nos. 137424 and 137453, from the state school aid fund money appropriated in [MCL 388.1611] there is allocated for 2014-2015 an amount not to exceed $38,000,500.00 to be used solely for the purpose of paying necessary costs related to the state-mandated collection, maintenance, and reporting of data to this state. [MCL 388.1752a(1), as amended by 2014 PA 196.]

individual teacher impact on student performance."[10] So, for the 2010-2011 school year, the Legislature made a separate appropriation in the amount of $8.4 million for the newly created TSDL mandate.[11] For the following school year, 2011-2012, the Legislature appropriated approximately $34 million to cover all of the CEPI record keeping requirements, which included money for the TSDL requirements (the "§ 152a appropriation").[12] Additionally, for both of these school years, the Legislature made a "discretionary nonmandated payment" (the "§ 22b appropriation").[13] However, these funds were conditioned on furnishing the data as required by the CEPI mandates. The condition currently reads as follows:

> In order to receive an allocation under subsection (1), each district shall do all of the following:
>
> * * *
>
> (c) Furnish data and other information required by state and federal law to the center and the department in the form and manner specified by the center or the department, as applicable.[14]

B. THE CURRENT LITIGATION

Plaintiffs, more than 450 Michigan school districts together with one individual taxpayer from each district

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[10] MCL 388.1694a(1)(d)(*i*), as amended by 2010 PA 204 ("Data shall include . . . [d]ata sets that link teachers to student information, allowing districts to assess individual teacher impact on student performance and consider student growth factors in teacher and principal evaluation systems."). This mandate was imposed after *Adair I*.

[11] See MCL 388.1694a(9), as amended by 2010 PA 204.

[12] See MCL 388.1752a, as amended by 2011 PA 62.

[13] See MCL 388.1622b(1), as amended by 2011 PA 62.

[14] MCL 388.1622b(3)(c), as amended by 2014 PA 196.

filed an original action in the Court of Appeals[15] challenging the amount of the § 152a appropriation for school year 2010-2011 as inadequate to compensate the school districts for the CEPI requirements. Plaintiffs amended their pleadings to include a similar challenge to the following school year's appropriation.[16]

The Court of Appeals assigned the case to a special master. After discovery, defendants moved for summary disposition under MCR 2.116(C)(10),[17] claiming that plaintiffs could not produce any evidence of the amount of necessary increased costs and that in any case, the § 22b appropriation fully funded the mandates. The master denied defendants' motion, finding that plaintiffs had presented "more than sufficient evidence to show that the state has underfunded the CEPI mandates . . . [and] the [TSDL] mandate." He also ruled that

> [p]laintiffs have a 'higher burden' which requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements. [*Adair I*, 486 Mich at 480] n 29 . . . . The Plaintiffs' poignant argument that the general direction of *Adair I* mitigates requiring them to establish the insufficiency of the amount of appropriation overlooks the factual distinc-

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[15] Const 1963, art 9, § 32 provides that claims under the Headlee Amendment are brought as an original action in the Court of Appeals.

[16] Plaintiffs made two additional claims: (1) that changes to the teachers' tenure act requiring annual teacher and administrator evaluations constitute Headlee violations; and (2) the manner of funding of the new mandates was unconstitutional because it unconstitutionally reduced per pupil funding. We denied plaintiffs' cross-application for leave to appeal which sought review of those issues. *Adair v Michigan*, 495 Mich 937, 938 (2014).

[17] MCR 2.116(C)(10) provides that the following is a ground for summary disposition: "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."

tion between *Adair I* (no appropriation made) and this case (appropriations made).

At that point, the master believed that "[o]nce the state establishes an appropriation, the Plaintiffs are equipped to attack whether the amount is sufficient. Indeed, the Plaintiffs' expert has done just that."

The case proceeded to trial, but during opening statements, plaintiffs' counsel stated that they would not attempt to prove a specific dollar amount of underfunding, but rather intended to show through expert testimony that the Legislature's methodology to determine the requisite amount of funding was materially flawed and thus that the appropriation could not be constitutionally adequate under Headlee. At the close of plaintiffs' opening statement, on the basis of plaintiffs' refusal to present proofs on the specific amount of alleged funding shortfall, defendants filed a motion for an involuntary dismissal,[18] claiming that plaintiffs were unable or unwilling to meet their burden. Plaintiffs responded that, because this was merely a declaratory action, they need not quantify the extent of the underfunding, but only show that an underfunding occurred. The special master granted defendants' motion. In a written opinion, the master reiterated that plaintiffs had the burden to establish the specific amount of

[18] The special master referred to the motion as one for "directed verdict and/or involuntary dismissal," and the Court of Appeals referred to the motion as one for directed verdict, though the appropriate label is one for involuntary dismissal because it is a case without a jury. See MCR 2.504(B)(2) (providing that dismissal may be granted "[i]n an action, claim, or hearing tried without a jury . . . on the ground that, on the facts and the law, the plaintiff has no right to relief"); *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995) (treating the defendants' motion for a "directed verdict" as one for involuntary dismissal because the trial court was sitting as the finder of fact).

underfunding. Because plaintiffs declined to offer those proofs, their case was dismissed.

Both parties filed objections, and the Court of Appeals reversed the special master's ruling on the appropriate burden of proof, but affirmed in all other respects.[19] The panel concluded that the special master had relied too heavily on the fact that *Adair I* involved no legislative funding while this case involves a claim for underfunding. In the Court of Appeals' view, *Adair I* stood for the proposition that neither Const 1963, art 9, § 29 nor MCL 21.233 required plaintiffs to prove how much their districts' costs had increased as a result of a new or increased mandate.

Instead, stated the panel, plaintiffs had the "burden to present sufficient evidence to allow the trier of fact to conclude that the method employed by the Legislature to determine the amount of the appropriation was so flawed that it failed to reflect the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ."[20] The Court of Appeals concluded that plaintiffs stood ready to meet this burden through expert testimony, which a trier of fact could find "undermined the validity of the method used by the Legislature to determine the amount of the appropriations at issue . . . ."[21] The panel remanded to the special master to reopen the proofs.

Both parties sought leave to appeal in this Court; we granted defendants' application for leave to appeal.[22]

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[19] *Adair v Michigan*, 302 Mich App 305, 308; 839 NW2d 681 (2013).

[20] *Id*. at 316, quoting MCL 21.233(6) (quotation marks omitted).

[21] *Adair*, 302 Mich App at 316-317.

[22] *Adair*, 495 Mich 937. We directed the parties to brief

> (1) which party has the burden of proving underfunding of a legislative mandate in a challenge under Const 1963, art 9, § 29,

III. STANDARD OF REVIEW

Questions of constitutional and statutory interpretation are reviewed de novo.[23] An appellate court reviews de novo a trial court's ruling on a motion for an involuntary dismissal.[24]

IV. ANALYSIS

Because we are interpreting the Michigan Constitution, the proper focus is on the will of the people ratifying the amendment. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification."[25] This is the rule of "common understanding," which is described by Justice Cooley as follows:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.[26]

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(2) what elements of proof are necessary to sustain such a claim, and (3) whether acceptance of a general appropriation from the Legislature which is specifically conditioned on compliance with reporting requirements pursuant to MCL 388.1622b([3])(c) waives any challenge to the funding level for those requirements under Const 1963, art 9, § 29. [*Id*. at 937-938.]

[23] *Makowski v Governor*, 495 Mich 465, 470; 852 NW2d 61 (2014).

[24] *Samuel D Begola*, 210 Mich App at 639.

[25] *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

[26] *Id*. at 468, quoting Cooley, Constitutional Limitations, p 81.

This Court locates the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification.[27] Interpretation of a constitutional provision also takes account of "the circumstances leading to the adoption of the provision and the purpose sought to be accomplished."[28]

A. THE HEADLEE AMENDMENT AND IMPLEMENTING LEGISLATION

In 1978, the voters passed the Headlee Amendment by initiative. The Headlee Amendment was adopted with "the primary purpose of relieving the electorate from overwhelming and overreaching taxation."[29] To effectuate its purpose, the amendment set forth "a fairly complex system of revenue and tax limits."[30] One of these limitations is contained in Const 1963, art 9, § 25, which provides, "The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government."

The Headlee Amendment provides for another set of limitations in article 9, § 29. The first sentence of that section provides:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law.

The second sentence of § 29 provides:

> A new activity or service or an increase in the level of any

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[27] *Hathcock*, 471 Mich at 468-469.

[28] *People v Tanner*, 496 Mich 199, 226; 853 NW2d 653 (2014) (citation omitted).

[29] *Durant v Michigan*, 456 Mich 175, 214; 566 NW2d 272 (1997).

[30] *Id*. at 182.

> activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

The first sentence prohibits the state from reducing the state-financed proportion of an existing activity required of local governments; the second generally prohibits new mandates which increase the burden on local governments unless accompanied by funding to offset increased costs. Claims under the first sentence are referred to as "maintenance of support" or "MOS" claims. Claims under the latter sentence are referred to as "prohibition of unfunded mandates" or "POUM" claims. This appeal involves a POUM claim: the plaintiffs contend that the state failed to provide adequate funding for increased services under the CEPI mandates.

Shortly after the Headlee Amendment was enacted, the Legislature passed an act to implement the constitutional provisions.[31] The act requires the Legislature to "annually appropriate an amount sufficient to make disbursements to each local unit of government for the necessary cost of each state requirement . . . ."[32] "Necessary cost" means "the net cost of an activity or service provided by a local unit of government."[33] "Net cost," in turn, is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement."[34]

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[31] 1979 PA 101, codified at MCL 21.231 *et seq*. The Legislature was required to implement the provisions of the Headlee Amendment by Const 1963, art 9, § 34.

[32] MCL 21.235(1).

[33] MCL 21.233(6).

[34] *Id.* "Necessary cost" does not include a cost that does not exceed a *de minimis* amount, defined as a cost not exceeding $300 per claim. MCL 21.233(6)(c); MCL 21.232(4).

B. ACCEPTANCE OF GENERAL APPROPRIATION AS WAIVER

As an initial matter, defendants contend that plaintiff school districts' acceptance of the "discretionary nonmandated payment"—the § 22b appropriation—constitutes a waiver of any claim that the Legislature has failed to fulfill its Headlee obligations. Because acceptance of the appropriation is conditioned on compliance with the CEPI mandates, defendants contend that such acceptance thereby waives any claim of a constitutional deficiency under the Headlee Amendment. "Waiver is the intentional relinquishment of a known right."[35] The condition in MCL 388.1622b reads:

> (3) In order to receive an allocation under subsection (1), each district shall do all of the following:
>
> * * *
>
> (c) Furnish data and other information required by state and federal law to [CEPI] and the department in the form and manner specified by [CEPI] or the department, as applicable.

The proper interpretation of a statute is rendered by reference to its plain language.[36] Examining the language, one searches in vain to find any notice that, by accepting the § 22b appropriation, plaintiffs have thereby relinquished their right to bring a constitutional challenge to the adequacy of funding provided by the Legislature. Indeed, all the § 22b appropriation requires is that the district comply with the statute's

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[35] See *Bailey v Jones*, 243 Mich 159, 162; 219 NW 629 (1928).

[36] *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438-39; 716 NW2d 247 (2006) ("The primary goal of statutory interpretation is to give effect to the Legislature's intent. The first step is to review the statute's language. And if the statute is plain and unambiguous, then this Court will apply the statute as written.") (citations omitted).

reporting mandates—to "furnish data and other information required by state and federal law to the center and the department"—in exchange for the allocation. The districts are bound to the terms of the condition upon acceptance of the appropriation, but the terms do not include a waiver of any Headlee claim.[37] The only thing the plaintiffs intentionally and voluntarily waived upon acceptance of these funds was the ability to ignore the condition requiring them to furnish data and information as required by the CEPI mandates.

C. APPROPRIATE BURDEN OF PROOF

This Court has considered Headlee claims arising under both the MOS and POUM sentences of § 29 and has consistently announced that a plaintiff making either claim under the Headlee Amendment must show

[37] Not only is no explicit Headlee waiver required, the language of § 22b suggests that the Legislature understood that there was no waiver of Headlee claims. In that very section, MCL 388.1622b(7) specifically contemplates potential Headlee claims by school districts against the state by setting up a procedure for reimbursing the districts in the event of a successful claim. The inclusion of this provision belies the defendants' argument that acceptance of the appropriation waives any Headlee claim. MCL 388.1622b(7) provides:

> It is the intent of the legislature that all constitutional obligations of this state have been fully funded . . . . If a claim is made by an entity receiving funds under this article that challenges the legislative determination of the adequacy of this funding or alleges that there exists an unfunded constitutional requirement, the state budget director may escrow or allocate from the discretionary funds for nonmandated payments under this section the amount as may be necessary to satisfy the claim before making any payments to districts . . . .

Moreover, even though the condition does not have the effect the defendants contend it does, it still serves a purpose. It serves as an enforcement mechanism to ensure a district's compliance with the mandate without requiring the state to bring a suit for declaratory or injunctive relief to do so.

the type and extent of the alleged shortfall in order to prove its case. In *Oakland Co v Michigan*, [38] we considered whether, under the Headlee Amendment's MOS provision, the state unconstitutionally reduced the ratio of financing for county foster care services. In remanding to the lower court for further proceedings, Justice MARILYN KELLY's plurality opinion stated that "plaintiffs must allege the type and *extent of the harm* so that the court may determine if a § 29 violation occurred for purposes of making a declaratory judgment. In that way, the state will be aware of the financial adjustment necessary to allow for future compliance."[39] The Court adopted this plurality position in the majority opinion of the 2004 *Adair* case, which concerned a POUM claim.[40] Thus, the Court has announced this standard as applicable to both of the sentences in § 29 of the Headlee Amendment, and has done so when the plaintiffs have requested only declaratory relief.

In 2007, the Michigan Court Rules were amended in order to clarify that a plaintiff bringing a Headlee claim must plead "with particularity the factual basis for the alleged violation . . . ."[41] In an action involving § 29, "the plaintiff shall state with particularity the type and extent of the harm and whether there has been a violation of either the first or second sentence of that section."[42]

While the requirement that a plaintiff must allege and prove the type and extent of the harm had been

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[38] *Oakland Co v Michigan*, 456 Mich 144; 566 NW2d 616 (1997).

[39] *Id*. at 166 (MARILYN KELLY, J., plurality opinion) (emphasis added).

[40] *Adair*, 470 Mich at 119-120, quoting *Oakland Co*, 456 Mich at 166 (MARILYN KELLY, J., plurality opinion) (emphasis added).

[41] MCR 2.112(M).

[42] *Id*. Moreover, in a POUM action, "the plaintiff shall state with particularity the activity or service involved." *Id*.

articulated consistently, this Court recognized a narrow exception in *Adair I*. In that case, we held that, when the state failed to make *any* appropriation to fund an increased level of activity or service mandated by the state, the plaintiff need not establish the particular amount of increased costs.[43] Instead, if a plaintiff proves that the state required a new or increased level of activity or service without providing any funding, the burden shifts to the state "to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary."[44]

This exception, however, is explained by the distinct factual scenario facing the Court in that case. We have recognized on multiple occasions that POUM claims are in some respects similar to MOS claims.[45] Significantly, MOS claims and POUM claims concerning an alleged underfunding are quite similar. Both types of claims require a close look at the Legislature's appropriation in comparison with the mandate in order to evaluate whether the appropriation is sufficient to meet Headlee obligations. This calculus is qualitatively different from a POUM claim in which the Legislature failed to appropriate any funding at all. While the former involves at least some appropriation that the Legislature can argue is sufficient to meet its Headlee obligations, the latter involves the complete absence of funding. A POUM claim alleging no funding is a simpler claim to make, as explained in *Adair I*, because the Legislature can be said to have completely abdicated its funding

[43] *Adair I*, 486 Mich at 480.

[44] *Id*.

[45] See *Adair*, 470 Mich at 120 n 13; *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 598 n 2; 597 NW2d 113 (1999) (stating that the two sentences must be read together because they were aimed at the alleviation of two possible manifestations of the same voter concern), quoting *Schmidt v Dep't of Ed*, 441 Mich 236, 250-251; 490 NW2d 584 (1992).

duty; all that needs to be shown is that the mandate required some increased level of activity or service.[46] This characteristic—the absolute lack of funding—separates *Adair I* from *Oakland Co* and the 2004 *Adair* case. Thus, *Adair I* is appropriately limited to situations in which the Legislature has not made any appropriation to cover the cost of a new or increased mandate and is inapplicable to § 29 claims in which some funding has been appropriated.[47]

Consistent with prior caselaw and our court rules, we hold that a plaintiff must allege and prove the specific amount of the purported funding shortfall in order to establish the "extent of the harm" caused by the Legislature's inadequate funding.[48] In other words, to sustain a claim under the Headlee Amendment when the Legislature appropriated at least some amount of funding to cover the cost of a new or expanded mandate, a plaintiff must allege and prove the extent of the "necessary increased cost" of the new or increased activity or service.[49]

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[46] See *Adair I*, 486 Mich at 483-485.

[47] Indeed, even in *Adair I*, we noted that a "higher burden" would likely apply in POUM cases such as this, where "the state *did* appropriate funds for the new activity or service." *Id*. at 480 n 29 (emphasis added).

[48] Defendants argue that plaintiffs should be held to a heightened "clear and convincing evidence" standard, relying on *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 149; 719 NW2d 553 (2006). That case, however, concerned the narrow situation in which a court seeks to exercise its "inherent power" to compel counties to provide funding where the trial court serving those counties "has not received sufficient funding to operate at a serviceable level." *Id*. at 160 (opinion by MARKMAN, J.). This standard was appropriate when, as in *46th Trial Court*, separation of powers concerns warranted that the judiciary respect the coordinate powers of the other branches. That heightened evidentiary standard has never been applied in our Headlee jurisprudence, and we decline to do so today.

[49] Const 1963, art 9, § 29. There remains an issue whether the definition of "net cost" in the Headlee implementing legislation, MCL 21.233(6), which focuses on the cost *to the state*, is consistent with Const 1963, art 9, § 29,

Requiring a plaintiff to establish the specific amount of a funding is consistent with the Constitution and reduces litigation gamesmanship. By requiring a plaintiff to prove the extent of the underfunding, "the state will be aware of the financial adjustment necessary to allow for future compliance."[50] In other words, if a plaintiff carries its burden, the Legislature will have a judicially determined amount that it must appropriate in order to comply with Headlee. If a plaintiff were required only to show flaws in the methodology by which the appropriation was determined, further determination of the precise cost would be needed, thus further delaying "full state financing" to the localities guaranteed by our Constitution.[51] The burden of showing the specific amount of funding shortfall is not only consistent with the language of the Headlee Amendment but avoids needless litigation.

D. APPLICATION

Before trial, the special master properly made clear that "[p]laintiffs have a 'higher burden' which requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements." Nonetheless, during their

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which focuses the cost *to the local unit of government*. There is an apparent tension between the Constitution and the statute concerning the appropriate measure of cost. Members of this Court have noted this tension before, see *Adair I*, 486 Mich at 506 n 17 (MARKMAN, J., dissenting), but because the issue was not raised by either party, we decline today to address it. *Williams v Hofley Mfg Co*, 430 Mich 603, 605 n 1; 424 NW2d 278 (1988) (refusing to consider a constitutional issue that, as here, "was not raised, preserved, or briefed by the parties"). As plaintiffs declined to show any specific dollar amount of cost before the special master, it is also not necessary to address the appropriate measure of cost today.

[50] *Adair*, 470 Mich at 119-120, quoting *Oakland Co*, 456 Mich at 166 (MARILYN KELLY, J., plurality opinion).

[51] Const 1963, art 9, § 25.

opening statement, plaintiffs disclaimed any obligation to prove a specific dollar amount of damages, stated that they would not attempt such proofs, and asserted that they intended to prove only that the Legislature's methodology for determining the amount of funding for the mandates at issue was flawed. Plaintiffs contended that they would carry their preferred burden by presenting expert testimony. Plaintiffs' expert report concluded that the state's appropriation was materially lacking because the determinations made by the state were inadequate and incomplete. While the report extensively documented the alleged problems with the Legislature's methodology in calculating the § 152a appropriation, the report failed to offer any evaluation of the extent of the shortfall. Plaintiffs did not offer, nor did they intend to offer, proofs sufficient to create an issue of fact regarding whether they could carry their burden. Accordingly, we reverse the Court of Appeals' ruling and reinstate the special master's involuntary dismissal in favor of defendants because plaintiffs failed to offer facts that would entitle them to relief.[52]

Because our precedents as well as our court rules make clear that a plaintiff must allege and prove with specificity the extent of the harm incurred as a result of a legislative funding shortfall, we decline to remand the case for further proceedings. The special master put the plaintiffs on notice before trial that they bore the burden of establishing the specific amount of increased costs. Even though plaintiffs were apprised of their burden, they declined to prepare or offer proofs that would at least create an issue of fact regarding the extent of underfunding.[53]

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[52] See MCR 2.504(B)(2).

[53] As noted, the special master ruled in his opinion and order regarding defendants' motion for summary disposition that "[p]laintiffs have a 'higher

V. CONCLUSION

We reaffirm and hold that a plaintiff claiming that the Legislature's appropriation failed to fully fund the cost of a new or increased service or activity must allege and prove the specific amount of the shortfall. Plaintiffs failed to offer any proofs that could entitle them to relief. Thus, we reverse the judgment of the Court of Appeals in part and reinstate the special master's order of involuntary dismissal.[54]

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

CAVANAGH, J. (*concurring in part and dissenting in part*). There are generally two issues implicated in this

burden' which requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements." Despite this ruling, plaintiffs maintained during their opening statement that "we do not have the burden to prove specific dollar damages accrued." Defendants promptly moved for dismissal, observing that plaintiffs were apparently unwilling or unable to abide by the special master's ruling. Plaintiffs responded that the substance of the special master's ruling was that their expert report constituted "more than sufficient evidence to show that the state has [underfunded] the CEPI mandate," so that they had no burden beyond this to show a specific dollar amount of damages.

We see no basis for plaintiffs' position. The special master's opinion and order stated that the expert report constituted " 'independent evidence' of a genuine factual dispute because, viewed most favorably to the [p]laintiffs, it rebuts the [d]efendants' argument that the [p]laintiffs have 'refused to satisfy their burden of proof that the legislative appropriation is insufficient to pay their necessary increase[d] costs.' " That is, the special master only rejected defendants' argument that plaintiffs failed to show that the legislative appropriation was "insufficient." This rejection was consistent with his ruling that plaintiffs would be required to show a specific dollar amount at trial. Given that plaintiffs declined to offer proofs in accordance with the special master's ruling, we now conclude that further proceedings are unwarranted.

[54] We do not disturb the balance of the Court of Appeals' holdings not addressed in this opinion.

appeal. First, we asked the parties to address "which party has the burden of proving underfunding of a legislative mandate in a challenge under Const 1963, art 9, § 29" and the elements of such a claim. *Adair v Michigan*, 495 Mich 937, 937-938 (2014). This first issue involves a plaintiff's burden of proof in showing that the state underfunded "[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law" for the purposes of the second provision of the Headlee Amendment, commonly referred to as a "prohibition on unfunded mandates" or "POUM" claim. Const 1963, art 9, § 29; *Adair v Michigan*, 486 Mich 468, 478; 785 NW2d 119 (2010) (*Adair I*).[1] In addition, we asked the parties to address "whether acceptance of a general appropriation from the Legislature which is specifically conditioned on compliance with reporting requirements pursuant to MCL 388.1622b([3])(c) waives any challenge to the funding level for those requirements under Const 1963, art 9, § 29." *Adair*, 495 Mich at 938.[2]

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[1] In full, Const 1963, art 9, § 29 states:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

As the majority notes, the first sentence of the Headlee Amendment is described as the "maintenance of support" ("MOS") provision. *Adair I*, 486 Mich at 478. As in *Adair I*, "[o]nly the POUM provision is at issue in this case." *Id*.

[2] MCL 388.1622b states in relevant part:

With respect to this second issue, I agree with the majority's conclusion that plaintiff school districts did not waive their POUM claim by accepting the conditional appropriation under MCL 388.1622b (§ 22b). As the majority explains, nothing on the face of § 22b would lead plaintiffs to believe that accepting the funds would result in a waiver of a Headlee Amendment claim, and thus, plaintiffs did not intentionally relinquish a known right. See *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (citations omitted). Moreover, in *Adair v Michigan* (*On Second Remand*), 279 Mich App 507, 523-524; 760 NW2d 544 (2008), aff'd in part and rev'd in part by *Adair I*, 486 Mich 468, the Court of Appeals addressed a similar issue regarding a general appropriation under § 22b, holding that "the POUM clause reflects the intent of the voters that the Legislature *actually determine* the necessary costs associated with the implementation of new legislative mandates and then appropriate that amount for the *express purpose* of funding the new mandate." (Emphasis added.) Accordingly, I agree with the majority's rejection of defendants' argument that accepting the conditional § 22b appropriation waived plaintiffs' Headlee Amendment claim.

My agreement with the majority ends there, however. Specifically, with respect to the first issue, I dissent from the majority's holding that a plaintiff alleging that the state failed to adequately measure and appropriate sufficient funding for the purposes of complying with the POUM provision must bear the burden to plead and

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(3) In order to receive an allocation under subsection (1), each district shall do all of the following:

* * *

(c) Furnish data and other information required by state and federal law to the center and the department in the form and manner specified by the center or the department, as applicable.

prove a quantified dollar amount of underfunding. As explained below, in deciding a POUM plaintiff's burden to show that the state failed to fully fund a new activity or service or an increase in the level of any activity or service, my aim is to recognize the dissimilarities of a per se and underfunding claim while remaining consistent with *Adair I*'s underlying principles. See Const 1963, art 9, § 29; MCL 21.233(6).

To begin, not unlike the majority, I think that there is a meaningful factual difference between a per se POUM claim, i.e., a mandate that was *not* accompanied by any appropriation, see *Adair I*, 486 Mich at 479 n 29, and a POUM claim alleging underfunding. In *Adair I*, which involved a per se POUM claim, we held that

> to establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local government, the plaintiff need not show the amount of increased costs. It is then the state's burden to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary. [*Id*. at 480.[3]]

Assuming that the state proceeded in good-faith compliance with its Headlee Amendment obligation, the state would have contemplated whether the mandate required an appropriation *before* it enacted the mandate at issue. See, generally, MCL 21.235(2). Specifically, if no funds were appropriated, the state would have necessarily determined that (1) the mandate would not constitute "a new activity or service or an increase in the level of any activities or services," Const 1963, art 9,

[3] Notably, in *Adair I*, we expressly left unanswered the issue of a POUM plaintiff's burden when it is alleged that an appropriation was underfunded. See *Adair I*, 486 Mich at 479 n 28.

§ 29; (2) local governments would not have "necessary increased costs," *id*.; and (3) any increased cost was not a "necessary cost," as defined by the Headlee Amendment's implementing provisions, MCL 21.235(1) and MCL 21.233(6).[4] Our standard regarding a POUM plaintiff's burden alleging a per se violation established in *Adair I* reflects the fact that such a claim may involve disputes on one or more of those issues.

Conversely, when the state decides to appropriate funding in conjunction with the mandate for the express purpose of meeting its Headlee Amendment obligation, it is unlikely that any of the above consider-

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[4] MCL 21.235(1) states, "The legislature shall annually appropriate an amount sufficient to make disbursements to each local unit of government for the necessary cost of each state requirement pursuant to this act, if not otherwise excluded by this act."

MCL 21.233(6) states in relevant part:

> "Necessary cost" means the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfies 1 or more of the following conditions:
>
> (a) The state requirement cost does not exceed a de minimus [sic] cost.
>
> (b) The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered, the requirement will not exceed a de minimus [sic] cost.
>
> (c) The state requirement imposes additional duties on a local unit of government which can be performed by that local unit of government at a cost not to exceed a de minimus [sic] cost.

In turn, "[d]e minimus [sic] cost" is defined by MCL 21.232(4), which states, " 'De minimus [sic] cost' means a net cost to a local unit of government resulting from a state requirement which does not exceed $300.00 per claim."

ations would be at issue. Instead, as plaintiffs assert in this case, the issue becomes whether the state properly measured the appropriation. For the purposes of that inquiry, the Legislature, pursuant to the constitutional directive to enact implementing legislation, see Const 1963, art 9, § 34, has instructed that the appropriation be measured by "the net cost of an activity or service provided by a local unit of government," and the "net cost" "shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ." MCL 21.233(6). This is consistent with this Court's previous recognition that the statute's reference to "actual cost to the state" *is* the proper measure of the appropriation. See *Adair I*, 486 Mich at 488-489; *Durant v Michigan*, 424 Mich 364, 390-391; 381 NW2d 662 (1985).

In my view, the majority erroneously bypasses the import of MCL 21.233(6) on the basis that the parties in this case did not address the "apparent tension" between (1) the POUM provision's statement that the appropriation should be made "to pay the unit of Local Government for any necessary increased costs" and (2) the appropriation's measure as the "actual cost to the state" under MCL 21.233(6).[5] "The legislature has

[5] To the extent that the majority is correct that the effect of MCL 21.233(6) on the issue currently before this Court is not preserved, "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and quotation marks omitted). Moreover, the majority's treatment of the "apparent tension" between the POUM provision and MCL 21.233(6) is similar to the *Adair I* dissent. See *Adair I*, 486 Mich at 506 n 17 (MARKMAN, J., dissenting) (explaining that the arguable conflict between the POUM provision and MCL 21.233(6) was not raised by the parties in that appeal, and thus, declined to address the issue fully). Avoiding this issue in *Adair I* when this Court was not considering the sufficiency of funds that were actually appropriated

power to adopt a statute, except as it is prohibited by the Constitution; and a statute will not be declared in conflict with the Constitution while serious doubt exists as to such conflict." *Gratiot Co v Federspiel*, 312 Mich 128, 132; 20 NW2d 131 (1945) (citations omitted). I have "serious doubt" whether there is such a conflict in this case, and therefore, in my opinion, the Legislature's explicit measure of the appropriation under MCL 21.233(6) is a valid and indispensible consideration in properly addressing a POUM plaintiff's burden to sustain a claim of underfunding.

To elaborate, under Const 1963, art 9, § 29, the POUM provision requires that local governments have projected or incurred "necessary increased costs" resulting from the mandate. See *Adair I*, 486 Mich at 483-485. The implementing legislation then requires that the local governments' costs be increased beyond a *de minimis* amount before an appropriation is required. MCL 21.233(6) and MCL 21.232(4). That system is sensible because if the local governments' "necessary increased costs" are not increased beyond a *de minimis* amount, to otherwise require an appropriation would create a windfall for local governments.[6] Stated differently, there is no need for funding if it would merely cost local governments, at most, a *de minimis* amount to implement the mandate. If, however, local governments' costs will increase beyond a *de minimis* amount as a result from the mandate, an appropriation is

might have been tenable because no appropriation had been made, but for the reasons stated within, I think that it must be addressed in this case.

[6] See *Adair I*, 486 Mich at 477 ("When interpreting constitutional provisions, we are mindful that the interpretation given the provision should be the sense most obvious to the common understanding and one that reasonable minds, the great mass of the people themselves, would give it.") (citations and quotation marks omitted).

required, but it is not measured by the dollar amount of the local governments' costs to implement the mandate. Instead, MCL 21.233(6) requires that the appropriation be measured by the state's costs if it were to perform the activity or service, which is consistent with the Headlee Amendment's purpose—i.e., that the state cannot shift its costs to local governments to perform what the state would like to see implemented.[7] In sum, using the state's costs as the measure of the appropriation ensures that the state does not unconstitutionally increase local tax burdens because it provides local governments with the money that the state is saving by not implementing the mandate itself. But the POUM provision does not require that the state make an appropriation to local governments if the mandate will not increase the local governments' necessary costs beyond a *de minimis* amount.

Additionally, I disagree with a key premise and strong implication on which the majority relies: that *Adair I* in its entirety merely stands for a "narrow exception" to a longstanding general rule regarding a POUM plaintiff's burden. Rather, I agree with the unanimous Court of Appeals opinion below that there are relevant general principles underlying *Adair I*'s analysis of the Headlee Amendment. See *Adair v Michigan*, 302 Mich App 305, 314-315; 839 NW2d 680 (2013).

Specifically, addressing whether the mandates resulted in increased costs to plaintiff school districts, *Adair I* relied on the language of the Headlee Amendment and MCL 21.233(6), which undoubtedly remains applicable regardless of whether a per se or under-

[7] See *Durant*, 424 Mich at 391 ("Providing only the actual cost to the state, if it provided the service, is in keeping with the voters' desire that there be no shift of responsibility for services from the state to the local governments without adequate compensation.").

funded POUM claim is at issue. We held that evidence of a "diversion of manpower . . . constituted increased costs to the districts." *Adair I*, 486 Mich at 483-484. And by juxtaposing the reference to "*actual* cost to the state" under MCL 21.233(6)[8] to the language of the Headlee Amendment, we concluded that "[t]he Headlee Amendment does not require the district to show that its *actual* expenditures increased." *Adair I*, 486 Mich at 484 n 32 (emphasis added). Further, when discussing the implementing statute, *Adair I* stated:

> Neither Const 1963, art 9, § 29 nor MCL 21.233 suggests that plaintiffs bear the burden of proving precisely how much the school districts' costs increased as a result of the mandate. In fact, the language of MCL 21.233 implies the opposite. That section defines "necessary cost" as the "net cost of an activity or service provided by a local unit of government." The "net cost" is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ." [*Id*. at 486-487.]

Because *Adair I* involved a per se violation of the POUM clause, we held that "a plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it." *Id*. at 487. As explained earlier, the pertinent difference between a per se and an underfunded POUM claim is that the latter only involves an inquiry into the sufficiency of the appropriation. Because the appropriation, consistently with our caselaw and legislative instruction, is measured by the actual cost to the state if the state were to provide the new activity, the burden to show that the Legislature's appropriation accurately reflects the state's costs is properly placed on the state. See *id*. at 489 ("[T]he Legislature is in a position far

[8] Emphasis added.

superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased record-keeping and reporting duties. Proofs on this point are easily accessible to the state because it could ascertain the costs it would incur if it provided the new activity."). While *Adair I* held that local governments must have "necessary increased costs" associated with implementing the mandate that exceed a *de minimis* amount, the local governments' costs need not be quantified for the purposes of *measuring* the sufficiency of the appropriation; whereas, the state's quantified costs if it were to implement the mandate are central to a claim that a POUM mandate was underfunded.

That is not to say that a plaintiff should be able to succeed under a POUM claim with a bare assertion that the state has underfunded the appropriation. I fully appreciate that we noted in *Adair I* that a plaintiff's burden "would likely [be] higher" when the Legislature did, in fact, appropriate funds, as opposed to the lack of any appropriation at issue in *Adair I*. See *Adair I*, 486 Mich at 480 n 29. Also, as the majority emphasizes, in 2007 a majority of this Court adopted MCR 2.112(M), which requires, in part, that a Headlee Amendment plaintiff "state with particularity the type and extent of the harm . . . ." Again, I think that "[t]he dispositive issue is the cost to the state if it were to provide the new or increased activity or service, not the cost incurred by the local governmental unit." *Adair I*, 486 Mich at 489. Thus, I would not apply this requirement in a manner that requires a plaintiff to arrive at the numeric difference between the state's actual costs and the amount that the state did in fact appropriate for the purposes of a pleading requirement or a plaintiff's ultimate burden of proof.

Instead, in keeping with *Adair I*'s burden-shifting framework, I would hold that to overcome the state's

motion for summary disposition, a plaintiff must show that there is a genuine issue of material fact that the state underfunded the appropriation. See MCR 2.116(C)(10). Depending on the nature of the underlying subject matter of the mandate and the circumstances surrounding the mandate's enactment with its accompanying appropriation, I would imagine that proofs in this regard might vary from case to case. For example, as the majority accurately explains, the appropriations in this case followed our holding in *Adair I*. Plaintiffs assert that the appropriations were measured on the basis of a cost study designed to bring the state into compliance with the Headlee Amendment, and, accordingly, they proffered detailed expert testimony about specific expenditures that were not accounted for in the cost study and the following appropriations. I agree with the Court of Appeals' conclusion that this evidence shows

> that plaintiffs stood ready to present some evidence that, if determined credible by the trier of fact, would have undermined the validity of the method used by the Legislature to determine the amount of the appropriations at issue and that would have shifted the burden of going forward with evidence to the state to present some evidence that the appropriations do fully fund the state's obligation under the POUM provision. [*Adair*, 302 Mich App at 316-317.[9]

[9] As the majority aptly explains, plaintiffs appealed defendants' motion for involuntary dismissal. I offer an analysis applicable to a motion for summary disposition under MCR 2.116(C)(10), however, in order to provide further explanation of my view of the parties' burdens. Nevertheless, I believe that the special master erred by granting defendants' motion for involuntary dismissal because I do not think that the special master was correct that "on the facts and the law the plaintiff[s] ha[d] shown no right to relief," given my view of plaintiffs' proper burden in the case. See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

I also think that this conclusion is consistent with MCR 2.112(M) because, in alleging specific expenditures that had not been accounted for by the state's cost study, plaintiffs alleged the "extent" of the underfunding by claiming *what* the Legislature failed to value, albeit without quantifying what those expenditures would cost the state if it were to implement the mandate. See *The American Heritage Dictionary of the English Language* (1981) (defining "extent" as "[t]he range over which something extends; scope; comprehensiveness").[10]

Finally, the majority reasons that requiring plaintiffs "to establish the specific amount of funding . . . reduces litigation gamesmanship" and "avoids needless litigation." However, I disagree with the instant majority's "parade of potentially negative 'consequences' " that would occur if it declined to adopt the state's argument in this case. *Adair I*, 486 Mich at 491.[11] It is true that a

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[10] Citing *Oakland Co v Michigan*, 456 Mich 144, 166; 566 NW2d 616 (1997) (opinion by MARILYN KELLY, J.), the majority reasons that MCR 2.112(M) requires and our caselaw has "consistently announced" that Headlee Amendment plaintiffs must allege the type and *extent* of harm. However, I fail to see how either the court rule's or *Oakland Co*'s reference to the "extent" of harm *necessarily* means that a POUM plaintiff alleging underfunding must show the specific dollar figure of underfunding. Moreover, to the extent that the majority finds *Oakland Co* relevant in this case on the basis of a rule that is often quoted in the context of Headlee Amendment claims—i.e., that because the MOS and POUM provisions are contained within the same amendment, they are read harmoniously, see, e.g., *Durant*, 424 Mich at 380 n 7—I continue to think that this general rule has limited application when the underlying issue involves a matter that is specific to one of the two provisions. See *Schmidt v Dep't of Ed*, 441 Mich 236, 278 n 15; 490 NW2d 584 (1992) (CAVANAGH, J., dissenting). See, also, *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 616 n 5; 597 NW2d 113 (1999) (CAVANAGH, J., dissenting). And in my view, considering a POUM plaintiff's burden of proof *is* a consideration apart from a MOS plaintiff's burden of proof. See, generally, *Adair*, 279 Mich App at 511-513.

[11] The policy argument asserted by the majority was also a point of contention in *Adair I*. Compare *Adair I*, 486 Mich at 491 (opinion of the Court), with *Adair I*, 486 Mich at 510-513 (MARKMAN, J., dissenting).

POUM plaintiff may end up with a declaratory judgment that merely states that there was underfunding, which would require the Legislature to appropriate supplemental funding. Yet because the required appropriation is statutorily measured as the state's costs if it were to implement the mandate, there is no guesswork about local governments' costs and the appropriation, as the current majority insinuates. In my view, the fact that a plaintiff may file another claim alleging *further* insufficient funding, i.e., that the state *continues* to fail to comply with its Headlee Amendment obligation, is no reason to heighten a plaintiff's initial burden. Stated differently, it is the *state's* duty in the first instance to adequately fund the mandate. As a result, when faced with an allegation that the state underfunded a mandate, I do not believe it is unreasonably cumbersome to place the burden on the state to show that it accurately measured the appropriation. That is because if it had complied with the POUM provision in the first instance, it would know exactly how the appropriation was measured, which, if accurate, would swiftly and effectively dispose of any allegations of underfunding.[12]

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[12] The majority further supports its conclusion that a POUM plaintiff must prove the specific amount of the funding shortfall by, again, relying on a single statement made in *Oakland Co*, 456 Mich at 166 (opinion by KELLY, J.), that "future plaintiffs must allege the type and extent of the harm so that the court may determine if a [violation of Const, 1963, art 9, § 29] occurred for purposes of making a declaratory judgment. In that way, *the state will be aware of the financial adjustment necessary to allow future compliance* (emphasis added)." Viewed in context, *Oakland Co* was explaining that, while it is an atypical remedy, plaintiffs may obtain a monetary damage award for a Headlee Amendment violation when the state consistently refuses to comply with its funding obligations. As explained earlier, because the state is well equipped to determine how much an activity or service would cost if the state were implementing it, it does not have to rely on local governments to inform the state of the financial adjustment necessary to bring it in compliance with article 9, § 29. Indeed, if the contrary were true, the state would have to seek

In light of my analysis, I respectfully dissent from the majority's holding that a Headlee Amendment plaintiff alleging that the state did not properly measure and fund a mandate that falls within the scope of the POUM provision must plead and prove a specific, quantified dollar amount of underfunding. As a result, I would affirm the judgment of the Court of Appeals and allow this case to continue in proceedings before the special master.

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counsel from local governments before enacting *any* mandate falling under the POUM provision in the first place or risk violating the Constitution every time such a mandate is made. In my view, that was not the intent of the above statement in *Oakland Co*.

SPEICHER v COLUMBIA TOWNSHIP BOARD OF TRUSTEES

Docket No. 148617. Argued October 8, 2014. Decided December 22, 2014.

Kenneth J. Speicher brought an action against the Columbia Township Board of Trustees and the Columbia Township Planning Commission in the Van Buren Circuit Court, seeking declaratory and injunctive relief on the basis of defendants' alleged violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. The trial court, Paul E. Hamre, J., granted summary disposition in favor of defendants. Plaintiff appealed. In an unpublished opinion issued January 22, 2013, the Court of Appeals, WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ., affirmed the trial court's denial of injunctive relief but reversed its denial of declaratory relief and remanded the case for further proceedings, specifying that because the technical nature of the OMA violation did not warrant injunctive relief, plaintiff was not entitled to attorney fees or costs under MCL 15.271(4). Plaintiff moved for reconsideration. On December 19, 2013, the Court of Appeals granted the motion, vacating that part of the opinion that had addressed attorney fees. On reconsideration, the Court of Appeals held that under binding caselaw interpreting the OMA, plaintiff was entitled to attorney fees and costs because he had succeeded in obtaining relief. The Court of Appeals added that absent that caselaw, the panel would have held that attorney fees and costs are available under MCL 15.271(4) only to plaintiffs who request and obtain injunctive relief. 303 Mich App 475 (2013). The panel called for the convening of a special panel under MCR 7.215(J)(3) to address the issue. The Court of Appeals declined to convene the special panel. Defendants sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 496 Mich 852 (2014).

In an opinion by Justice VIVIANO, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

Prior decisions of the Court of Appeals strayed from the plain language of MCL 15.271(4). A person may not recover court costs or attorney fees under the plain language of that statute unless he or she succeeds in obtaining injunctive relief, overruling *Ridenour v Dear-*

born Bd of Ed, 111 Mich App 798 (1981), and its progeny to the extent that those cases allowed the recovery of attorney fees and costs under MCL 15.271(4) when injunctive relief was not obtained.

1. If a public body is not complying with the OMA, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action. The first statutory condition—if a public body is not complying with the act—contemplates an ongoing violation, precisely the circumstances in which injunctive relief is appropriate. The second statutory condition—commencement of a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act—requires that the person seek injunctive relief. The third statutory condition—a requirement that a person who files an action seeking such relief succeeds in obtaining relief in the action—cannot be separated from the phrase that precedes it. Given that the phrase "relief in the action," uses a definite article and immediately follows the phrase "a person commences a civil action against the public body for injunctive relief," the phrase "relief in the action" must be construed as referring to injunctive relief. The Legislature was not required to restate the modifier "injunctive" when again referring to the noun "relief" because the modifier is implied when the statute is read as a whole. When read in the context of the statutory scheme, MCL 15.271 limits the award of attorney fees to cases in which the public body persists in violating the act, a suit is brought to enjoin that behavior, and that suit is successful in obtaining injunctive relief. There is no allowance in the statute for obtaining the equivalent of relief; the plaintiff must obtain injunctive relief, as sought in commencing the action.

2. In this case, the trial court and the Court of Appeals agreed that plaintiff failed to show that he was entitled to injunctive relief because there was no evidence that the commission had a history of OMA violations, there was no evidence that this violation was willful, and there was no evidence that the public or plaintiff was harmed. Therefore, while the Court of Appeals concluded that plaintiff was entitled to declaratory relief for defendants' notice violation, he was not entitled to court costs and attorney fees because he did not succeed in obtaining injunctive relief.

Court of Appeals opinion and order issued December 19, 2013, reversed; portion of the Court of Appeals opinion issued January 22, 2013, concerning court costs and attorney fees reinstated.

Justice CAVANAGH, dissenting, would have held that plaintiff was entitled to costs and attorney fees. Shortly after the enactment of the

OMA, the Court of Appeals effectively held that declaratory relief granted in lieu of or as the functional equivalent of an injunction supports an award of costs and attorney fees under MCL 15.271(4). The Court of Appeals has reiterated that holding in numerous published opinions over a period of more than 30 years. Despite the clear holdings of the Court of Appeals, the Legislature has not taken any action to signal its disapproval of that line of cases. The Legislature's silence is a strong indication that the Court of Appeals properly effectuated the Legislature's intent. The Court of Appeals' interpretation, moreover, was consistent with the purpose of MCL 15.271(4) in particular and the OMA more broadly. In the context of public bodies, a judgment for declaratory relief is the functional equivalent of an injunction in that it restrains the public body from further noncompliance with the OMA. The majority's interpretation, in contrast, undermines the OMA's enforcement provision and the purpose of the OMA generally, and will curtail the ability of private citizens to bring OMA complaints.

STATUTES — OPEN MEETINGS ACT — ENFORCEMENT PROVISION — COSTS AND ATTORNEY FEES — INJUNCTIVE RELIEF.

Under MCL 15.271(4), if a public body is not complying with the Open Meetings Act, MCL 15.261 *et seq*., and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining injunctive relief in the action, the person shall recover court costs and actual attorney fees; a person may not recover costs and attorney fees under MCL 15.271(4) unless he or she obtains injunctive relief, as sought in commencing the action.

Warner Norcross & Judd LLP (by *John J. Bursch*) and *Silverman, Smith & Rice, PC* (by *Robert W. Smith*), for Kenneth J. Speicher.

Plunkett Cooney (by *Mary Massaron*, *Hilary A. Ballentine*, and *Robert A. Callahan*) for the Columbia Township Board of Trustees and the Columbia Township Planning Commission.

Amici Curiae:

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

Outside Legal Counsel PLC (by *Philip L. Ellison*) for Outside Legal Counsel PLC and Philip L. Ellison.

VIVIANO, J. In this Open Meetings Act (OMA)[1] case, defendants Columbia Township Board of Trustees and Columbia Township Planning Commission appeal the Court of Appeals' decision holding that plaintiff Kenneth Speicher was entitled to an award of court costs and actual attorney fees based on his entitlement to declaratory relief under the OMA. The Court of Appeals reached this decision only because it was compelled to do so by Court of Appeals precedent.[2] If not for this binding precedent, the Court of Appeals would have denied plaintiff's request for court costs and actual attorney fees on the ground that the plain language of MCL 15.271(4) does not permit such an award unless the plaintiff obtains injunctive relief. We agree with the Court of Appeals that prior decisions of that court have strayed from the plain language of MCL 15.271(4). Therefore, we reverse the Court of Appeals opinion and order issued December 19, 2013, and reinstate the portion of its January 22, 2013 decision regarding court costs and actual attorney fees.

I. FACTS AND PROCEDURAL HISTORY

In early 2010, the Columbia Township Board of Trustees (the Board) adopted a resolution that fixed the regular monthly meetings of the Board and the Columbia Township Planning Commission (the Planning Commission) for the year 2010-2011. However, during the regularly scheduled October 18, 2010 meeting, the Planning Commission adopted another resolution that it would conduct quarterly, rather than monthly, meet-

[1] MCL 15.261 *et seq*.

[2] MCR 7.215(J).

ings beginning January 2011. According to the Township Clerk, after the Planning Commission adopted the new schedule, she contacted a local newspaper, the *South Haven Tribune*, and requested publication of the new meeting schedule. She stated that she also posted a revised meeting schedule at the Township Hall entrance with the February and March 2011 meetings whited out.

Plaintiff is a property owner in the township. According to plaintiff, he had no notice of the new quarterly meeting schedule, and he appeared for the meetings in February and March 2011, seeking to raise a number of issues before the Planning Commission. Plaintiff claimed that the posted schedule did not reflect the change to quarterly meetings and no notices appeared in the *South Haven Tribune* prior to those previously scheduled meetings.

Plaintiff sued defendants, alleging that the decision to change the schedule was not made at an open meeting[3] and that the February and March meetings were canceled without proper notice in violation of the OMA.[4] Plaintiff alleged that, as a result of the meetings not being held, his right to present certain concerns to the Planning Commission was impaired.[5] Plaintiff

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[3] MCL 15.263(2) requires that "[a]ll decisions of a public body shall be made at a meeting open to the public."

[4] MCL 15.265(3) requires that public notice of changes to regularly scheduled meetings be "posted within 3 days after the meeting at which the change is made[.]"

[5] This allegation appears to refer to MCL 15.270(2), which provides as follows:

> A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3 [MCL 15.263](1), (2), and (3) in making the decision or if failure to give notice in accordance with section 5 [MCL 15.265] has interfered with substantial compliance with section 3(1), (2), and (3)

sought a declaration that the Planning Commission's decision to cancel the regularly scheduled meetings was made in violation of the OMA, and he sought to enjoin the Planning Commission and the Board from further noncompliance with the OMA.[6] Plaintiff also cited MCL 15.271(4) and alleged that "if this Court grants relief as a result of this complaint, [plaintiff] shall recover court costs and actual attorney fees for this action."

Finding that defendants' conduct was not actionable, the trial court denied plaintiff's motion for summary disposition and granted summary disposition to defendants. The trial court also denied plaintiff's motion for reconsideration. The trial court ruled that defendants did not violate the OMA because plaintiff was not denied access to any meetings. To the extent that notice may not have been timely posted, this was a technical violation not entitling plaintiff to relief. The trial court acknowledged that the notice cancelling the February and March Planning Commission meetings "may not have been done in strict compliance with" the OMA, but the court concluded that any violations were "technical in nature, and did not impair the rights of the public in having their governmental bodies make decisions in an open meeting." Plaintiff had, at most, been inconvenienced by the failure to post timely notice of the meeting changes given that "[p]laintiff had the option

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and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

However, plaintiff has specifically disclaimed that he sought to invalidate defendants' decision under that provision, stating that "[t]he damage had been done and invalidation under MCL 15.270 was simply not available."

[6] Plaintiff clarified in a later pleading that his claim for injunctive relief was premised on the Board's prior violation of the OMA during the selection of a new township fire chief. See *Speicher v Columbia Twp Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2014 (Docket No. 313158).

of bringing his concerns to the Planning Commission at its next regularly scheduled meeting."

Plaintiff appealed in the Court of Appeals, which affirmed in part and reversed in part in an unpublished opinion.[7] The Court of Appeals concluded that while the meeting schedule change was properly made at an open meeting, defendants plainly violated the OMA by not timely posting the modified schedule. It therefore held that the trial court erred by failing to grant declaratory relief to plaintiff on that point. However, the Court of Appeals also held that the trial court properly denied injunctive relief for defendants' technical notice violation because "there was no evidence that the Commission had a history of OMA violations, there was no evidence that this violation was done willfully," and there was no evidence that the public or plaintiff was harmed in any manner.[8] The Court of Appeals therefore ruled that "given that the technical nature of this OMA violation resulted in no injunctive relief being warranted, plaintiff is not entitled to any attorney fees or costs under MCL 15.271(4) on remand."[9]

Plaintiff moved for reconsideration, arguing that because the Court of Appeals had held that he was entitled to declaratory relief under the OMA, he was entitled to an award of court costs and actual attorney fees under MCL 15.271(4). The Court of Appeals granted reconsideration and vacated the portion of its unpublished opinion regarding attorney fees.[10] In a

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[7] *Speicher v Columbia Twp Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2013 (Docket No. 306684).

[8] *Id*. at 2. The Court of Appeals pointed out that plaintiff was able to present his concerns to the Commission at the December 2010, January 2011, and April 2011 meetings.

[9] *Id*.

[10] *Speicher v Columbia Twp Bd of Trustees*, unpublished order of the Court of Appeals, entered December 19, 2013 (Docket No. 306684).

published opinion, the Court of Appeals then held that plaintiff was entitled to court costs and actual attorney fees under existing case law because he established entitlement to declaratory relief.[11] However, the Court of Appeals reached this conclusion only because it was bound by court rule to follow prior published Court of Appeals decisions.[12] The Court explained that the rule that court costs and actual attorney fees were available whenever a plaintiff files a lawsuit seeking injunctive relief under MCL 15.271 and obtains some form of relief had developed from the misapplication of a prior Court of Appeals decision issued in 1981, *Ridenour v Dearborn Bd of Ed*.[13] However, the Court determined that this rule was unsupported by the plain language of MCL 15.271(4) and that the cases that developed this rule often did not provide any substantive analysis.[14] Were

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[11] *Speicher v Columbia Twp Bd of Trustees*, 303 Mich App 475, 476-477; 843 NW2d 770 (2013). We note that the Court of Appeals also stated that "plaintiff did not request attorney fees at the trial court or in his claim of appeal." *Id*. at 477. But our review of the record proves that statement to be inaccurate. Plaintiff initiated his request for attorney fees in his complaint and reiterated that request in briefing on his motion for summary disposition and claim of appeal. Thus, this issue is preserved.

[12] *Id*. at 476-477, citing 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.").

[13] *Speicher*, 303 Mich App at 482, citing *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981). In *Ridenour*, the trial court did not find it necessary to grant injunctive relief because of the defense attorney's promise that the defendant would abide by the court's ruling. *Ridenour*, 111 Mich App at 801. The trial court nevertheless awarded the plaintiff court costs and actual attorney fees because he obtained "the equivalent of an injunction," and the Court of Appeals affirmed. *Id.* at 801, 806.

[14] See *Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003); *Morrison v East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Kitchen v Ferndale City Council*, 253 Mich App 115, 127;

the Court of Appeals free to decide the issue as it deemed appropriate, it would have denied attorney fees and costs under MCL 15.271(4) because the statute permits such an award *only* when a plaintiff prevails on a request for injunctive relief, which did not occur in this case.[15]

Defendants sought review in this Court, asserting that the Court of Appeals erred by awarding plaintiff court costs and actual attorney fees but correctly reasoned that such costs and fees were improper because plaintiff did not obtain injunctive relief as required by MCL 15.271(4). Plaintiff responded, contending that MCL 15.271(4) expressly requires an award of court costs and actual attorney fees when a plaintiff obtains any relief, not just injunctive relief. In lieu of granting leave, we ordered oral argument on the application, directing the parties to address

> whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief regarding claimed violations of the Open Meetings Act (MCL 15.261 *et seq*.), or whether the plaintiff must obtain injunctive relief as a necessary condition of recovering attorney fees and costs under MCL 15.271(4).[16]

II. STANDARD OF REVIEW

Issues of statutory interpretation are reviewed de novo.[17] In interpreting a statute, we consider "both the

654 NW2d 918 (2002); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999); *Schmiedicke v Clare Sch Bd*, 228 Mich App 259, 266-267; 577 NW2d 706 (1998); *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich App 814, 820; 362 NW2d 871 (1984).

[15] *Speicher*, 303 Mich App at 479. The Court of Appeals called for a special panel to resolve the conflict, see MCR 7.215(J)(3), but the Chief Judge of the Court of Appeals subsequently ordered that a special panel not be convened.

[16] *Speicher v Columbia Twp Bd of Trustees*, 496 Mich 852 (2014).

[17] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme."[18] As with any statutory interpretation, our goal is to give effect to the intent of the Legislature by focusing on the statute's plain language.[19]

III. ANALYSIS

At issue in this case is the proper interpretation of the phrase "succeeds in obtaining relief in the action" in MCL 15.271(4). This Court has not yet addressed whether that phrase refers to *injunctive* relief, as defendants contend and the Court of Appeals panel would have held, or to *any* relief, as plaintiff contends and the *Ridenour* line of cases have held.[20] Unlike the Court of Appeals below, we are not bound by the prior Court of Appeals decisions. Therefore, we are able to independently assess the relevant statutory language to determine whether the Court of Appeals has properly interpreted MCL 15.271(4). For the reasons stated below, we agree with defendants and the Court of Appeals panel that court costs and actual attorney fees under MCL 15.271 may only be awarded when a plaintiff *seeks and obtains* injunctive relief.

Under the OMA, public bodies must conduct their meetings, make all of their decisions, and conduct their deliberations (when a quorum is present) at meetings

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[18] *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) (quotation marks and citations omitted).

[19] *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013).

[20] In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007), this Court addressed the language of MCL 15.271(4), but the plaintiff there sought and obtained injunctive relief, and the issue was limited to whether a pro se litigant, who is also an attorney, may recover court costs and actual attorney fees.

open to the public.[21] The OMA also requires public bodies to give notice of their regular meetings and changes in their meeting schedule in the manner prescribed by the act.[22] If a public body has failed to comply with the requirements of the act, in addition to authorizing enforcement actions by the attorney general or local prosecuting attorney, the OMA also allows for any person to commence a civil action.[23] The OMA creates a three-tiered enforcement scheme for private litigants:

(1) Section 10 of the OMA allows a person to file a civil suit "to challenge the validity of a decision of a public body made in violation of this act."[24] Subsection (2) specifies when a decision may be invalidated, and Subsection (5) allows a public body to cure the alleged defect by reenacting a disputed decision in conformity with the OMA. Notably, § 10 does not provide for an award of attorney fees or costs.

(2) If a public body is not complying with the OMA, § 11 allows a person to file a civil suit "to compel compliance or to enjoin further noncompliance with this act."[25] Subsection (4) provides for an award of court costs and actual attorney fees when three conditions are met: (a) a public body is not complying with the act; (b) a person files "a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act"; and (c) the person "succeeds in obtaining relief in the action[.]"[26] The meaning of this latter phrase is the crux of this case.

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[21] MCL 15.263.

[22] MCL 15.265.

[23] MCL 15.270; MCL 15.271; MCL 15.273.

[24] MCL 15.270(1).

[25] MCL 15.271(1).

[26] MCL 15.271(4).

(3) Finally, § 13 provides that a public official who intentionally violates the OMA is "personally liable in a civil action for actual or exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees . . . ."[27]

As an initial matter, "these sections, and the distinct kinds of relief that they provide, stand alone."[28] This is an important point because "[t]o determine whether a plaintiff may bring a cause of action for a specific remedy, this Court must determine whether [the Legislature] intended to create such a cause of action."[29] When a statute, like the OMA, "gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only."[30]

Plaintiff does not seek to invalidate any action by defendants or make a claim for personal liability against a public official. Therefore, we must train our focus on § 11 of the OMA to determine if it provides an adequate basis for the Court of Appeals' award of court costs and actual attorney fees in this case.[31] MCL 15.271

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[27] MCL 15.273.

[28] *Leemreis v Sherman Twp*, 273 Mich App 691, 701; 731 NW2d 787 (2007).

[29] *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528-529; 734 NW2d 533 (2007) (quotation marks and citation omitted).

[30] *Id*. at 529 (quotation marks and citations omitted).

[31] The Court of Appeals failed to identify the source of its authority to grant plaintiff declaratory relief in this case. The OMA does not provide for such relief. Nor is it clear that plaintiff was entitled to declaratory relief under MCR 2.605, the court rule governing declaratory judgments. See *South Haven*, 478 Mich at 533-534 (stating that a party does not have standing to bring a declaratory judgment claim where there is no actual controversy); *id*. at 528 ("It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers.") (quotation marks and citation omitted). In any event, since no party raised the issue, we will assume without deciding that

provides as follows:

> (1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.
>
> (2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.
>
> (3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.
>
> (4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

At the outset, we acknowledge that, in isolation, the phrase "relief in the action" in MCL 15.271(4) could potentially refer to more than one type of relief because "it 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 a statute.' "[32] However, "it is equally well established that to discern the Legislature's intent, statutory provisions are *not* to be read in

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plaintiff was entitled to declaratory relief on its claim that defendants violated the act by not timely posting the Planning Commission's modified meeting schedule, as required by MCL 15.265(3).

[32] *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (citation omitted).

isolation; rather, context matters, and thus statutory provisions are to be read as a whole."[33] An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent.[34] Therefore, plaintiff's strained reading of an excerpt of one sentence must yield to context. If, when reading the statute as a whole, it is apparent that "relief in the action" refers to injunctive relief, we should not circumscribe our analysis to one clause of the sentence.

Looking to the plain language of MCL 15.271(4), we believe it is clear that the Legislature only intended for a person to recover court costs and actual attorney fees if the person succeeds in obtaining injunctive relief.[35] The first statutory condition, "[i]f a public body is not complying with this act," contemplates an ongoing violation, precisely the circumstances in which injunctive relief is appropriate. The second condition, i.e., commencement of "a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act," directly refers to and obviously requires that a party seek injunctive relief. And the third condition, i.e., a requirement that a party who files an action seeking such relief "succeeds in obtaining relief in the action," cannot be divorced from the phrases that precede it.[36]

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[33] *Id*.

[34] *Id*. at 16, citing 2A Singer & Singer, Statutes & Statutory Construction (7th ed), § 47.2, p 282.

[35] As noted above, Subsection (4) provides for an award of court costs and actual attorney fees when three conditions are met: (1) "a public body is not complying with the act"; (2) a person files "a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act"; and (3) the person "succeeds in obtaining relief in the action." MCL 15.271(4).

[36] See *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955) ("[W]ords and clauses will not be divorced from those which precede and those which follow.").

Plaintiff makes much of the fact that, in this latter phrase, the Legislature did not specifically modify the word "relief" with the word "injunctive," and argues that this means that *any* relief obtained for a violation of the OMA mandates an award of attorney fees and costs. However, by its plain language, MCL 15.271(4) requires that the plaintiff succeed "in obtaining relief *in the action*." We find it significant that the phrase "relief in *the* action" employs the definite article, "the."[37] Use of that word, which we read as having a "specifying or particularizing effect,"[38] indicates a legislative intent to refer to an action seeking *injunctive* relief and subsequently obtaining such relief. That is, given that the relevant phrase, "relief in *the* action," immediately follows the phrase "a person commences a civil action against the public body for *injunctive* relief," the phrase "relief in *the* action" must also be construed as referring to injunctive relief. Obtaining relief other than injunctive relief merely because, or as result, of the action is insufficient to meet the requirement of the statute.[39]

Moreover, even though the Legislature did not modify the word "relief" with the word "injunctive" in the particular phrase at issue, use of the word "injunctive" when again referring to "relief" was unnecessary. This Court was faced with an almost identical problem in *Robinson v City of Lansing*: the Legislature modified

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[37] See *Robinson*, 486 Mich at 14, citing *Detroit v Tygard*, 381 Mich 271, 275; 161 NW2d 1 (1968) ("We regard the use of the definite article 'the' as significant.").

[38] *Random House Webster's College Dictionary* (2001).

[39] See *Felice v Cheboygan Co Zoning Comm*, 103 Mich App 742, 746; 304 NW2d 1 (1981) ("Some meaning must be attributed to the phrase 'relief in the action.' The Legislature did not use the phrase 'because of the action,' nor did they simply require that a party be successful in obtaining 'relief.' In choosing the words 'in the action,' the Legislature intended to restrict the circumstances under which a plaintiff would be entitled to costs and actual attorney fees.").

a noun, but omitted the modifier from its subsequent use of the noun.[40] The defendant City argued that the Legislature's failure to qualify "highway" as a "county highway" in MCL 691.1402a(2) meant that the 2-inch rule applied to all improved portions of highways designed for vehicular travel.[41] Plaintiff, on the other hand, asserted that the "highway" in Subsection (2) must be a "county highway" as framed by Subsection (1) (meaning it did not apply to the state highway where she was injured).[42] This Court sided with the plaintiff, stating that "a reasonable person reading this statute would understand that all three subsections of this provision apply only to *county* highways."[43]

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[40] *Robinson*, 486 Mich at 10-11, citing MCL 691.1402a.

[41] *Robinson*, 486 Mich at 13. The version of MCL 691.1402a in effect at the time provided, in pertinent part, as follows:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, *a portion of a county highway outside of the improved portion of the highway* designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion *of the highway* designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation *outside of the improved portion of the highway* designed for vehicular travel in reasonable repair [i.e., the "2-inch rule"]. [Emphasis added.]

[42] *Robinson*, 486 Mich at 13.

[43] *Id*. at 16; see also *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012) ("When undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context.").

The same analysis applies here. Subsection (4) specifically refers to and is limited to injunctive relief by use of the word "injunctive" in the preceding phrase, "a civil action against the public body for *injunctive* relief[.]" Because the word "relief" appears twice in the same sentence, only a strained reading of a portion of that sentence prevents the obvious conclusion that the second mention of "relief" is in direct reference to the first. The Legislature was not required to restate the modifier, "injunctive," when again referring to the noun, "relief," as the modifier was already sufficiently incorporated into the statute and, when read in context, was implied when the Legislature subsequently used the word "relief."[44] A reasonable reader of MCL 15.271(4) would understand that when a plaintiff "commences a civil action . . . for injunctive relief," the plaintiff is required to "succeed[] in obtaining [*injunctive*] relief in the action" to be entitled to court costs and actual attorney fees.

Our conclusion is reinforced by viewing MCL 15.271 as a whole. The statute allows a person to seek injunctive relief to compel compliance or to enjoin further noncompliance with the OMA.[45] The statute then provides the proper venue in which to commence an action for injunctive relief.[46] And finally, the statute allows for a person to recover court costs and actual attorney fees for an action against the public body for injunctive relief

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[44] See *Robinson*, 486 Mich at 16-17 ("[W]e do not believe that the Legislature is under an obligation to cumbersomely repeat language that is sufficiently incorporated into a statute . . . ."); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (" '[T]he meaning of statutory language, plain or not, depends on context.' ") (citation omitted).

[45] MCL 15.271(1) and (4).

[46] MCL 15.271(2).

if a person "succeeds in obtaining relief in the action."[47] Thus, as a whole, MCL 15.271 only speaks in terms of an injunctive relief and contemplates no other form of relief.[48]

Plaintiff's interpretation of the statute does not comport with the statutory scheme. According to plaintiff's theory, a party can satisfy the second condition of the statute simply by requesting injunctive relief—regardless of whether such claim has any legal merit. And, according to plaintiff, as long as a party receives any type of relief, the party has satisfied the third condition of the statute—regardless of whether the relief arises from another section of the OMA or has a separate legal basis altogether. We cannot conclude that this is what the Legislature intended simply by omitting an implied modifier. Rather, a party seeking a remedy under the OMA is confined to the remedy provided under the applicable section of the act—here, MCL 15.271.[49] A party cannot simply assert a meritless claim for injunctive relief under MCL 15.271 in the hope that one of its other claims will yield some fruit, and then bootstrap its claim for court costs and actual attorney fees on the other relief provided.

In sum, when considering both the plain meaning of the critical phrase in context as well as its placement and purpose in the statutory scheme, MCL 15.271 limits the award of attorney fees to cases in which the

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[47] MCL 15.271(4).

[48] We note that MCL 15.271(3) discusses an "action for mandamus" instead of an "action for injunctive relief" like MCL 15.271(1), (2), and (4). However, mandamus operates like an injunction, as mandamus "may issue *to compel* a body or an officer to perform a clear legal duty for one holding a clear legal right to such performance." *Detroit v Detroit Police Officers Ass'n*, 174 Mich App 388, 392; 435 NW2d 799 (1989) (emphasis added).

[49] See *South Haven*, 478 Mich at 529.

public body persists in violating the act, a suit is brought to enjoin such behavior, and that suit is successful in obtaining injunctive relief. Accordingly, we conclude that the phrase "succeeds in obtaining relief in the action" necessarily mandates that the plaintiff succeed in obtaining *injunctive* relief, not just any relief, in order to be entitled to court costs and actual attorney fees under MCL 15.271(4).

In so holding, we acknowledge the line of contrary holdings of the Court of Appeals. But, for the reasons explained above, the *Ridenour* court and the cases that followed it impermissibly strayed from the plain language of MCL 15.271(4).[50] There is no allowance in the statute for obtaining the *equivalent* of relief—rather the plaintiff must obtain injunctive relief, as sought in commencing the action.[51] The Court of Appeals has unfortunately perpetuated this error in numerous cases since *Ridenour*.[52] Because these decisions have incorrectly extended the entitlement to court costs and actual attorney fees beyond the scope articulated by the Legislature, we overrule *Ridenour* and its progeny to the extent that those cases allow for the recovery of attorney fees and costs under MCL 15.271(4) when injunctive relief was not obtained, equivalent or otherwise.

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[50] As the dissent acknowledges, this Court does not favor legislative acquiescence as a proper interpretive tool to construe statutes. See *McCahan*, 492 Mich at 749-750 ("[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.") (quotation marks and citation omitted).

[51] To the extent the dissent invokes the federal presumption that a declaratory judgment is the functional equivalent of an injunction, that presumption has not been adopted in this state, nor would it apply in this context given that the Legislature has explicitly provided injunctive relief as an available remedy under the OMA. MCL 15.271.

[52] See note 14 of this opinion.

IV. APPLICATION

Plaintiff commenced a civil action against the Board and Planning Commission that sought to enjoin the Planning Commission and the Board from further noncompliance with the OMA under MCL 15.271. However, both the trial court and the Court of Appeals agreed that plaintiff failed to sustain his burden to show that he was entitled to an injunction. As the Court of Appeals explained in its January 2013 opinion, "there was no evidence that the Commission had a history of OMA violations,[53] there was no evidence that this violation was done willfully," and there was no evidence that the public or plaintiff was harmed in any manner.[54] Although the Court of Appeals concluded that plaintiff was nevertheless entitled to declaratory relief for defendants' notice violation, he is not entitled to receive court costs and actual attorney fees because he did not succeed in obtaining injunctive relief in the action, as MCL 15.271(4) requires.

V. CONCLUSION

We hold that a person cannot recover court costs and actual attorney fees under MCL 15.271(4) unless he or she succeeds in obtaining injunctive relief in the action.

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[53] To the extent that plaintiff claimed that defendants' other OMA violations warranted injunctive relief in this case, the lower courts properly disregarded that claim, as those other OMA violations were unrelated to the alleged notice violation in this case. See *Wilkins v Gagliardi*, 219 Mich App 260, 276; 556 NW2d 171 (1996) (affirming denial of injunction when there had been no similar incidents since the incident complained of and the membership of the committee involved was different).

[54] *Speicher*, unpub op at 2. See *Wilkins*, 219 Mich App at 276 ("Injunctive relief should be granted only when justice requires it, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable harm.").

Accordingly, we reverse the Court of Appeals opinion and order issued December 19, 2013, and reinstate the portion of the Court of Appeals decision issued January 22, 2013, regarding court costs and actual attorney fees.

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

CAVANAGH, J. (*dissenting*). Shortly after the enactment of the Open Meetings Act (OMA), MCL 15.261 *et seq*., the Court of Appeals effectively held that declaratory relief granted in lieu of or as the functional equivalent of an injunction supports an award of costs and actual attorney fees under MCL 15.271(4). See *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981). Over the past 33 years, the Court of Appeals has reiterated that holding in numerous published opinions, solidifying the role of declaratory relief as it relates to costs and attorney fees under MCL 15.271(4). Despite this long line of precedent, at no time has the Legislature taken steps to amend MCL 15.271(4) in response. Because I believe that these cases properly interpreted and effectuated the Legislature's intent, I respectfully dissent.

In 1968, the Legislature enacted an open meetings law to consolidate a "patchwork of statutes" that required accountability and openness in governmental affairs. *Booth v Univ of Mich Bd of Regents*, 444 Mich 211, 221; 507 NW 2d 422 (1993). By rendering the decision-making process of most public bodies open and accessible to the public, the 1968 statute was intended to act as " 'an important check and balance on self-government.' " *Id*. at 223, quoting Osmon, *Sunshine or Shadows: One State's Decision*, 1977 Det C L Rev 613, 617. Specifically, by addressing a longstanding concern regarding the public's access to governmental decision-

making,[1] the statute's aim was to " 'serve as both a light and disinfectant in exposing potential abuse and misuse of power.' " *Booth*, 444 Mich at 223, quoting *Sunshine or Shadows*, 1977 Det C L Rev at 617. Although the goals of the 1968 statute were laudable, the statute was flawed: "because the 1968 statute failed to impose an enforcement mechanism and penalties to deter noncompliance, nothing prevented the wholesale evasion of the act's provisions" by public bodies, and the law was often ignored. *Booth*, 444 Mich at 221. See, also, *Sunshine or Shadows*, 1977 Det C L Rev at 619. To remedy this, the statute was "comprehensively revise[d]" in 1976 to provide for enforcement by way of several mechanisms, including actions by private citizens to vindicate, not primarily personal rights, but the rights of the public at large. *Booth*, 444 Mich at 222. One such enforcement provision is MCL 15.271(4), which provides that a successful party is entitled to court costs and actual attorney fees. Specifically, MCL 15.271(4) states:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

At issue in this case is whether the statutory phrase "succeeds in obtaining relief in the action" encompasses more than formal injunctive relief. Stated another way, at issue is whether the Court of Appeals has correctly effectuated the Legislature's intent by holding that the

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[1] See *Sunshine or Shadows*, 1977 Det C L Rev at 617 ("Concern for public access to governmental decision-making is not new. . . . [T]he importance of government being open and accessible was established very early in this country.").

absence of formal injunctive relief does not preclude a plaintiff from recovering statutory attorney fees and costs under MCL 15.271(4). Considering the purposes behind the OMA, including the Legislature's conscious choice to enact a citizen enforcement provision aimed at ensuring compliance with the OMA, I cannot conclude that the last 33 years of Court of Appeals precedent was in error.

As previously noted, four years after the effective date of MCL 15.271(4), the *Ridenour* panel effectively held that declaratory relief granted in lieu of or as the functional equivalent of an injunction supports an award of costs and actual attorney fees under the statute. In *Ridenour*, the plaintiff sought to enjoin the defendant from holding a closed meeting. Although the trial court determined that the defendant's proposed conduct would violate the OMA, it determined that injunctive relief was not necessary in light of the defendant's promise that it would comply with the trial court's decision. *Ridenour*, 111 Mich App at 801. Despite the trial court's decision to deny the plaintiff's request for injunctive relief on that basis, it granted the plaintiff's request for costs and attorney fees under MCL 15.271(4), reasoning that the relief that the plaintiff obtained was "the equivalent of an injunction." *Id*. at 801. On appeal, the Court of Appeals affirmed the award of costs and attorney fees explaining, "No matter how it is viewed, plaintiff received the relief he sought. The [trial court] agreed with plaintiff's position and gave a judgment in his favor." *Id*. at 806.

Subsequent panels of the Court of Appeals have followed *Ridenour*, reasoning that, under MCL 15.271(4), "neither proof of injury nor issuance of an injunction is a prerequisite for the recovery of attorney fees under the OMA"; rather, under the language of

MCL 15.271(4), a "plaintiff need only 'succeed in obtaining *relief* in the action,' " and, therefore, declaratory relief, as a form of relief, is necessarily sufficient. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 92; 669 NW2d 862 (2003), quoting MCL 15.271(4) (emphasis added).[2] Accordingly, for more than three decades, the Court of Appeals has repeatedly held that declaratory relief granted in lieu of an injunction or that is the functional equivalent of an injunction is sufficient to trigger an award of attorney fees and costs because, in

[2] See, also, *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk*, 139 Mich App 814; 362 NW2d 871 (1984) (holding that the absence of a formal injunction does not preclude the plaintiff from recovering costs and attorney fees under MCL 15.271(4)); *Schmiedicke v Clare Sch Bd*, 228 Mich App 259, 267; 577 NW2d 706 (1998) (holding that the "legal remedy of declaratory relief is adequate" to trigger an award of attorney fees and costs under MCL 15.271(4)); *Manning v East Tawas*, 234 Mich App 244, 253-254; 593 NW2d 649 (1999) (expressly rejecting the notion that a failure to either grant injunctive relief or order future compliance with the OMA precludes an award of costs and attorney fees, reasoning that a finding that the OMA was violated constitutes declaratory relief, which is sufficient to entitle the plaintiff to an award of costs and attorney fees under MCL 15.271(4)); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 535; 609 NW2d 574 (2000) (holding that a declaratory judgment entitles a plaintiff to actual attorney fees and costs under MCL 15.271(4), "despite the fact that the trial court found it unnecessary to grant an injunction given defendants' decision to amend the notice provision after plaintiffs filed the present suit"); *Kitchen v Ferndale City Council*, 253 Mich App 115, 127-128; 654 NW2d 918 (2002) ("Costs and fees are mandatory under the OMA when the plaintiff obtains relief in an action brought under the Act" because "[t]he plain language of [MCL 15.271(4)] simply states that plaintiffs need only 'succeed[] in obtaining relief in the action' in order to recover court costs and attorney fees") (citation omitted); *Morrison v East Lansing*, 255 Mich App 505, 521 n 11; 660 NW2d 395 (2003) (noting that the trial court properly granted the plaintiffs attorney fees and other costs because, "[w]here a trial court declares that the defendants violated the OMA, but finds it unnecessary to grant injunctive relief, the plaintiffs are entitled to actual attorney fees and costs"); *Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572, 580; 697 NW2d 529 (2005) (stating that "[t]he imposition of attorney fees is mandatory upon a finding of a violation of the OMA").

such cases, the plaintiff has "succeeded in obtaining relief in the action," which is all that MCL 15.271(4) requires.

Despite the clear holdings of the Court of Appeals, the Legislature has not amended MCL 15.271(4) or otherwise taken any action to signal its disapproval of *Ridenour* and its progeny, even though the Legislature has made numerous amendments to other provisions of the OMA. I continue to find relevant the well-established presumption that the Legislature is aware of statutory interpretations by this Court and the Court of Appeals. See *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006); *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991).[3] Consequently, in my view, the Legislature's silence on this topic since 1981 is a strong indication that the Court of Appeals has properly effectuated the Legislature's intent, in accordance with that primary goal of statutory interpretation. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989). While the Legislature may not be required to "cumbersomely repeat language that is sufficiently incorporated into a statute," *Robinson v Lansing*, 486 Mich 1, 16-17; 782 NW2d 171 (2010), the Legislature also unquestionably has the ability to correct judicial interpretations that it believes are contrary to its intent. The fact that the Legislature has long acquiesced to *Ridenour* and its progeny, despite numerous intervening amendments to the OMA, is, in my opinion, compelling.[4]

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[3] See, also, *Autio v Proksch Constr Co*, 377 Mich 517, 546; 141 NW2d 81 (1966) (BLACK, J., dissenting) (noting the "constantly employed axiom" that "the legislature enacts with the Court's interpretational decisions in one hand as it writes and votes with the other").

[4] While some members of this Court undoubtedly disagree with the doctrine of legislative acquiescence, I continue to believe that the doctrine, which has a deep-rooted history in Michigan, remains a valid

Indeed, the interpretation of the statutory language in *Ridenour* and its progeny is consistent with the purpose of MCL 15.271(4) and the history of the OMA, both of which are relevant considerations in discerning the Legislature's intent. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989); *Booth*, 444 Mich at 223-224. To begin, it is entirely reasonable to presume that public bodies will adhere to the law as declared by a court. Cf. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (noting that declaratory relief is generally sufficient to induce the legislative and executive branches to comply with the law); *Florida v US Dep't of Health & Human Servs*, 780 F Supp 2d 1307, 1314, 1316 (ND Fla, 2011) (noting the longstanding presumption that federal officials will follow the law as declared by a court). In fact, a judgment for declaratory relief constitutes a binding and conclusive adjudication of the rights and status of the litigants. *Black's Law Dictionary* (6th ed). Thus, a declaratory judgment has the force and effect of a final judgment. MCR 2.605(E). It is a "real judgment, not just a bit of friendly advice," and, as one court has noted, those who try to evade it will likely "come to regret it." *US Dep't of Health & Human Servs*, 780 F Supp 2d at 1316, quoting *Badger Catholic, Inc v Walsh*, 620 F3d 775, 782 (CA 7, 2010).[5] "If it were otherwise, a . . . declaratory judgment

interpretive aid. See *McCahan v Brennan*, 492 Mich 730, 757 n 22; 822 NW2d 747 (2012) (MARILYN KELLY, J., dissenting); *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 53-54; 732 NW2d 56 (2007) (MARILYN KELLY, J., dissenting).

[5] Indeed, the evasion of a court's judgment might trigger other enforcement provisions of the OMA, further supporting the conclusion that declaratory relief, in the context of the OMA, acts to restrain noncompliance with the OMA. See MCL 15.272(1) ("A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00."); MCL 15.273(1) ("A public official who intentionally violates this act shall be personally liable in a civil action for

would serve no useful purpose as a final determination of rights." *Id*. (quotation marks omitted). See, also, MCR 2.605(F) ("Further necessary or proper relief based on a declaratory judgment may be granted . . . ."). Consequently, in the context of public bodies, a judgment for declaratory relief is the "functional equivalent of an injunction." *US Dep't of Health & Human Servs*, 780 F Supp 2d at 1314 (citations and quotation marks omitted).[6] As a final order, a declaratory judgment acts to restrain public bodies from further noncompliance with the OMA, consistent with the overall purpose of MCL 15.271. Accordingly, as *Ridenour* explained, although a plaintiff might not receive relief in the *form* of an injunction, the receipt of a declaratory judgment upon the finding of an OMA violation is the functional equivalent of one. *Ridenour*, 111 Mich App at 806. Although that might not be the case in a context other than the OMA, considering the purpose of MCL 15.271 and the OMA generally, I believe that *Ridenour* and its progeny clearly effectuated the intent of the Legislature by concluding that obtaining a judgment for declaratory relief is "succeed[ing] in obtaining relief in the action." See MCL 15.271(4).

In contrast to *Ridenour* and its progeny, the majority's interpretation undermines the OMA's enforcement provision and the purpose of the OMA, generally. In addition to mandating formal injunctive relief before costs and attorney fees can be awarded, the majority

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actual and exemplary damages of not more than $ 500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.").

[6] See, also, *id*. at 1316 (referring to a declaratory judgment against governmental officials as a "de facto injunction"); *California v Grace Brethren Church*, 457 US 393, 408; 102 S Ct 2498; 73 L Ed 2d 93 (1982) ("[T]here is little practical difference between injunctive and declaratory relief . . . .").

now clarifies that an "ongoing violation" is also a prerequisite to obtaining costs and attorney fees under the OMA. Consequently, the majority opinion effectively gives a public body at least one free pass at violating the OMA because, without more, the public body's violation of the OMA, no matter how substantial, is presumably not "ongoing."[7] I do not believe that the majority's apparent interpretation is what the Legislature intended when it adopted legislation aimed at promoting a "new era" of governmental accountability and public access to governmental decision-making. *Booth*, 444 Mich at 222-223.

Further, under the majority's interpretation of MCL 15.271(4), even if a lawsuit may be brought to enforce the interests of the public at large, there is no incentive for the public body not to contest the plaintiff's interpretation of the statutory provisions through vigorous

[7] The majority does not elaborate on the meaning of "ongoing violation." However, to the extent that the majority opinion could be read to suggest that a plaintiff cannot bring suit under MCL 15.271 if the OMA violation is already complete at the time suit is filed, that result is inconsistent with decades of precedent. See *Wexford Co Prosecutor v Pranger*, 83 Mich App 197, 204; 268 NW2d 344 (1978) ("Insofar as the declaratory judgment finds the closed session of May 9, 1977, in violation of the open meetings statute, we affirm"); *Nicholas*, 239 Mich App at 535 ("Here, the trial court declared that defendants violated the OMA. This constitutes declaratory relief, thus entitling plaintiffs to actual attorney fees and costs despite the fact that the trial court found it unnecessary to grant an injunction given defendants' decision to amend the notice provision after plaintiffs filed the present suit"). Such a conclusion would also preclude most OMA actions that are brought under MCL 15.271(4) to challenge the alleged erroneous procedures used by a public body. Notably, those actions ultimately assist in bringing clarity to the OMA's requirements, thereby reducing future violations and furthering the OMA's purpose. I imagine that most citizens will not have time to run to the doors of a courthouse the moment a public body makes an erroneous decision to conduct its meeting in secret or in violation of the OMA's notice requirements. But, under the majority's apparent interpretation, this may now be required.

litigation. After all, upon the trial court's adverse ruling, the public body need only concede defeat to preclude injunctive relief. See *Wexford Co Prosecutor v Pranger*, 83 Mich App 197, 205; 268 NW2d 344 (1978) (affirming declaratory relief based on a violation of the OMA, but vacating an injunction, reasoning that there was no "*real* and *imminent danger* of irreparable injury" when the defendants acted in good faith); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534; 609 NW2d 574 (2000) ("Where there is no reason to believe that a public body will deliberately fail to comply with the OMA in the future, injunctive relief is unwarranted."). Under the majority's interpretation, such a concession will preclude an award to the plaintiff for his or her costs of pursuing the litigation even though, as previously explained, a grant of declaratory relief is generally sufficient to make the violation known to the public body and restrain it from further violating the OMA, which is consistent with the purpose of MCL 15.271(4) and the purpose of the OMA generally.

Of particular importance is that, in enacting MCL 15.271(4), the Legislature granted individual citizens the right to pursue remedies for OMA violations rather than rely solely on the Attorney General or county prosecutors. By doing so, the Legislature seems to have implicitly recognized that there would be times when members of the executive branch could not, or would not, act and that, in those instances, the overriding concern for governmental accountability mandates the availability of causes of action brought by private citizens. In light of the Legislature's choice to allow private citizen suits to pursue remedies for procedural OMA violations,[8] which vindicate the rights of the public at

[8] Compare MCL 15.270 (permitting a private citizen to seek the invalidation of a public body's decision upon a violation of the OMA) with

large, I cannot conclude that the Legislature intended to limit this right to the small portion of the population that is capable of pursuing such actions at their own personal expense. See *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 47; 576 NW2d 641 (1998) (CAVANAGH, J., concurring in part and dissenting in part). The result of the majority's decision is that the ability of private citizens to bring OMA complaints will, in all likelihood, be severely curtailed. To penalize private citizens and, consequently, the public at large, simply because relief comes in the form of a declaratory judgment, rather than injunctive relief, elevates form over substance when, as explained earlier, there is little practical difference between the two forms of relief in this context. Consequently, I do not believe that the Legislature intended the majority's interpretation of MCL 15.271(4), which undermines the OMA's purpose.

In this case, plaintiff requested both injunctive and declaratory relief and was ultimately awarded the latter. Because declaratory relief is sufficient to trigger attorney fees and costs under MCL 15.271(4), I would hold that plaintiff is entitled to costs and attorney fees, consistent with *Ridenour* and its progeny.

In light of the language, history, and purpose of the act, I cannot agree with the majority's decision to cast aside 33 years of precedent and erroneously write into the OMA a requirement that the Legislature did not intend—i.e., that a party must obtain formal *injunctive* relief as a prerequisite to an award of costs and attorney fees under MCL 15.271(4). Because I believe that more than three decades of precedent properly interpreted and effectuated the Legislature's intent, I respectfully dissent.

MCL 15.271 (generally permitting private citizens to seek compliance with the procedural requirements of the OMA, rather than the invalidation of a public body's decision).

PEOPLE v JONES

Docket No. 147735. Argued October 9, 2014 (Calendar No. 6). Decided December 23, 2014.

Thabo Jones was charged in the 36th District Court with reckless driving causing death in violation of MCL 257.626(4). The court, Cylenthia L. Miller, J., bound defendant over to the Wayne Circuit Court following a preliminary examination. In a pretrial motion, defendant requested that the circuit court instruct the jury on the lesser included offense of moving violation causing death, MCL 257.601d, although MCL 257.626(5) specifically prohibits giving this instruction when the charged offense is reckless driving causing death. The circuit court, Richard M. Skutt, J., granted the motion, concluding that MCL 257.626(5) unconstitutionally infringed the judiciary's authority to establish court practice and procedure. The Court of Appeals, RONAYNE KRAUSE and SHAPIRO, JJ. (K. F. KELLY, P.J., dissenting), affirmed. 302 Mich App 434 (2013). The Supreme Court granted the prosecutor's interlocutory application for leave to appeal. 495 Mich 905 (2013).

In an opinion by Justice KELLY, joined by Chief Justice YOUNG and Justices MARKMAN, ZAHRA, and MCCORMACK, the Supreme Court *held*:

The circuit court erred by granting defendant's request to instruct the jury on moving violation causing death. The Legislature acted within its constitutional authority by creating a substantive exception that prohibited the jury's consideration of that lesser offense when the charged offense is reckless driving causing death.

1. MCL 768.32(1) sets forth the general rule that a defendant is entitled to have the jury instructed on necessarily included lesser offenses. MCL 257.626(5) sets forth a clear exception to this general rule: when a defendant is charged with reckless driving causing death, the jury shall not be instructed regarding the crime of moving violation causing death. Under *People v Cornell*, 466 Mich 335 (2002), this legislative modification did not impermissibly infringe the Supreme Court's constitutional authority to enact rules governing practice and procedure because determining what charges a jury may consider concerned a matter of substantive law.

2. Defendant did not have a Sixth Amendment right to have the jury instructed on moving violation causing death. While the United States Supreme Court has ruled that the jury must have the opportunity to convict on a lesser included offense in capital cases, it has expressly declined to rule on whether there is a constitutional entitlement to have the jury consider lesser included offenses in cases involving noncapital offenses. The fact that MCL 257.626(5) is silent in the context of a judge sitting as finder of fact did not alter this conclusion. Given the clear intent of the Legislature to forbid consideration of the lesser misdemeanor offense of moving violation causing death when a defendant has been charged with reckless driving causing death, a judge trying a case without a jury would understand that the defendant could not be convicted of the lesser offense.

Justice VIVIANO, concurring in the result, would have decided the case on the nonconstitutional ground that the offense of moving violation causing death, which may only be committed by a person operating a motor vehicle, is not a necessarily included lesser offense of reckless driving causing death, which may be committed in a non-motor vehicle.

Court of Appeals judgment reversed; case remanded to the circuit court for further proceedings.

Justice CAVANAGH, dissenting, would have affirmed on the basis of his views that jury instructions are procedural rather than substantive, that MCL 257.626(5) violates the constitutional separation-of-powers doctrine because it conflicts with MCR 2.512(B)(2), and that MCL 257.626(5) violates defendants' Sixth Amendment rights by limiting their ability to present their theory of the case and by effectively punishing them for exercising their right to a trial by jury.

1. CRIMINAL LAW — RECKLESS DRIVING CAUSING DEATH — JURY INSTRUCTIONS — NECESSARILY INCLUDED LESSER OFFENSES — SEPARATION OF POWERS.

The statutory provision that prohibits a jury from being instructed on the crime of moving violation causing death when the charged offense is reckless driving causing death does not infringe the authority of the judiciary in violation of the separation-of-powers doctrine (Const 1963, art 3, § 2; MCL 257.626(5)).

2. CRIMINAL LAW — RECKLESS DRIVING CAUSING DEATH — JURY INSTRUCTIONS — NECESSARILY INCLUDED LESSER OFFENSES — RIGHT TO JURY TRIAL.

The statutory provision that prohibits a jury from being instructed on the crime of moving violation causing death when the charged

offense is reckless driving causing death does not violate a defendant's constitutional right to a jury trial (US Const, Am VI; MCL 257.626(5)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

James C. Howarth for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the people.

Peter Jon Van Hoek for the Criminal Defense Attorneys of Michigan.

KELLY, J. This interlocutory appeal concerns whether a defendant charged with reckless driving causing death[1] is entitled to a jury instruction on the misdemeanor lesser offense of moving violation causing death,[2] notwithstanding the Legislature's prohibition against such an instruction.[3] Ordinarily, statutory law entitles criminal defendants to instructions on necessarily included lesser offenses when the facts at issue warrant such instructions.[4] Here, because the Legislature specifically created an exception prohibiting an instruction on moving violation causing death where the charged offense is reckless driving causing death, and because the Legislature did not exceed its constitu-

[1] MCL 257.626(4).

[2] MCL 257.601d.

[3] MCL 257.626(5).

[4] MCL 768.32(1); *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

tional authority in doing so, we hold that it was error for the circuit court to grant the defendant's request to instruct the jury on moving violation causing death.

We therefore reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion. Specifically, on remand, the circuit court shall enter an order vacating its ruling granting defendant's request to instruct the jury on the misdemeanor lesser offense of moving violation causing death. In light of the clear legislative dictates of MCL 257.626(5), the circuit court is precluded from granting defendant's request and providing such a jury instruction.

I. FACTS AND PROCEDURAL HISTORY

On the afternoon of March 2, 2012, defendant was driving his automobile at approximately 80 mph on a road with a posted speed limit of 35 mph. While changing lanes, defendant collided with another vehicle, which, in turn, struck a third vehicle that had been parked on the side of the road. The driver of the second vehicle was killed in the collision. Consequently, defendant was charged with reckless driving causing death under MCL 257.626(4).

Prior to trial, defense counsel filed a motion in limine, requesting that the circuit court instruct the jury on the misdemeanor lesser offense of committing a moving violation causing death. Despite the explicit prohibition in MCL 257.626(5) against such an instruction, the circuit court granted the motion, concluding that moving violation causing death is a necessarily included lesser offense of reckless driving causing death and, therefore, MCL 257.626(5) violates the doctrine of separation of powers under Const 1963, art 3, § 2.

The prosecution appealed, and the Court of Appeals affirmed in a split published opinion. The majority held that MCL 257.626(5) is constitutionally infirm because it violates both the separation of powers and a criminal defendant's fundamental due process right to a trial by jury.[5] Noting the general rule that a jury may acquit a defendant of the charged offense and instead find him guilty of a lesser offense, the majority first concluded that it is a violation of the separation of powers for the Legislature to prohibit the courts from instructing the jury on a necessarily included lesser offense. Because MCL 257.626(5) impermissibly precludes an instruction on moving violation causing death, which "by definition" is a necessarily included lesser offense of reckless driving causing death, the majority held the statutory prohibition to be unconstitutional.[6] The majority explained that because the Legislature's sole function is to create substantive law whereas the Supreme Court has exclusive rulemaking authority in matters of practice and procedure, effectuating the right to a properly instructed jury is exclusively within the domain of the judiciary.[7] Therefore, by prohibiting courts from instructing juries on the necessarily included lesser offense of moving violation causing death, the Legislature, via MCL 257.626(5), unconstitutionally infringed the judiciary's authority to establish court practice and procedure.[8]

Alternatively, the majority concluded that MCL 257.626(5) could likewise be invalidated as an unconsti-

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[5] *People v Jones*, 302 Mich App 434; 839 NW2d 51 (2013).

[6] *Id*. at 439.

[7] *Id*. at 441, 442, citing *People v Cornell*, 466 Mich 335, 349; 646 NW2d 127 (2002).

[8] *Id*. at 440, citing *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

tutional deprivation of a defendant's right to a trial by a properly instructed jury. The majority observed that although MCL 257.626(5) plainly prevents the court from instructing the jury on the lesser offense of moving violation causing death, the statute does not bar or otherwise restrict *a judge* sitting as fact-finder from finding a defendant guilty of that lesser offense. The majority reasoned that, had the Legislature intended to limit a judge's consideration of moving violation causing death, it could have easily included language to that effect. Because a criminal defendant has no right to a bench trial unless the prosecutor and judge agree,[9] MCL 257.626(5) places a criminal defendant in the position of compromising one right in favor of another, namely, a criminal defendant must relinquish his constitutional right to a trial by jury in order to permit the fact-finder to consider the lesser offense of moving violation causing death.[10]

We granted the prosecution's interlocutory application for leave to appeal, directing the parties to brief the following issues:

> (1) whether a legislative provision barring consideration of a necessarily included lesser offense violates the separation of powers doctrine, Const 1963, art 3, § 2; (2) whether MCL 257.626(5) violates a defendant's right to a jury trial by foreclosing a jury instruction on a lesser offense; and (3) whether MCL 257.601d is a necessarily included lesser offense of MCL 257.626(4).[11]

II. STANDARD OF REVIEW

The prosecution contends that the circuit court erred by granting defendant's request to instruct the jury on

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[9] See MCL 763.3 and MCR 6.401.

[10] *Id*. at 443.

[11] *People v Jones*, 495 Mich 905 (2014).

the misdemeanor lesser offense of moving violation causing death. We review de novo a claim of instructional error involving a question of law.[12] However, a circuit court's decision as to whether a requested lesser-included-offense instruction is applicable under the facts of a particular case will only be reversed upon a finding of an abuse of discretion.[13] An abuse of discretion occurs when the circuit court chooses an outcome that falls outside the range of principled outcomes.[14] Before addressing any alleged instructional error by the circuit court, however, we first consider whether a defendant is entitled to a jury instruction on the offense of moving violation causing death despite the statutory prohibition set forth in MCL 257.626(5). We review this and other questions of law de novo.[15]

III. ANALYSIS

In determining whether the circuit court erred by granting the request to instruct the jury on the misdemeanor lesser offense of moving violation causing death, we begin by reviewing the common law and statutory basis for lesser offense instructions, after which we will address the extent to which this review affects the construction of the reckless driving causing death and moving violation causing death provisions.[16]

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[12] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[13] *Cornell*, 466 Mich at 352-353.

[14] *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

[15] *People v Kowalski*, 489 Mich 488, 497; 803 NW2d 200 (2011).

[16] Because both parties have conceded that moving violation causing death is, in fact, a necessarily included lesser offense of reckless driving causing death—as opposed to a cognate offense—we will proceed on this assumption, analyzing this case in light of that concession. We note, however, that even if moving violation causing death does *not* constitute a necessarily included lesser offense of reckless driving causing death, the result would nevertheless the same because, as will be discussed later in

A. PROPRIETY OF LESSER-INCLUDED-OFFENSE INSTRUCTIONS

At common law, the general rule of lesser included offenses was that

> when an indictment charged an offense which included within it another less offense or one of a lower degree, the defendant, though acquitted of the higher offense, might be convicted of the less.
>
> This rule, however, was subject to the qualification, that upon an indictment for a felony, the defendant could not be convicted of a misdemeanor.[17]

This common-law rule has since been legislatively modified[18] and appears in what is now MCL 768.32(1), which provides as follows:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.[19]

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the opinion, MCL 768.32(1) does not permit cognate lesser offense instructions. See *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002).

[17] *Hanna v People*, 19 Mich 316, 318 (1869).

[18] Significantly, no longer does the rule preclude a misdemeanor from constituting a lesser included offense of a felony but instead authorizes a conviction "for any substantive offense included in the offense charged, without reference to the fact that one was a felony and the other a misdemeanor . . . ." *Hanna*, 19 Mich at 322.

[19] We note that when the charged offense involves a major controlled substance, the rules pertaining to lesser included offenses are different. MCL 768.32(2) states:

> (2) Upon an indictment for an offense specified in section 7401(2)(a)(*i*) or (*ii*) or section 7403(2)(a)(*i*) or (*ii*) of the public health code, Act No. 368 of the Public Acts of 1978, being sections

Reduced to its simplest terms, when a defendant is charged with an offense "consisting of different degrees," the factfinder may, consistent with the statutory text, acquit the defendant of the charged offense and find him of her "guilty of a degree of that offense inferior to that charged in the indictment . . . ."

In *People v Cornell*,[20] this Court considered what crimes constitute lesser or "inferior" offenses within the meaning of MCL 768.32(1). After reviewing the dissonant approaches to lesser-included-offense instructions articulated throughout our jurisprudence, this Court noted that "the word 'inferior' in the statute does not refer to inferiority in the penalty associated

333.7401 and 333.7403 of the Michigan Compiled Laws, or conspiracy to commit 1 or more of these offenses, the jury, or judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense. A jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance. The jury shall be instructed to return a verdict of not guilty of an offense involving the controlled substance at issue if it finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance. A judge in a trial without a jury shall find the defendant not guilty of an offense involving the controlled substance at issue if the judge finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance.

In *People v Binder (On Remand)*, 215 Mich App 30; 544 NW2d 714 (1996), the Court of Appeals held unconstitutional the provisions of MCL 768.32(2) that limit consideration of the lesser offense and jury instruction in cases involving a major controlled substance offense as a violation of the separation of powers doctrine. This Court, however, vacated that portion of the Court of Appeals opinion as unnecessary to the resolution of that case. *People v Binder*, 453 Mich 915 (1996).

[20] 466 Mich 335.

with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense."[21] On this basis, this Court concluded that a defendant is entitled to a lesser offense instruction only if that lesser offense is necessarily included in the greater offense; that is, the offense must be committed as part of the greater offense insofar as it would be "impossible to commit the greater offense without first committing the lesser offense."[22] *Cornell* thus interpreted the legislative prerogative contained in MCL 768.32(1)—that an included-inferior-offense instruction may be appropriate upon request—as limited to necessarily included lesser offenses only; it foreclosed consideration of cognate lesser offenses, which, in the absence of adequate notice, may violate a defendant's fundamental due process rights.[23] Under *Cornell*, then, the rule of lesser included offenses is simple: pursuant to MCL 768.32(1), the court must first determine whether an offense is necessarily included, which requires a comparison of the elements of the offenses, and if so, the court must then determine whether an instruction is warranted on the facts of a particular case by examining whether "the charged greater offense

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[21] *Id*. at 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997) (citation and quotation marks omitted).

[22] *Id*. at 361; *People v Hendricks*, 446 Mich 435; 521 NW2d 546 (1994).

[23] See *Cornell*, 466 Mich at 353-355. Indeed, "cognate" lesser offenses are those that share some common elements, and are of the same class or category as the greater offense, but likewise contain additional elements not found in the greater offense. See also *Hendricks*, 446 Mich at 443. Accordingly, failure to provide a defendant with adequate notice that he is being charged with a cognate offense may deprive the defendant of the opportunity to defend himself, since he would not have had notice of all the elements of the offense against which he was required to defend. In contrast, a defendant *always* has adequate notice that he might be charged with necessarily included lesser offenses, which contain no additional elements beyond those contained in the principal charge.

requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support [the instruction]."[24]

As a corollary of this conclusion, *Cornell* returned MCL 768.32(1) to its original construction as given by this Court in *Hanna*: consideration of cognate lesser offenses is not permitted and the right to an instruction on a necessarily included lesser offense turns on whether "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support [the instruction]."[25] In so doing, this Court noted the separation of powers concerns inherent in its earlier caselaw permitting instructions on cognate offenses: to interpret MCL 768.32(1) as permitting instruction on cognate offenses is not a proper exercise of Supreme Court authority to determine rules of practice and procedure. While this Court exclusively retains the authority and duty to prescribe general rules that "establish, modify, amend, and simplify the practice and procedure in all courts of this state,"[26] it cannot be disputed that "enact[ing] court rules that establish, abrogate, or modify the substantive law"[27] transcends the limits of that authority. Indeed, "matters of substantive law are left to the Legislature."[28] And because "[d]etermining what charges a jury may consider does not concern merely the 'judicial dispatch of litigation,' "[29] MCL 768.32(1) thus concerns

[24] *Cornell*, 466 Mich at 357.

[25] *Id*. at 357.

[26] Const 1963, art 6, § 5.

[27] *McDougall*, 461 Mich at 27.

[28] *Cornell*, 466 Mich at 353. See also *People v Glass (After Remand)*, 464 Mich 266, 281; 627 NW2d 261 (2001); *McDougall*, 461 Mich at 27.

[29] *Cornell*, 466 Mich at 353, quoting *McDougall*, 461 Mich at 30.

a matter of substantive law and, consequently, courts may not promulgate procedural rules contrary to statutory law governing lesser-included-offense instructions, but are instead required to adhere to the legislative dictates.

B. RECKLESS DRIVING CAUSING DEATH AND MOVING VIOLATION CAUSING DEATH

Defendant was charged with reckless driving causing death pursuant to MCL 257.626(4). The reckless driving statute, MCL 257.626, provides in relevant part as follows:

> (2) Except as otherwise provided in this section, a person who operates a vehicle upon a highway or a frozen public lake, stream, or pond or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, in willful or wanton disregard for the safety of persons or property is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.
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> * * *
>
> (4) Beginning October 31, 2010,[30] a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.
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> (5) In a prosecution under subsection (4), the jury shall not be instructed regarding the crime of moving violation causing death.

[30] As stated, defendant's alleged offense occurred on March 2, 2012.

Taken together, then, these provisions demonstrate the Legislature's intent that a person is guilty of reckless driving causing death, a 15-year felony, if that person "operates a vehicle . . . [in willful or wanton disregard for the safety of persons or property] and by the operation of that vehicle causes the death of another person. . . ." Moreover, in a prosecution for reckless driving causing death, "the jury shall not be instructed regarding the crime of moving violation causing death."

Despite these plain legislative dictates, the circuit court granted defendant's request that the jury be instructed on the misdemeanor lesser offense of moving violation causing death, which, in turn, provides as follows:

> (1) A person who commits a moving violation that causes the death of another person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.
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> * * *
>
> (3) This section does not prohibit the person from being charged with, convicted of, or punished for any other violation of law.
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> (4) As used in this section, "moving violation" means an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that involves the operation of a motor vehicle, and for which a fine may be assessed.[31]

IV. APPLICATION

Assuming, based on the record concession, that moving violation causing death indeed constitutes a necessarily included lesser offense of reckless driving causing

[31] MCL 257.601d.

death, we nevertheless conclude that the circuit court erred in granting the request that the jury be instructed on the misdemeanor lesser offense of moving violation causing death. MCL 768.32(1) sets forth the general rule that a defendant is entitled to have the jury instructed on necessarily included lesser offenses. MCL 257.626(5), in turn, sets forth a clear exception to this general rule: when a defendant is charged with reckless driving causing death, "the jury shall not be instructed regarding the crime of moving violation causing death." As *Cornell* indicates, MCL 768.32(1) reflects both the Legislature's abolition of the common-law misdemeanor restriction as well as its proscription against consideration of cognate lesser offenses.[32] As *Cornell* further indicates, this legislative modification does not impermissibly infringe this Court's constitutional authority to enact rules governing practice and procedure, because "[d]etermining what charges a jury may consider . . . concerns a matter of substantive law."[33] Just as modifying the common-law rule is a permissible exercise of legislative authority under *Cornell*, we conclude that, by extension, so too is creating a substantive exception to that rule.[34]

Notwithstanding this Court's explicit statements to the contrary, the Court of Appeals interprets *Cornell* to "support" its conclusion that "determining what instructions should be given to the jury is exclusively

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[32] *Id*. at 354.

[33] *Id*. at 353.

[34] Indeed, we note that, as a substantive exception to the rule the Legislature articulated in MCL 768.32(1), MCL 257.626(5) has the effect of reestablishing the common-law rule with regard to the crimes of reckless driving causing death (a felony) and moving violation causing death (a misdemeanor). See *Hanna*, 19 Mich at 318 ("[U]pon an indictment for a felony, the defendant could not be convicted of a misdemeanor.").

within the judiciary's role."[35] The Court of Appeals opinion similarly asserts that "[c]orrectly instructing the jury . . . is a fundamental requirement of fair and proper administration of justice."[36] Yet the two cases upon which the Court of Appeals relies in support of this proposition—*People v Murray* and *People v Townes*[37]—contain no such language nor do they somehow suggest that a criminal defendant has an unfettered right to have the jury instructed on a lesser included offense or that such instructions are within the exclusive domain of the judiciary. At most, these cases merely reaffirm the unexceptional legal premise that a judge has a duty to accurately instruct the jury regarding the "law applicable to the facts,"[38] irrespective of whether a proper request for or objection to those instructions has been made. Contrary to the Court of Appeals' assertion, MCL 257.626(5) is not a matter of practice and procedure, and, consequently, there can be no violation of separation of powers simply because a necessarily included lesser offense exists and the Legislature has acted within its constitutional authority by creating a substantive exception that prohibits or otherwise limits the jury's consideration of that lesser offense.

Nevertheless, defendant also argues that his Sixth Amendment right to a jury trial requires an instruction on moving violation causing death. However, the United States Supreme Court has not identified any requirement that a jury *must* consider lesser included offenses when deciding whether to convict on the *charged* of-

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[35] *Jones*, 302 Mich App at 442.

[36] *Id*. at 441.

[37] *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888); *People v Townes*, 391 Mich 578, 587; 218 NW2d 136 (1974).

[38] *Murray*, 72 Mich at 16.

fense. While the United States Supreme Court has ruled that, in a capital case, the jury must have the opportunity to convict on a lesser included offense,[39] this holding has been limited to capital offenses.[40] Except within this limited circumstance, the United States Supreme Court has expressly declined to rule on whether there is a constitutional entitlement to have the jury consider lesser included offenses.

Neither does the fact that MCL 257.626(5) is silent in the context of a judge sitting as finder of fact at a bench trial alter our conclusion. As stated, the Legislature made a policy decision that the jury may not be instructed on the lesser offense of moving violation causing death when the defendant is on trial for reckless driving causing death. The trial judge has a duty to instruct the jury "as to the law applicable to the case,"[41] including lesser included offenses, and MCL 257.626(5) presents one such law applicable to the charge of reckless driving causing death. Furthermore, there is logical connection between the jury being instructed "as to the law applicable to the case," MCL 768.29, and the jury finding guilt based on those instructions. That is,

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[39] *Beck v Alabama*, 447 US 625, 638; 100 S Ct 2382; 65 L Ed 2d 392 (1980).

[40] *Id*. at 638 n 14. We recognize that defendant structures his constitutional argument as a violation of his Sixth Amendment right to a trial by jury whereas *Beck* dealt with violations of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. See *Smith v Spisak*, 558 US 139, 159; 130 S Ct 676; 175 L Ed 2d 595 (2010) ("Our concern in *Beck* was that presenting the jury with only two options—death or no punishment—introduced a risk of arbitrariness and error into the deliberative process that the Constitution could not abide in the capital context."). However, defendant's failure to support his Sixth Amendment argument with citation of helpful authority deprives us of any meaningful opportunity to assess whether the constitutional entitlement announced in *Beck* should be extended to the noncapital context.

[41] MCL 768.29.

by precluding the jury from being instructed on the crime of moving violation causing death, the Legislature was essentially precluding the jury from *convicting* a criminal defendant of that lesser offense.

While jurors are not presumed to know the law applicable to a case, Michigan law presumes that a trial judge sitting as finder of fact is "aware of lesser-included offenses without the need for instruction."[42] Conversely, the judge must also be aware when (as here) it is not appropriate to consider lesser included offenses.[43] As a result, the Legislature did not need to provide an explicit limitation on a judge acting as the finder of fact when enacting its exception to the general rule governing lesser included offenses. To interpret MCL 257.626(5) as precluding the lesser offense instruction in *either* a jury trial or bench trial is therefore consistent with the general purpose of MCL 257.626(5): to eliminate the possibility that a defendant charged with reckless driving causing could be convicted of moving violation causing death. For these reasons, we agree with the Court of Appeals dissenting opinion, which explained that "[g]iven the clear intent of the Legislature to forbid consideration of the lesser misdemeanor offense of moving violation causing death when a defendant has been charged with reckless driving causing death, a judge trying a case without a jury would surely understand that he or she could not convict the defendant of the lesser offense."[44]

As a result of defendant's charge of reckless driving causing death, MCL 257.626(5) barred an instruction

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[42] *People v Cazal*, 412 Mich 680, 686-687; 316 NW2d 705 (1982).

[43] Cf. *People v Ellis*, 468 Mich 25, 28; 658 NW2d 142 (2003) (noting that a judge may not "reward[] a defendant for waiving a jury trial by 'finding' him not guilty of a charge for which an acquittal is inconsistent with the court's factual findings" and convicting him of a lesser offense).

[44] *People v Jones*, 302 Mich App at 449 (K. F. KELLY, J., dissenting).

on the misdemeanor lesser offense of moving violation causing death. This legislative enactment does not run afoul of the separation of powers because, consistent with *Cornell*, MCL 257.626(5) is a substantive rule of law and is thus within the domain of the Legislature.[45] Because defendant was statutorily precluded from having the jury consider the lesser offense of moving violation causing death, we therefore hold that the circuit court erred by granting the requested instruction.

V. CONCLUSION

We conclude that the circuit court erred by granting defendant's request that the jury be instructed on moving violation causing death. Defendant was charged with the greater offense of reckless driving causing death and, as such, was precluded under MCL 257.626(5) from receiving an instruction on the misdemeanor lesser offense of moving violation causing death. We therefore reverse the judgment of the Court of Appeals and remand this case to the circuit court for further proceedings, including entry of an order vacating its ruling granting defendant's request to instruct the jury on the misdemeanor lesser offense of moving violation causing death.

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[45] Although the defendant in this case challenges the propriety of MCL 257.626(5), the limitation on the lesser offense limits prosecutorial discretion as well: the Legislature chose, when enacting MCL 257.626(5), to *require* a prosecutor who charges a defendant with reckless driving causing death to pursue an all-or-nothing strategy. That is, if the prosecutor has a reasonable, but marginal case that the defendant acted "in willful or wanton disregard for the safety of persons or property," the prosecutor cannot argue in the alternative that the jury must *at least* convict the defendant on the moving violation causing death offense to achieve *some* conviction. We respect this policy decision of the Legislature.

YOUNG, C.J., and MARKMAN, ZAHRA, and MCCORMACK, JJ., concurred with KELLY, J.

VIVIANO, J. (*concurring in the result*). I concur in the result because I agree with the majority that we should reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court to enter an order vacating its ruling granting defendant's request to instruct the jury on the offense of moving violation causing death. However, I write separately because I believe that the same result can be reached by deciding this case on a nonconstitutional ground.

This Court's order granting leave to appeal in this case asked the parties to address constitutional issues regarding the separation of powers and the right to a jury trial.[1] However, we also asked the parties to address "whether MCL 257.601d [moving violation causing death] is a necessarily included lesser offense of MCL 257.626(4) [reckless driving causing death]."[2] The majority opinion declines to address that issue because both parties conceded that moving violation causing death is a necessarily included lesser offense of reckless driving causing death. Despite this concession, however, I would decline to reach the constitutional issues[3] and instead decide, as a matter of law, that moving violation

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[1] *People v Jones*, 495 Mich 905 (2014).

[2] *Id*.

[3] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014), quoting *Lisee v Secretary*, 388 Mich 32, 40; 199 NW2d 188 (1972), quoting *People v Quider*, 172 Mich 280, 288-289; 137 NW 546 (1912) (" '[I]t is well settled in Michigan that "[c]onstitutional questions will not be passed upon when other decisive questions are raised by the record which dispose of the case." ' "); see also *Lichtman v Detroit*, 75 Mich App 731, 734-735; 255 NW2d 731 (1977), citing *Neese v Southern R Co*, 350 US 77, 78; 76 S Ct 131; 100 L Ed 60 (1955) ("A decision should have been made on nonconstitutional grounds, even though not raised by the parties.").

causing death is not a necessarily included lesser offense of reckless driving causing death.[4]

In determining whether an offense is a necessarily included lesser offense of a greater offense, the issue requires the Court to determine whether the greater offense at issue always includes the lesser offense at issue.[5] In other words, the question is whether all of the elements of moving violation causing death are subsumed into reckless driving causing death such that it is impossible for a person to commit reckless driving causing death without first committing moving violation causing death.[6]

The reckless driving causing death statute applies to "a person who operates a *vehicle*."[7] However, moving violation causing death applies to "[a] person who commits a moving violation," which requires "an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that involves the

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[4] *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010) (stating that the determination whether an offense is a lesser included offense is a question of law subject to review de novo).

[5] See *People v Nickens*, 470 Mich 622, 629-630; 685 NW2d 657 (2004); see also *People v Walls*, 474 Mich 1142 (2006) (CORRIGAN, J., concurring), citing *People v Cornell*, 466 Mich 335, 357, 358 n 13; 646 NW2d 127 (2002) and *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003) (stating that "the court must first determine whether an offense is necessarily included," which is resolved solely by a comparison of the elements of the offenses, and that "once it is established that the offense is necessarily included, the court must then determine whether an instruction is warranted on the facts of a particular case, by examining whether 'the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it' ").

[6] See *Nickens*, 470 Mich at 630; *Cornell*, 466 Mich at 345, 361 (stating that to be a necessarily included lesser offense "the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser") (quotation marks and citation omitted).

[7] MCL 257.626.

operation of a *motor vehicle*[.]"[8] This may seem like a distinction without a difference upon first glance. But I believe the Legislature's use of the words "motor vehicle" and "vehicle" is significant given that the Michigan Vehicle Code has assigned distinct definitions to the two terms.

MCL 257.79 defines "vehicle," in pertinent part, as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks . . . .

Whereas MCL 257.33 defines "motor vehicle" as follows:

> "Motor vehicle" means every vehicle that is self-propelled, but for purposes of chapter 4 of this act[9] motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act. Motor vehicle does not include an electric personal assistive mobility device. Motor vehicle does not include an electric carriage.

Thus, by its terms, a "motor vehicle" is more narrowly defined as a "vehicle" with the distinct feature of being self-propelled. Arguably, then, a person could operate[10] a "vehicle" in violation of the reckless driving causing death statute, but not violate the moving violation causing death statute if the vehicle involved was

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[8] MCL 257.601d.

[9] Chapter 4 of the Michigan Vehicle Code pertains to civil liability.

[10] "Operate" or "operating" means, in pertinent part, "[b]eing in actual physical control of a vehicle." MCL 257.35a(a).

not specifically a "motor vehicle." But this distinction raises the question—what types of vehicles could a person operate in violation of the reckless driving causing death statute that are not motor vehicles?

According to my review of the Michigan Vehicle Code, a "vehicle" for purposes of the reckless driving causing death statute could be a "person riding an animal," "an animal-drawn vehicle,"[11] or an "electric carriage."[12] And while those devices are vehicles under the act, they are obviously not "motor vehicles." Thus, while it could be possible for a person to be charged with reckless driving causing death for recklessly driving a horse-drawn carriage, it would be impossible for that person to be found guilty of moving violation causing death because a horse-drawn carriage is not a motor vehicle. In other words, the offense of moving violation causing death is not a necessarily included lesser offense of reckless driving causing death because it *is* possible to commit reckless driving causing death without first committing a moving violation causing death—if you are operating a "vehicle" that is not also a "motor vehicle."[13]

I am fully aware that the circumstances under which a person may commit reckless driving causing death using such a non-motor vehicle will be rare, but the

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[11] MCL 257.604 states:

> A person riding an animal or driving an animal-drawn vehicle upon a roadway shall be granted all of the rights and shall be subject to all the duties, criminal penalties, and civil sanctions applicable to the driver of a vehicle by this chapter, except those provisions of this chapter which by their very nature may not have application.

[12] The Michigan Vehicle Code defines "electric carriage" as "a horse-drawn carriage that has been retrofitted to be propelled by an electric motor instead of by a horse and that is used to provide taxi service." MCL 257.13d. And, as quoted above, the definition of "motor vehicle" specifically states, "Motor vehicle does not include an electric carriage."

[13] *Nickens*, 470 Mich at 628, 630; *Cornell*, 466 Mich at 345, 361.

rarity of that potential occurrence does not change the legal analysis. An offense is either always considered a necessarily included lesser offense or it is not.[14] And applying principles of statutory interpretation,[15] I believe the Legislature's use of different terminology to describe the elements of each offense dictates the conclusion that the offense of moving violation causing death is not a necessarily included lesser offense of reckless driving causing death because all of the elements of moving violation causing death are not subsumed into reckless driving causing death such that it is impossible for a person to commit reckless driving causing death without first committing moving violation causing death. Accordingly, because it would instead be a cognate lesser offense,[16] defendant was not entitled to an instruction on the offense of moving violation causing death irrespective of the Legislature's statutory prohibition.[17] Therefore, I would dispose of

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[14] See *Nickens*, 470 Mich at 630 ("*In every instance* where an actor commits CSC-I involving personal injury and uses force or coercion to accomplish sexual penetration, the actor first commits an attempted-battery assault with the intent to commit CSC involving sexual penetration.") (emphasis added); *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993) ("[I]f the lesser offense is one that is necessarily included in the charged offense, the evidence *always* supports the lesser offense if it supports the greater.") (emphasis added).

[15] *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009) (stating that our Legislature is presumed to be aware of the consequences of its use of statutory language as well as its effect on existing laws); see also *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002) ("When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional.").

[16] *Cornell*, 466 Mich at 345, 355 (stating that a cognate lesser offense is one that is of the same class or category and shares elements with the charged offense, but may contain elements not found in the higher offense).

[17] MCL 257.626(5).

the case on this nonconstitutional ground.[18]

CAVANAGH, J. (*dissenting*). The majority holds that jury instructions on lesser included offenses "concern a matter of substantive law," and, therefore, the Legislature's decision to bar instruction on the lesser included offense of moving violation causing death, MCL 257.601d(1), within MCL 257.626(5), is a permissible exercise of legislative power and does not offend the separation-of-powers doctrine. I continue to disagree with the majority's test regarding the difference between substantive and procedural law, and I disagree that lesser-included-offense instructions are a matter of substantive law. See *McDougall v Schanz*, 461 Mich 15, 60-61; 597 NW2d 148 (1999) (CAVANAGH, J., dissenting). Further, I believe that MCL 257.626(5) deprives a defendant of the ability to present his theory of the case and disadvantages a defendant who chooses to exercise his right to a jury trial in violation of the Sixth Amendment. Therefore, I must respectfully dissent.

I. SEPARATION OF POWERS

The majority's separation-of-powers test was established in *McDougall*, where it held that a law only impinges on the Court's power to govern "practice and procedure" under Const 1963, art 6, § 5, when "no clear legislative policy consideration other than judicial dispatch of litigation can be identified." *McDougall*, 461 Mich at 30, quoting *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of WILLIAMS, J.) (quotation marks omitted). In doing so, the *McDougall* majority overruled *Perin v Peuler*, (*On Rehearing*), 373 Mich 531; 130 NW2d 4 (1964), criticizing *Perin*'s rule as overly broad.

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[18] MCL 768.32(1); *Cornell*, 466 Mich at 359.

However, I continue to believe that *Perin* properly applied Const 1963, art 6, § 5. As I explained in *McDougall*, 461 Mich at 41-42 (CAVANAGH, J., dissenting), the separation-of-powers doctrine can be traced to the first Michigan Constitution, "which even predated our statehood." We have long held that when a court rule and a statute conflict, the court rule shall control absent the Court's acquiescence. See e.g., *Byrne v Gypsum Plaster & Stucco Co*, 141 Mich 62, 63-34; 104 NW 410 (1905); *Berman v Psiharis*, 325 Mich 528, 533; 39 NW2d 58 (1949); *In re Koss Estate*, 340 Mich 185, 189-190; 65 NW2d 316 (1954). As *Perin* correctly explained, "[t]he function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court[,] a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will." *Perin*, 373 Mich at 541 (citations omitted). Thus, unless this Court acquiesces to the Legislature's decisions to regulate court procedures, this Court's power to regulate its own matters will always trump any legislatively prescribed rules.

Supplementing *Perin*'s analysis, when one considers the definitions of "substantive law" and "procedural law," it becomes clear that lesser-included-offense instructions are procedural rather than substantive law, and, therefore, within the Court's constitutionally prescribed powers under art 6, § 5. "Substantive law" is defined as "[t]he part of law that creates, defines, and regulates the rights, duties, and powers of parties," *Black's Law Dictionary* (8th ed); whereas, "procedural law" is defined as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights and duties themselves." *Id*. Indeed, our caselaw supports these distinctions between substantive and procedural law.

For example, *Phelps v Wayne Circuit Judge*, 225 Mich 514, 517-518; 196 NW 195 (1923), determined a statute to be procedural and explained that "[t]he contingent right given by the statute is not substantive law, but a rule of procedure relating only to the remedy. Its purpose and character class it as adjective law, which deals with methods for maintenance and enforcement of primary rights or to redress their invasion." Similarly, *Chandler Motor Sales Co v Dertien*, 229 Mich 630, 634; 201 NW 954 (1925), explained that a procedural law "is one of practice. It relates to the method of applying a remedy and not to the substantive law (citation and quotation marks omitted)."

Lesser-included-offense instructions determine the method by which the substantive law—i.e. crimes—are applied in a criminal case. They do not, however, determine what is or is not a crime, and they do not define the rights and duties of members of society. Instead, they help prescribe the steps that a jury follows in reaching its verdict by informing the jury of their options under the existing substantive law. In other words, lesser-included-offense instructions inform the jury of the applicable crimes the jury may consider. Another way to approach the issue is to consider a jury's verdict the "remedy" in a criminal trial. Just like the outcome of a civil case is a remedy, the outcome in a criminal case is the verdict. See *Chandler Motor Sales Co*, 229 Mich at 634. Stated another way, lesser-included-offense instructions consider the methods for redressing a criminal defendant's potential "invasion," see *Phelps*, 225 Mich at 517-518, by prescribing the steps for determining a criminal sentence. Likewise, lesser-included-offense instructions do not determine *what* remedy is available, or whether a remedy *is* available, but instead inform the method of choosing and applying the "remedy" by providing varied options

to the jury. And while the bar in MCL 257.626(5) on jury instruction in this case could arguably define the substantive rights of a defendant, the rights being defined are those within the context of a trial: they are the *procedural* rights a criminal defendant is afforded, and not the rights and obligations of the defendant as it relates to his membership in society.

Having established that lesser-included-offense instructions are indeed procedural, and, thus, within the purview of the court, the Legislature's action is only impermissible if the law conflicts with a court rule. I believe that there is such a conflict. MCR 2.512(B)(2) requires that the court "shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in [another subrule], that party's theory of the case." In my view, MCR 2.512(B)(2) directs that the court instruct the jury regarding lesser included offenses because lesser included offenses for which a defendant is potentially culpable is part of the "applicable law." In addition, as discussed later in this opinion, jury instructions, including lesser-included-offense instructions, are integral to a defendant's ability to present his theory of the case. Therefore, in my mind, MCL 257.626(5) irreconcilably conflicts with MCR 2.512(B)(2). The court rule must control unless this Court acquiesces or adopts the statute's rule—we have done neither. Therefore, MCL 257.626(5) impermissibly infringes this Court's sole authority to adopt rules and procedures and thus violates the separation-of-powers doctrine.

To the contrary, the majority holds that lesser-included-offense instructions are a matter of substantive law and, thus, the Legislature's regulation of such instructions does not offend the separation-of-powers doctrine. However, the majority merely cites a single

statement in *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002), that "[d]etermining what charges a jury may consider . . . concerns a matter of substantive law." Yet *Cornell* provided little analysis to support this bold pronouncement, simply citing the following passage from *People v Piasecki*, 333 Mich 122, 143; 52 NW2d 626 (1952):

> The measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes.

When read in context, it is clear that *Piasecki* defined *jurisdictional* powers of the Court as *granted* by the Legislature. Importantly, *Piasecki* did not involve a situation in which the Legislature attempted to intrude on powers constitutionally granted to the courts under Const 1963, art 6, § 5. Thus, *Cornell*'s citation to *Piasecki* to support its assertion was incorrect, as the following passage from *Piasecki* makes clear:

> Appellant's argument does not rest on the theory of an improper usurpation of judicial authority but on the claim that if the *jurisdiction* of the court in the criminal case has attached there may be no interference with such *jurisdiction*.
>
> * * *
>
> *We are not dealing with a situation in which the legislature has undertaken to interfere with the exercise of strictly judicial prerogatives in the trial of cases* . . . . Such decisions are not in point in the instant controversy. We are concerned here with the *power of the legislature to create substantive rights* and to provide for the protection thereof

> in matters that are clearly within the scope of the police power of the State. [*Id*. at 147-148 (emphasis added) (citations omitted).]

It is clear that *Piasecki*'s discussion regarding the court's power was describing those jurisdictional powers granted to the courts by the Legislature, not those powers that are inherent in the courts by virtue of Michigan's Constitution. Thus, in my opinion, *Cornell*'s fleeting statement was incorrect, and the majority's reliance on it is likewise improper.

Moreover, in *McDougall* and subsequent cases, including this one, the majority continues to apply an overbroad test that risks making this Court's ability to govern judicial matters all but an illusion. As previously stated, the majority considers whether "no clear legislative policy consideration other than judicial dispatch of litigation can be identified." *McDougall*, 461 Mich at 30 (citation and quotation marks omitted). However, the pitfalls of the majority's test become clear when one considers that a policy reason can be found for nearly any legislative enactment affecting the procedures of the courts. Under the majority's test, arguably the Legislature could amend the voir dire process to attempt to ensure better jury selections, or even attempt to dictate the structure of a trial for the purposes of efficiency. I am hesitant to believe that the Legislature acts purely arbitrarily, without policy considerations in mind. In other words, irrespective of whether the Legislature acts within the confines of its power, every law passed by the Legislature, whether constitutional or not, is the result of a policy decision. It would seem, therefore, that unless the Legislature acts arbitrarily, with no policy goal in mind, *every law* involves a "legislative policy consideration." Therefore, I believe that the mere existence of legislative policy goals is not sufficient to avoid separation-of-powers concerns.

II. RIGHT TO A JURY TRIAL

In addition to violating the separation-of-powers doctrine, MCL 257.626(5) gravely implicates the constitutional right to a trial by jury in two ways. First, more broadly, lesser-included-offense instructions ensure that a jury makes an informed decision and a defendant is able to present the theory of his case. Second, MCL 257.626(5) punishes a defendant for exercising his right to a trial by jury.

First, the Sixth Amendment requires that the state afford a defendant a jury trial at the defendant's request in "serious criminal cases." *Duncan v Louisiana*, 391 US 145, 156; 88 S Ct 1444; 20 L Ed 2d 491 (1986). See, also, *People v Duncan*, 462 Mich 47, 53; 610 NW2d 551 (2000). Also, the court's failure to instruct a jury on the elements of an offense "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827; 144 L Ed 2d 35 (1999), quoting *Rose v Clark*, 478 US 570, 577-578; 106 S Ct 3101; 92 L Ed 2d 460 (1986). The court must inform the jury of the law by which its verdict must be controlled; otherwise, the jury is deprived of a tool essential to its decision-making process. See *Duncan*, 462 Mich at 52-53.

As noted, we have held that the failure to instruct on an element of a crime undermines the reliability of a verdict. *Id*. at 54. Similarly, the failure to instruct on a lesser included offense undermines the reliability of a jury's verdict. When credible evidence exists to support such an instruction, the failure to provide it denies the jury the opportunity to consider the defendant's theory of the case and deprives a defendant of his right to a fair

trial. See *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000); *Cornell*, 466 Mich at 375 (KELLY, J., dissenting). Indeed, instructions on lesser included offenses mitigate "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic v Rafferty*, 844 F2d 1023, 1027 (CA 3, 1988), citing *Keeble v United States*, 412 US 205, 212, 213; 93 S Ct 1993; 36 L Ed 2d 844 (1973). Therefore, these instructions are important to ensure that a defendant is only convicted of the crime he actually committed.

Because this Court has concluded that lesser-included-offense instructions are a necessary part of ensuring reliable verdicts and, thus, protecting a defendant's Sixth Amendment right to a jury trial, why would we sanction a law as constitutional when it curtails constitutional guarantees? Notably, this Court would invalidate as unconstitutional any law that sought to curtail a defendant's right to an attorney under the Fifth or Sixth Amendment. Similarly, the Court would invalidate any law that sought to reduce the protections of the Fourth Amendment against search and seizure in order to aid police. It must follow that any law which impinges on a defendant's right to a jury trial must, similarly, be found unconstitutional. Therefore, in my mind, any law, including MCL 257.626(5), that bars a jury from hearing and considering lesser included offenses violates a criminal defendant's Sixth Amendment right to a jury trial.

But the constitutional concerns with MCL 257.626(5) do not stop there. In addition to its impact on a jury's ability to render informed decisions, it also impermissibly punishes a defendant for *exercising* his right to a jury trial. MCL 257.626(5) states, "In a prosecution

under [reckless driving causing death], the *jury* shall not be instructed regarding the crime of moving violation causing death." Emphasis added. MCL 257.626(5), by its plain language, only restricts a *jury's* ability to be instructed on the lesser included offense of moving violation causing death. However, it is silent regarding bench trials and, thus, does not preclude the consideration of the lesser included offense if the defendant chooses to forgo the right to a jury trial.[1] The effect of this statute is that a defendant who exercises his right to a jury trial is placed at a disadvantage because the lesser included offense of moving violation causing death is not available. This places defendants between a rock and a hard place as they are forced to choose whether to exercise their constitutional right to a jury trial or to have considered the lesser offense of moving violation causing death, a misdemeanor, instead of

[1] The majority ignores its own textualist approach when it states, "To interpret MCL 257.626(5) as precluding the lesser offense instruction in *either* a jury trial or bench trial is . . . consistent with the general purposes of MCL 275.626(5)." However, this approach ignores that "[w]hen construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003) (citations and quotation marks omitted). The language of MCL 257.626(5) is clear, and it only precludes the *jury*'s consideration of lesser-included-offense instructions. Had the Legislature intended the meaning that the majority gives MCL 257.626(5), it would have included language similar to that in MCL 768.32(2), which states that "the jury, or *judge* in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense." Emphasis added. Therefore, the Legislature knows how to preclude lesser included offense considerations in *both* jury and bench trials, but chose not to do so in MCL 257.626(5).

reckless driving causing death, a 15-year felony. See MCL 257.601d(1), MCL 257.626(4).

Further, MCL 763.3(1) allows a prosecutor, in effect, to preclude any consideration of the lesser included offense of moving violation causing death. MCL 763.3(1) states that, "In all criminal cases arising in the courts of this state the defendant may, *with the consent of the prosecutor and approval by the court*, waive a determination of the facts by a jury and elect to be tried before the court without a jury." Emphasis added. See, also, *People v Kirby*, 440 Mich 485, 487; 487 NW2d 404 (1992). Therefore, a defendant may not elect a bench trial without the prosecutor and the court's *consent*. This grants the prosecutor a significant strategic advantage to preclude the consideration of a charge that, as has been explained, is necessary to a defendant's ability to present his theory of his case.

"The right [to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Sullivan v Louisiana*, 508 US 275, 277; 113 S Ct 2078; 124 L Ed 2d 182 (1993). "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Id*. at 277-278 (citations omitted). The ultimate effect of MCL 257.626(5) and MCL 763.3(1) is that a defendant may never be able to have the lesser included offense of moving violation causing death considered in a criminal trial. The result is a chilling effect on a defendant's constitutional right to trial by jury. In my view, MCL 257.626(5) violates a defendant's right to jury trial and is, therefore, unconstitutional.

III. CONCLUSION

Because I believe that jury instructions are procedural rather than substantive, and because MCL 257.626(5) conflicts with MCR 2.512(B)(2), I believe that MCL 257.626(5) is an unconstitutional violation of the separation-of-powers doctrine. Further, because MCL 257.626(5) limits a defendant's ability to present the theory of his case to a jury and effectively punishes a defendant for exercising his Sixth Amendment right to a trial by jury, MCL 257.626(5) is also unconstitutional under the Sixth Amendment. Accordingly, I would affirm the Court of Appeals holding that the circuit court properly granted defendant's request that the jury be instructed on the lesser included offense of moving violation causing death.

HODGE v US SECURITY ASSOCIATES, INC

Docket No. 149984. Decided February 6, 2015.

Carnice Hodge brought an action in the Wayne Circuit Court to appeal the Unemployment Insurance Agency's determination that she was disqualified from receiving unemployment benefits under MCL 421.29(1)(b), a provision of the Michigan Employment Security Act (MESA) that disallows benefits for individuals discharged for work-related misconduct, after respondent U.S. Security Associates, Inc., terminated her employment as a security guard at Detroit Metropolitan Wayne County Airport. Claimant was fired for accessing publicly available flight departure information on a computer near her post at the request of a traveler in violation of respondent's policy regarding the unauthorized use of client equipment. Administrative Law Judge Lawrence E. Hollens affirmed the denial of benefits, as did the Michigan Compensation Appellate Commission (MCAC), but the Wayne Circuit Court, Robert L. Ziolkowski, J., reversed. The Court of Appeals, O'CONNELL, P.J., and WILDER and METER, JJ., granted respondent's application for leave to appeal and affirmed, holding that the circuit court had not erred by concluding as a matter of law that claimant's behavior was a good-faith error in judgment rather than misconduct under MCL 421.29(1)(b). 306 Mich App 139 (2014). The Unemployment Insurance Agency sought leave to appeal.

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

The Wayne Circuit Court and the Court of Appeals applied an incorrect standard of review by substituting their own assessment of the relative severity of claimant's violation of her employer's rules for the assessment of the MCAC. Because the MCAC's assessment of the claimant's conduct was made within the correct legal framework and was therefore authorized by law and not contrary to law, the courts below improperly reweighed the evidence in order to reach a different assessment in violation of Const 1963, art 6, § 28 and MCL 421.38.

Court of Appeals judgment reversed; MCAC judgment reinstated.

ADMINISTRATIVE LAW — UNEMPLOYMENT COMPENSATION — MICHIGAN EMPLOYMENT SECURITY ACT — STANDARD OF REVIEW.

A circuit court must affirm a decision of an administrative law judge and the Michigan Compensation Appellate Commission regarding whether an individual is disqualified from receiving unemployment benefits for work-related misconduct if that decision conforms to the law and if competent, material, and substantial evidence supports it (Const 1963, art 6, § 28; MCL 421.38).

Michigan Unemployment Insurance Project (by *Steve Gray*) for Carnice Hodge.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Shannon W. Husband*, Assistant Attorney General, for the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency.

Howard & Howard Attorneys PLLC (by *Brian A. Kreucher* and *Alex G. Cavanaugh*) for US Security Associates, Inc.

PER CURIAM. In this case involving a claim for unemployment benefits, we must determine whether the lower courts applied the proper standard for reviewing determinations made by an administrative agency. Specifically, claimant was terminated from her employment for willfully violating her employer's computer use policy. The state's unemployment agency denied her claim for unemployment benefits and this decision was affirmed by an administrative law judge (ALJ). In turn, the Michigan Compensation Appellate Commission (MCAC) affirmed the ALJ's decision, holding that the decision was made in conformity with the facts as developed at the hearing and properly applied the law to the facts. On appeal to the circuit court, however, the court concluded that, because claimant violated her employer's policy to assist a customer, the conduct did

not warrant a denial of unemployment benefits. The Court of Appeals, in a published opinion, affirmed the circuit court, agreeing that claimant's violation of her employer's rules was not sufficiently egregious to deny the claimant benefits.

We reverse the judgment of the Court of Appeals and we reinstate the judgment of the MCAC. Both the Wayne Circuit Court and the Court of Appeals applied an incorrect standard of review by substituting their own assessment of the relative severity of the claimant's violation of her employer's rules for the assessment of the MCAC. The MCAC's assessment of the claimant's conduct was made within the correct legal framework and, therefore, was authorized by law and was not contrary to law, and the courts below improperly reweighed the evidence in order to reach a different assessment in violation of Const 1963, art 6, § 28 and MCL 421.38(1).

I. BASIC FACTS AND PROCEEDINGS

Claimant, Carnice Hodge, was employed as a security guard with U.S. Security Associates, Inc (USSA). On November 11, 2008, shortly after being hired, Hodge signed an acknowledgement of USSA's "Security Officer's Guide," which provided, in relevant part, that the "[u]nauthorized use of client facilities or equipment, including copiers, fax machines, computers, the internet, forklifts, and vehicles" may result in immediate termination. USSA had a contract to provide security at Detroit Metropolitan Airport, and she was assigned to work at the airport. Despite acknowledgement of USSA's "Security Officer's Guide," on January 27, 2011, Hodge accessed the airport's computer system in order to assist a passenger by retrieving departure information.

The parties agree to the following facts: (1) USSA had a policy that prohibited employees from accessing airport computers, (2) Hodge knew of this policy, (3) Hodge had violated this policy on some occasions in the past, (4) Hodge never received any instruction or approval to violate this policy, and (5) Hodge violated this policy on January 27, 2011, when she accessed the airport's computer system in order to retrieve departure data for a passenger.

Given these facts, the ALJ concluded that Hodge's reason for using the airport computer was irrelevant because USSA's policy prohibited computer access for any reason. The ALJ concluded that the unauthorized computer access constituted misconduct, disqualifying Hodge from benefits under MCL 421.29(1)(b), because Hodge "was discharged for reasons which would constitute behavior beneath the standard the [e]mployer had reason to expect . . . ."[1]

The MCAC upheld that decision, ruling that the ALJ's decision conformed to the facts as developed at the administrative hearing and that the ALJ properly applied the law to the facts.

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[1] MCL 421.29(1) reads, in pertinent part:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> * * *
>
> (b) Was suspended or discharged for *misconduct* connected with the individual's work or for intoxication while at work. [Emphasis added.]

In *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), this Court defined "misconduct" as including "such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee . . . ."

II. APPLICABLE STANDARDS OF REVIEW

Michigan's Constitution sets forth the guiding principles of how courts should review a decision of an administrative body. It provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[2]

Consistent with this provision, the Michigan Employment Security Act, MCL 421.1 *et seq*., expressly provides for the direct review of unemployment benefit claims. Specifically, MCL 421.34 addresses an appeal from an ALJ to the MCAC. MCL 421.38 then addresses an appeal from the MCAC to a circuit court:

> The circuit court . . . may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the [MCAC], . . . but the [circuit] court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.[3]

Using this standard, a circuit court must affirm a decision of the ALJ and the MCAC if it conforms to the law, and if competent, material, and substantial evidence supports it. A reviewing court is not at liberty to

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[2] Const 1963, art 6, § 28.

[3] MCL 421.38(1).

substitute its own judgment for a decision of the MCAC that is supported with substantial evidence.[4] The Court of Appeals then reviews a circuit court's decision "to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings . . . ."[5]

III. ANALYSIS

We conclude that both the circuit court and Court of Appeals erred by departing from the applicable standard of review.

The circuit court determined that Hodge ultimately had to make a decision between two conflicting policies: one, to not use the airport's computer system, and two, to assist passengers by retrieving departure information.[6] The lower court record, however, does not contain any evidence of a stated policy to assist passengers by retrieving departure information. Even if such a policy can be implied from the record, the ALJ determined, in

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[4] *Smith v Employment Security Comm*, 410 Mich 231, 256; 301 NW2d 285 (1981).

[5] *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585, 701 NW2d 214 (2005).

[6] The circuit court inaccurately characterized this case as placing Hodge in a dilemma in which she had to choose to violate one of two company policies. There is no evidence that it was the policy of Hodge's employer that employees assist passengers with flight information. Hodge admitted as much during a July 13, 2011 hearing with the ALJ. When asked if there is "anything in the policy that says it's okay to violate these rules [to not access the airport's computers] so long as you're assisting a passenger," Hodge responded "no." But even if such a policy existed, there was no dilemma presented. Hodge could have complied with the express policy barring the use of airport computers and at the same time assisted the passenger seeking flight departure information by directing the passenger to airport personnel authorized to obtain and provide flight information to passengers.

a factual finding, that the most weight should be given to the expressly stated policy against access of the airport's computer system. Thus, the circuit court erred when it discounted the stated policy of Hodge's employer and, instead, credited Hodge with complying with a nonexistent policy of assisting passengers by retrieving departure information.

Likewise, the Court of Appeals erred by determining that Hodge's act of helping a passenger actually benefitted USSA.[7] The panel reached this conclusion despite the ALJ's contrary finding that Hodge's violation was so severe that it went against USSA's interest. Instead of determining whether factual assessments made by the agency were supported by substantial evidence, both the lower courts engaged in an unbridled effort to reevaluate the ALJ's factual findings.

The ALJ, the only adjudicator who actually heard testimony and observed the demeanor of the witnesses while testifying, reviewed all the evidence in the record and made findings of fact based on the credibility of witnesses and weight of the evidence. The ALJ ultimately determined that Hodge's violation of the computer policy was a deliberate disregard of USSA's interest and that Hodge was discharged for reasons that would constitute behavior beneath the standard expected of employees. Thus, the ALJ disqualified Hodge from unemployment benefits for committing misconduct, in accordance with MCL 421.29(1)(b), and most prominently defined in *Carter*, 364 Mich at 541.[8]

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[7] *Hodge v US Security Assoc, Inc*, 306 Mich App 139; 855 NW2d 513 (2014).

[8] Hodge claims that the lower courts applied the proper standard of review and reversed the MCAC because its decision did not conform to the law. Specifically, Hodge claims that the test for "misconduct" as set forth by this Court in *Carter* was not satisfied by the undisputed facts presented in this case. We disagree. The test for "misconduct," first and foremost, looks to whether the claimant's conduct showed a willful

The ALJ reached this conclusion by giving weight to evidence within the lower record. The lower courts should have given deference to the ALJ and the MCAC by reviewing those decisions only to ensure conformity with the law and the existence of competent, material, and substantial evidence. In sum, the lower courts improperly discounted the ALJ's findings to apply their own factual assessments, in violation of Const 1963, art 6, § 28 and MCL 421.38(1).

IV. CONCLUSION

The application for leave to appeal the July 15, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the judgment of the Michigan Compensation Appellate Commission.

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

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disregard of her employer's interest. One example of such disregard is the deliberate violation of standards of behavior that the employer has the right to expect of its employees. Such standards are set out in an employer's policy, and in this case that policy clearly and unequivocally prohibited the use of the airport's computers. Hodge was fully aware of the policy and knew that, by going to the computer to check on flight information, she was violating that policy. In short, plainly and unequivocally, Hodge engaged in "misconduct" as defined in *Carter*.

AFT MICHIGAN V STATE OF MICHIGAN

Docket No. 148748. Argued October 9, 2014 (Calendar No. 2). Decided April 8, 2015.

AFT Michigan and numerous other labor organizations representing public school employees brought an action in the Court of Claims against the state of Michigan, the State Treasurer, the Public School Employees' Retirement System, and others, asserting various constitutional challenges to 2012 PA 300, which had amended the Public School Employees Retirement Act, MCL 38.1301 *et seq*. In particular, the act added MCL 38.1391a(5), which enables current public school employees to opt out of retiree healthcare and thereby avoid paying the 3% retiree healthcare contributions required by MCL 39.1343e, a statute enacted in 2010 and subsequently struck down by the Court of Appeals as violating the Takings Clauses, Contracts Clauses, and Due Process Clauses of the Michigan and United States Constitutions in *AFT Mich v Michigan*, 297 Mich App 597 (2012). It also added MCL 38.1391a(8), which provides a separate retirement allowance for public school employees who elect to pay the 3% contributions but subsequently fail to qualify for retiree healthcare benefits. Furthermore, the act altered the manner in which public school employees accrue pension benefits. It increased the amount that all current public school employees must contribute in order to continue accruing pension benefits at the existing rate. MCL 38.1343g(1)(a) requires members of the retirement system's Basic Plan (who had not previously contributed to their pensions) to contribute 4% of their salaries to the retirement system for that purpose. MCL 38.1343g(1)(b) requires members of the retirement system's Member Investment Plan to contribute 7% of their salaries to the system. Employees who decline to make the additional contributions will accrue future pension benefits at a lower amount. Finally, MCL 38.1384b(3) and (4) allow employees to discontinue accruing future pension benefits altogether and participate in a 401(k)-style Tier 2 retirement account. The act, however, altered only the manner in which employees accrue pension benefits arising after the act's effective date. It had no effect on pension benefits previously accrued. Plaintiffs argued that the act violated the Takings Clauses, Const 1963, art 10, § 2 and US Const, Ams V and XIV; that the act impaired the obligation of contracts in violation of the Contracts Clauses,

Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1; and that the act violated the Due Process Clauses, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. The Court of Claims, Rosemarie E. Aquilina, J., ruled in favor of defendants on all claims, and plaintiffs appealed. The Court of Appeals, SAAD, P.J., and K. F. KELLY, J. (GLEICHER, J., concurring), affirmed, concluding that contributions to the retiree healthcare program would be made voluntarily and were therefore free of constitutional infirmity and that the act did not affect any obligation of contracts between the state and public school employees with regard to the pension modification because the state is not obligated to provide future pension benefits to public school employees. 303 Mich App 651 (2014). Plaintiffs sought leave to appeal, which the Supreme Court granted. 495 Mich 1002 (2014).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

2012 PA 300 does not violate the Takings Clauses, the Contracts Clauses, or the Due Process Clauses of the Michigan and United States Constitutions.

1. Const 1963, art 10, § 2 and the Fifth Amendment, as applied to the states through the Fourteenth Amendment, prohibit the government from taking private property for public use without providing just compensation to the owner. The term "taking" encompasses governmental interference with rights to both tangible and intangible property. However, governmental action creating general burdens or liabilities, i.e., merely requiring citizens to expend monies for valid public purposes and expenditures, typically will not form the basis for a cognizable taking claim. For there to be a compensable taking, the government must assert its authority to seize title or impair the value of property. This does not occur if the owner voluntarily relinquishes the property to the government. The retiree healthcare contributions are not mandatory. Public school employees may entirely opt out of the retiree healthcare program and thereby avoid making the salary contributions. The state is not obligated to provide publicly subsidized healthcare to public school employees, but has affirmatively chosen to do so, and it is therefore entirely reasonable to request that any eligible employee who desires the benefit help pay for it. Accordingly, 2012 PA 300 does not take private property in violation of the Takings Clauses.

2. Assuming, without deciding, that the United States Supreme Court's doctrine of unconstitutional conditions applies in the present case, the state has also not attached an unconstitutional condition to the receipt of a governmental benefit. Plaintiffs argued that the act

requires public school employees seeking access to retiree healthcare to relinquish in exchange their right to demand just compensation if they eventually fail to qualify for retiree healthcare. Individuals generally may voluntarily waive their constitutional rights. Individuals also have no constitutional right to receive any particular governmental benefits. Under limited circumstances, however, the government may be prevented from denying a benefit to an individual because that person has exercised a constitutional right. This is known as the doctrine of unconstitutional conditions. The fundamental principle underlying the doctrine is that the government cannot attach conditions to governmental benefits that effectively coerce individuals into relinquishing their constitutional rights. The United States Supreme Court has held that a governmental benefit given in exchange for a seemingly voluntary transfer of private property interests to the government may violate the doctrine of unconstitutional conditions if the condition lacks a nexus between the burden that the condition imposes on the property owner and the government's interest advanced by the condition or if the burden that the condition imposes is not roughly proportionate to the governmental interest advanced by the condition. The retiree healthcare contributions under MCL 38.1343e, however, are voluntary and are not the product of coercion by an unconstitutional condition.

3. Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1 prohibit laws that impair obligations under contracts. There can be no impairment of a contract, however, if the complaining party can freely avoid the alleged impairment altogether. Under MCL 38.1391a(5), public school employees who do not wish to participate in the retiree healthcare program can simply opt out and instead contribute money into their Tier 2 accounts. By opting out, the employees guarantee that the state will not receive their 3% contributions and that they will be paid the full amount of their bargained-for salaries. The retiree healthcare modifications therefore do not impair any employment contracts, but instead afford public school employees the option to choose between two potential retirement benefits, and the underlying employment contracts are unaffected.

4. Plaintiffs also argued that the act impairs separate contracts between the state and public school employees that guarantee the employees the opportunity to accrue pension benefits at a specific rate. A contract for employment is typically formed when the employee accepts the employer's promised terms of employment through performance. However, no contracts exist between public school employees and the state of Michigan, which has taken on the responsibility of providing pension benefits to public school

employees. Public school employees were given no express promises that they would continue to accrue pension benefits at a specific rate, and even if the Office of Retirement Services had made such promises, the promises would have been ultra vires and incapable of binding the state. Accordingly, 2012 PA 300 does not impair any contractual rights possessed by public school employees to continue accruing pension benefits at any particular rate.

5. Const 1963, art 1, § 17 and US Const, Am XIV, § 1 forbid the state from depriving any person of life, liberty, or property without due process of law. The Due Process Clauses offer not only procedural protections, but also have a substantive component that protects individuals against the arbitrary exercise of governmental power. If a challenged law does not infringe any fundamental rights, the plaintiff must prove that the law is not reasonably related to a legitimate governmental interest in order to prevail on a claim of a violation of substantive due process. Plaintiffs argued that the act violates substantive due process because current employees contribute money to fund current retirees' healthcare benefits absent any guarantee that current employees themselves will ever receive retiree healthcare benefits. Plaintiffs did not argue that 2012 PA 300 infringes any fundamental rights, so the applicable test is whether the law is reasonably related to a legitimate governmental purpose, which was satisfied in this case. The state may reasonably request that public school employees assist in funding a retiree healthcare benefit system to which they belong, and the state's purpose (implementing a fiscally responsible system by which to fund public school employees' retiree healthcare) is unquestionably legitimate. It is entirely proper for the state to seek the continuation of an important retirement benefit for its public school employees while simultaneously balancing and limiting a strained public budget. The means used by the state are also reasonably related to this purpose. 2012 PA 300 therefore comports with any constitutional guarantees of substantive due process.

Affirmed.

Justice BERNSTEIN took no part in the decision of this case.

Mark H. Cousens for AFT Michigan and others.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Frank J. Monticello*, *Larry F. Brya*, *Joshua O. Booth*, and *Patrick M. Fitzgerald*, Assistant Attorneys General, for the state of Michigan.

Amici Curiae:

White, Schneider, Young & Chiodini, P.C. (by *James A. White*, *Kathleen Corkin Boyle*, and *Timothy J. Dlugos*), and *Michael M. Shoudy* for the Michigan Education Association.

Jones Day (by *James P. Cone*) for the Judicial Education Project.

MARKMAN, J. We granted leave to appeal to address the constitutionality of 2012 PA 300, which modified the retirement benefits of current public school employees. Plaintiffs, which are various labor organizations representing such employees, raise three constitutional challenges: (1) whether the act violates the prohibitions of uncompensated takings in the Michigan and United States Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV; (2) whether the act impairs the obligation of contracts in violation of the Michigan and United States Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1; and (3) whether the act violates the guarantee of due process in the Michigan and United States Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. After considering each of these challenges, we hold that the act does not violate any provision of either the Michigan or the United States Constitution. For the reasons stated in this opinion, we affirm the judgment of the Court of Appeals.

I. FACTS AND HISTORY

A. 2010 PA 75

Facing a budget shortfall in the state public school system in 2010, the Legislature enacted Public Act 75, which modified retirement benefits for current public

school employees. The statute supplemented and altered the Public School Employees Retirement Act (Retirement Act), MCL 38.1301 *et seq*., which governs the Michigan Public School Employees' Retirement System (MPSERS). The most controversial provision of 2010 PA 75 was MCL 38.1343e, which required all current public school employees to contribute 3% of their salaries to the MPSERS to assist in funding retiree healthcare benefits for current and future public school retirees. Before the enactment of 2010 PA 75, public school employees had never been required to pay for these benefits. MCL 38.1343e directed school districts to withhold and remit this 3% amount to the state for deposit into a trust account from which current retirees' healthcare benefits would be paid.

B. *AFT MICH I*

Current public school employees, through their representative labor organizations, sued the state of Michigan and other state defendants in 2011, contending that MCL 38.1343e violated the aforementioned provisions of the Michigan and United States Constitutions. The Court of Claims held this provision unconstitutional as violative of the Takings Clauses of the Michigan and United States Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV, and the guarantees of due process in the Michigan and United States Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. The Court of Claims did not find any violation of the Contracts Clauses of the Michigan and United States Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1. The state appealed the Court of Claims' ruling, and in a split decision, the Court of Appeals affirmed in part. *AFT Mich v Michigan*, 297 Mich App 597, 616, 621, 627; 825 NW2d 595 (2012) (*AFT Mich I*).

AFT Mich I held that MCL 38.1343e effected a taking without just compensation because the state was forcibly taking possession of a portion of the school employees' salaries without affording them just compensation in return. The Court of Appeals focused on what it viewed as the confiscatory nature of the statute—requiring that current public school employees fund the healthcare benefits of current public school retirees absent any guarantee that the former would ever be eligible to receive healthcare benefits upon their own retirement. It concluded as a result that MCL 38.1343e violated the takings clauses of the Michigan and United States Constitutions. *Id*. at 621.

The Court of Appeals also held that MCL 38.1343e unconstitutionally impaired employment contracts between public school employees and employer school districts, notwithstanding the Court of Claims' conclusion to the contrary, because MCL 38.1343e effectively required the school districts to pay the employees less than their agreed-upon salaries. Although asserting that a contractual impairment does not always rise to the level of a constitutional violation, the Court concluded nonetheless that the state here had failed to demonstrate that the impairment was necessary to further its purpose in enacting the statute, which was to ensure the fiscal stability of the MPSERS retiree healthcare program. The Court reasoned that the state could have pursued alternative means to correct the funding problem that would not have involved a diminution, or "impairment," of the salaries of current employees. Because the state had not attempted to achieve its goals through those alternatives, the Court ruled that 2010 PA 75 also violated the Contracts Clauses of the Michigan and United States Constitutions. *Id*. at 616.

Finally, the Court of Appeals held that MCL 38.1343e violated the employees' right to "substantive" due process. It concluded that the law arbitrarily forced one discrete group of individuals—current public school employees—to fund the retiree healthcare of a separate discrete group—current public school retirees. The Court recognized that, although the *accrued pension* benefits of public employees are expressly protected by Const 1963, art 9, § 24 as contractual obligations that can be neither diminished nor impaired, future healthcare benefits are not. Nonetheless, because the state did not prefund retiree healthcare benefits, current employees were contributing 3% of their salaries absent any guarantee that they themselves would ever receive healthcare benefits upon retirement. The Legislature could simply alter the law again and modify or even eliminate the retiree healthcare program before current employees retired. The state was thus requiring current employees to cover the state's own financial obligations, while merely undertaking an essentially empty promise that current employees would receive similar benefits when they retired. The Court believed that this scheme was unreasonable, arbitrary, and capricious, and that it violated the "substantive" due process guaranteed by the Michigan and United States Constitutions. *Id*. at 627.

Judge SAAD, who authored an opinion concurring in part and dissenting in part, would have reversed the judgment of the Court of Claims and held 2010 PA 75 constitutional. He began by noting that "legislative enactments are presumed to be constitutional absent a clear showing to the contrary," and then argued that an obligation merely to pay money cannot constitute a taking requiring just compensation, that 2010 PA 75 created an obligation between public school employees and the state that did not affect the employment

contracts between the employees and their school district employers, and that the Court of Claims should not have granted relief on plaintiffs' "substantive" due process claim because it was a mislabeled claim essentially alleging an uncompensated taking, an argument that plaintiffs had separately raised. *AFT Mich I*, 297 Mich App at 630-640 (SAAD, J., concurring in part and dissenting in part).

The state sought leave to appeal the Court of Appeals' ruling in *AFT Mich I*. That application is currently pending before this Court and has been held in abeyance for the resolution of the instant case. *AFT Mich v Michigan*, 846 NW2d 57, 58 (Mich, 2014).

C. 2012 PA 300

The instant case arises from legislation enacted in response to the Court of Appeals' decision in *AFT Mich I*. On September 4, 2012, the Governor signed into law 2012 PA 300, which further modified the Retirement Act. Current public school employees, once again through their representative labor organizations, have challenged provisions of this statute. In doing so, they raise many of the same constitutional challenges that were asserted with regard to 2010 PA 75 in *AFT Mich I*.

The legal challenges to 2012 PA 300 focus on two principal aspects of the new law—the changes it makes to the retiree healthcare plan and the changes it makes to the pension benefit plans provided by the MPSERS. Regarding retiree healthcare, 2012 PA 300 maintains in place MCL 38.1343e, the statute struck down by the Court of Appeals in *AFT Mich I*. However, the Legislature added two new provisions. MCL 38.1391a(5) enables current public school employees to opt out of retiree healthcare and thereby to avoid paying the 3% retiree healthcare contributions under MCL 38.1343e.

And MCL 38.1391a(8) provides a separate retirement allowance for public school employees who elect to pay the 3% contributions but who then subsequently fail to qualify for retiree healthcare benefits. The allowance is equal to the amount that the employee contributed to the healthcare plan with the addition of certain interest and is payable in 60 equal monthly installments after the employee reaches the age of 60.

Concerning the pension benefits offered by the MPSERS, 2012 PA 300 alters the manner in which public school employees accrue these benefits. Before 2012 PA 300, public school employees generally fell into one of two groups. Those hired before January 1, 1990 belonged to what was commonly called the "Basic Plan." These employees historically made no contributions to assist in funding their pensions. Those hired on or after January 1, 1990, automatically belonged to the "Member Investment Plan" (MIP) and contributed varying percentages of their salaries in the process of accruing pension benefits. MCL 38.1343a, as amended by 2007 PA 11. Members of both plans became fully vested in their benefits after 10 years of service, MCL 38.1381(1)(b); MCL 38.1343b, and monthly benefits were calculated using identical formulas. An employee's final average salary—that is, the mean salary of the employee's last three years of employment—was multiplied by the number of years served, and then further multiplied by 1.5%. MCL 38.1384.

2012 PA 300 increased the amount that all current public school employees must contribute in order to continue accruing pension benefits at the existing rate. Members of the Basic Plan, who have never before been required to contribute to their pensions, must now contribute 4% of their salaries to the MPSERS for this purpose. MCL 38.1343g(1)(a). Members of the MIP

must now contribute 7% of their salaries to the MPSERS. MCL 38.1343g(1)(b). Employees who do not wish to make the additional contributions may decline to do so, but those employees will only accrue future pension benefits calculated using a 1.25% multiplier, instead of the existing 1.5% multiplier. MCL 38.1384b. Employees may also choose to discontinue accruing future pension benefits entirely and instead participate in a 401(k)-style retirement account called a "Tier 2" account. MCL 38.1384b(3) and (4). No matter which retirement plan an employee chooses, the pension benefits that the employee has already accrued are calculated using a 1.5% multiplier. MCL 38.1384b. 2012 PA 300 alters only the manner in which employees accrue future pension benefits, i.e., those arising after the effective date of 2012 PA 300; it has no effect on pension benefits that have previously accrued.

D. *AFT MICH II*

Public school employees, through their representative labor organizations, asserted numerous constitutional challenges to the validity of 2012 PA 300 in the Court of Claims. However, unlike its ruling in the challenge to 2010 PA 75, the Court of Claims ruled in favor of the state on all claims, holding that the provisions of the earlier statute deemed in *AFT Mich I* to have been unconstitutional had been sufficiently ameliorated by the enactment of the more recent statute, in particular by the choice afforded employees regarding whether to pay into the retiree healthcare plan, and that several new challenges raised for the first time against the later act were equally unavailing. Regarding the only new challenge germane to the instant case, the court found that public school employees had no vested interest in future pension benefits and, as a result, that

2012 PA 300 did not affect any contractual obligation on the part of the state to allow employees to accrue pension benefits at any particular rate.

Plaintiffs appealed, and the Court of Appeals affirmed the Court of Claims. *AFT Mich v Michigan*, 303 Mich App 651; 846 NW2d 583 (2014) (*AFT Mich II*). As did the Court of Claims, the Court of Appeals held that contributions to the retiree healthcare program would be made voluntarily and were therefore free of constitutional infirmity. The Court also assessed plaintiffs' challenges to the pension modification and, again as did the Court of Claims, concluded that 2012 PA 300 did not affect any obligation of contracts between the state and public school employees in this regard because the state is not obligated to provide future pension benefits to public school employees. Plaintiffs sought leave to appeal in this Court, which we granted. *AFT Mich v Michigan*, 495 Mich 1002 (2014).

II. STANDARD OF REVIEW

This case is an appeal from summary disposition in favor of defendants involving issues of constitutional, statutory, and contractual interpretation. This Court reviews de novo all such issues. *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 63; 748 NW2d 524 (2008); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

III. PLAINTIFFS' ARGUMENTS

Plaintiffs raise three clearly articulated arguments before this Court against 2012 PA 300. First, they argue that the statute violates the Takings Clauses of the Michigan

and United States Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV, by allowing the state to retain a significant amount of the interest that will accrue on public school employees' retiree healthcare contributions. Second, plaintiffs argue that 2012 PA 300 violates the Takings Clauses for the additional reason that it unconstitutionally coerces public school employees into waiving their rights under those constitutional provisions. Third, they argue that 2012 PA 300 "breaches" contracts between the state and public school employees guaranteeing employees that they will continue accruing pension benefits at a specific rate.

Although plaintiffs frame their third argument as a "breach of contract" claim, we understand them essentially to be raising a constitutional challenge to the pension modifications under Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1, which prohibit laws impairing the obligation of contracts. An action for breach of a contract and an action alleging that a law impairs the obligation of a contract are distinct claims. *Thompson v Auditor General*, 261 Mich 624, 634; 247 NW 360 (1933). A refusal to perform in compliance with a valid contract amounts to a breach of a contract and may entitle the other party to damages or other forms of relief; however, a breach does not affect the contract's fundamental validity. *Id*. In contrast, a contract is "impaired" when a law undermines a party's ability to legally enforce that contract; a contractual impairment is typically remedied through invalidation of the impairing law. *Id*. at 634-635. Plaintiffs here are not, in fact, seeking remedies for *breach* of contract, but rather are seeking the invalidation of 2012 PA 300 because, they allege, it impairs an asserted contract between public school employees and the state.[1] Conse-

[1] Plaintiffs' reply brief requests only that "[t]his Court should declare the contested provisions [of 2012 PA 300] to be unenforceable."

quently, we analyze plaintiffs' objection to the pension modifications instituted by 2012 PA 300 as a claim of unconstitutional impairment of contractual obligations under the Contract Clauses of the Michigan and United States Constitutions.[2]

Plaintiffs also make a broad and unsupported argument that "2012 PA 300 does not repair the defect found in 2010 PA 75. [The act] is still unconstitutional because it permits an extraction with no guarantee of benefit and provides for a refund of contributions which itself is unconstitutional." Plaintiffs elaborate that "[the retiree healthcare contributions] now made still lack any certainty that the individual paying in MPSERS will actually receive post employment retiree health care. Further, the provision for a refund of payments is so unreasonable as to be itself a violation of the individual's right to substantive due process."

By arguing that 2012 PA 300 is "still" unconstitutional, plaintiffs appear to be reasserting the arguments that prevailed with respect to 2010 PA 75 in *AFT Mich I*. But to the extent that plaintiffs expressly raise these same arguments, they do so in an inconsistent and ambiguous manner. Plaintiffs' brief on appeal, for example, states: "[MCL 38.1343e] is a deprivation of the right of substantive due process for the same reasons expressed to this Court, and the Court of Appeals, in [*AFT Mich I*]." Contradictorily, however, plaintiffs' reply brief states: "Defendant incorrectly asserts that Plaintiffs have somehow argued that 2012 PA 300

[2] If we are mistaken, and plaintiffs do indeed seek relief for a claim of breach of contract, our ruling is unaffected. As discussed in Part IV(B)(2) of this opinion, plaintiffs have failed to demonstrate that public school employees have a contractual right to continue accruing pension benefits at any specific rate. By the same analysis, the state could not have breached a contract by enacting 2012 PA 300 if the alleged contract did not exist in the first place.

deprives members of their right to substantive due process." We are therefore left somewhat confused about the appropriate manner by which to evaluate these arguments.

In the interest of a thorough and complete adjudication for the numerous persons whom plaintiffs represent, we believe that the most appropriate solution is to conclude that by arguing that "2012 PA 300 does not repair the defect found in 2010 PA 75," plaintiffs are essentially arguing that 2012 PA 300 is unconstitutional for the same reasons that the Court of Appeals deemed 2010 PA 75 to be unconstitutional. In other words, we believe plaintiffs continue to argue that 2012 PA 300 violates the Contract Clauses and any "substantive" due process guarantees of the Michigan and United States Constitutions for the same reasons that the Court of Appeals deemed these provisions to have been violated by 2010 PA 75.[3]

Defendants, not entirely without basis, contend that plaintiffs have abandoned these arguments by failing to properly rearticulate them; nonetheless, we believe it appropriate to address them. Although we are troubled that plaintiffs have not clearly reasserted their original arguments (or clearly articulated new arguments, if it was their intention to do so), we choose to address these arguments for several reasons. First, plaintiffs have framed their broad and unsupported arguments by at least referring to the Court of Appeals' decision in *AFT*

[3] Although the Court of Appeals also held in *AFT Mich I*, 297 Mich App at 621, that 2010 PA 75 violated the Takings Clauses of the Michigan and United States Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV, plaintiffs have clearly raised before this Court a challenge under those constitutional provisions. Therefore, we have no need to infer from their reference to *AFT Mich I* that plaintiffs continue to make such an argument.

Mich I.[4] Those references suggest, in our judgment, that plaintiffs did not intend to abandon arguments that they asserted in that case. Second, these same arguments were all properly raised before the Court of Appeals in *AFT Mich II*, and that Court specifically addressed each of the constitutional arguments that were at the heart of the decision in *AFT Mich I*. Third, defendants themselves thoroughly addressed each of these arguments before the Court of Appeals in *AFT Mich II*, and have now thoroughly addressed the "substantive" due process argument raised before this Court. For these reasons, in evaluating the range of objections to 2012 PA 300, we have chosen to consider the arguments alleging impairment of contracts and "substantive" due process violations that prevailed in *AFT Mich I*, but have been presented to this Court in what can only be described as an indirect and obscure manner. In addition, we consider the alleged violations of the Takings Clauses that plaintiffs clearly raise before this Court, as well as the breach of contract claim that we analyze as a distinct claim of contractual impairment separate from the contractual impairment claim that prevailed in *AFT Mich I*.[5]

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[4] In their reply brief, plaintiffs state:

> In *AFT Michigan* [*I*] the Court of Appeals rightly found that 2010 PA 75 deprived members of the Public School Employees Retirement System of their right to substantive due process because the statute mandated the extraction of 3% of wages without assuring that anything would be provided in return. . . .
>
> * * *
>
> . . . 2012 PA 300 does not repair the defect found in 2010 PA 75. Section 43e, MCL 38.1343e, is still unconstitutional because it permits an extraction with no guarantee of benefit . . . .

[5] Plaintiffs' claim of contractual impairment that prevailed in *AFT Mich I* focused on the changes that 2010 PA 75 made to the retiree

Finally, we note that although plaintiffs raise challenges under both the Michigan and United States Constitutions, they have not argued with any specificity, or by reference to, the decisions of the courts of this state that a particular provision of the Michigan Constitution affords greater or distinct protections than its federal counterpart. Rather, plaintiffs have simply left it to this Court to identify such differences in meaning if and where these exist. Although this Court on numerous occasions has interpreted a Michigan constitutional provision differently than its federal counterpart,[6] "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments . . . ." *Mudge v Macomb Co*, 458 Mich 87, 105;

healthcare benefits program. *AFT Mich I*, 297 Mich App at 604, 609-610. Plaintiffs' claim of contractual impairment, newly asserted in the present case, focuses on the changes that 2012 PA 300 made to the pension benefits program.

[6] Textual differences, state constitutional and common-law history, state law preexisting the constitutional provision at issue, structural differences between the Michigan and United States Constitutions, or matters of special state interest may compel us to conclude that the state Constitution offers protections distinct from those of the federal Constitution. *People v Catania*, 427 Mich 447, 466 n 12; 398 NW2d 343 (1986). We have, for example, interpreted the state Constitution more broadly on numerous occasions. Compare, e.g., *Sitz v Dep't of State Police*, 443 Mich 744; 506 NW2d 209 (1993) (holding that sobriety checkpoints are prohibited by Const 1963, art 1, § 11, which forbids "unreasonable searches and seizures"), with *Mich Dep't of State Police v Sitz*, 496 US 444; 110 S Ct 2481; 110 L Ed 2d 412 (1990) (holding such checkpoints permissible under US Const, Ams IV and XIV); and compare *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992) (holding that a mandatory life sentence without the possibility of parole for possession of 650 or more grams of cocaine is so "grossly disproportionate" that it violates the prohibition of "cruel or unusual punishment" in Const 1963, art 1, § 16), with *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (holding that the same sentence is permissible under US Const, Ams VIII and XIV).

580 NW2d 845 (1998) (quotation marks and citation omitted). We will therefore not seek to discover whether the Michigan Constitution might afford protections greater than, or distinct from, those of the United States Constitution when plaintiffs have not supplied us with arguments or guidance in support of this proposition. Rather, we will assume for the purposes of this case that similarly worded provisions of the Michigan and United States Constitutions are intended to be coextensive in their meaning, although we emphasize strongly that we are never bound to such an interpretation of the former. *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

IV. ANALYSIS

We have sought to examine closely plaintiffs' constitutional arguments, and for the reasons set forth we conclude that they do not warrant the invalidation of 2012 PA 300. We preface our analysis leading to this conclusion, however, by noting that this Court is obligated to uphold all laws that do not infringe the state or federal Constitutions and invalidate only those laws that do so infringe. We do not render judgments on the wisdom, fairness, or prudence of legislative enactments. See *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004). Legislation is presumed to be constitutional absent a clear showing to the contrary. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). In the present case, this Court is not oblivious to the fact, as reflected by the sheer breadth of the class of plaintiffs, that many public school employees intensely dislike the policies instituted by 2012 PA 300 and believe that the healthcare and pension choices imposed on them are unfair and unsatisfactory. However, decisions concerning the allo-

cation of public resources will often leave some parties disappointed. Recourse and correction must be pursued through those bodies authorized by our Constitution to undertake such decisions—typically the legislative branch—and not through bodies, such as this Court, that are charged only with comparing the provisions of the law with the prohibitions of our Constitution and deciding whether they are compatible. Const 1963, art 3, § 2.

We also note at the outset that all public employees must contend with a variety of future uncertainties, of which they are, or should be, aware at the time that they pursue and accept public employment. The terms, conditions, and even continued existence of public employment positions may be influenced by the changing fiscal conditions of the state, the evolving policy priorities of governmental bodies, constitutional modifications and other initiatives of the people, and the ebb and flow of state, national, and global economies. The future is not easily predictable, and public employees, along with individuals working in the private sector, must contend with these realities.[7] When changing circumstances require that the state undertake what may be difficult or unpopular decisions regarding its own work force, it will often be unavailing for dissatisfied public employees to file constitutional lawsuits insisting on an unreasonable level of fixedness or immutability. See *LeRoux v Secretary of State*, 465 Mich 594, 616; 640 NW2d 849 (2002) (" '[T]he Legislature, in enacting a law, cannot bind future Legislatures.' "), quoting *Bal-*

[7] This opinion considers only the *constitutionality* of legislative changes to the public school employees' retirement plan and not "whether the plan is ideal . . . ." *AFT Mich II*, 303 Mich App at 677. Although we do not agree with plaintiffs' constitutional arguments, the social *value* and *importance* of public school employees and their work is in no way intended to be derogated or diminished by this opinion.

lard v Ypsilanti Twp, 457 Mich 564, 569; 577 NW2d 890 (1998) (alteration in original).

A. TAKINGS

Plaintiffs argue that 2012 PA 300 causes the state to take private property without providing just compensation, in violation of the Michigan and United States Constitutions. *AFT Mich I* held that 2010 PA 75 violated both Const 1963, art 10, § 2 and US Const, Ams V and XIV because its provision for mandatory retiree healthcare contributions caused the state to take portions (3%) of public school employees' salaries without providing just compensation. *AFT Mich I*, 297 Mich App at 621. According to plaintiffs, 2012 PA 300 suffers from the same constitutional defect. We respectfully disagree and hold that 2012 PA 300 does not violate the uncompensated taking prohibitions contained in those provisions. However, we emphasize that we address in this case only 2012 PA 300 and do not decide whether the Court of Appeals correctly held that 2010 PA 75 violated those same provisions.

The government may not take private property for public use without providing just compensation to the owner. The power to take property, commonly referred to as "eminent domain" or "condemnation," arises from the state's power as a sovereign. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373; 663 NW2d 436 (2003). The term "property" encompasses everything over which a person "may have exclusive control or dominion." *Rassner v Federal Collateral Society, Inc*, 299 Mich 206, 213-214; 300 NW 45 (1941) (quotation marks and citation omitted). The power of eminent domain is enshrined and limited in the Takings Clauses of the Michigan and United States Constitutions. Const 1963, art 10, § 2 provides:

> Private property shall not be taken for public use without just compensation therefore [sic] being first made or secured in a manner prescribed by law.

The Fifth Amendment, US Const, Am V, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment is applied to the states through the Fourteenth Amendment, US Const, Am XIV. *Chicago, B & Q R Co v Chicago*, 166 US 226, 241; 17 S Ct 581; 41 L Ed 979 (1897) (declaring that the Fourteenth Amendment forbids the states from taking private property without providing just compensation). Although the courts of this state have applied the state and federal Takings Clauses coextensively in many situations,[8] this Court has found that Const 1963, art 10, § 2 offers broader protection than do US Const, Ams V and XIV.[9] However, because plaintiffs have not argued that Const 1963, art 10, § 2 should be applied any differently than the federal

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[8] *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184 n 10; 521 NW2d 499 (1994).

[9] Compare, for example, *Kelo v New London*, 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005), with *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). *Kelo* held that the requirement of US Const, Ams V and IX that eminent domain be exercised for a "public *use*" was satisfied when the city sought to condemn property and transfer it to private entities upon a showing that the transfer would create an economic benefit to the community; essentially, the government can "take" private property when the taking advanced a "public *purpose*." In contrast, *Hathcock* held that the requirement of Const 1963, art 10, § 2 that eminent domain be exercised for "public use" was violated when the county sought to condemn property and transfer it to private entities in order to facilitate economic development. We explained that the public-use requirement forbids the forced transfer of private property to a private entity for a private use and held that economic benefit to a community, without more, did not constitute a "public use," even though it could be construed as a "public purpose." *Hathcock*, 471 Mich at 462, 482-483.

Takings Clause in this case, we shall not inquire further whether it would be proper to do so.

The term "taking" can encompass governmental interference with rights to both tangible and intangible property. *Ruckelshaus v Monsanto Co*, 467 US 986, 1003-1004; 104 S Ct 2862; 81 L Ed 2d 815 (1984). However, governmental action creating general burdens or liabilities, i.e., merely requiring citizens to expend monies for valid public purposes and expenditures, typically will not form the basis for a cognizable taking claim. See *Eastern Enterprises v Apfel*, 524 US 498, 540-542; 118 S Ct 2131; 141 L Ed 2d 451 (1998) (Kennedy, J., concurring in part and dissenting in part); *id*. at 554-555 (Breyer, J., dissenting). Adopting a rule to the contrary would include taxes and user fees within the realm of compensable takings, and the courts of this country have long held these kinds of governmental actions distinct from and outside the scope of takings analysis. *Koontz v St Johns River Water Mgt Dist*, 570 US ___, ___; 133 S Ct 2586, 2600-2601; 186 L Ed 2d 697 (2013); *Mobile Co v Kimball*, 102 US 691, 703; 26 L Ed 238 (1880). It is possible, nonetheless, for the government to undertake a constitutional taking that requires compensation when it asserts control over a discrete and identifiable fund of money, such as a deposit account. *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 164-165; 101 S Ct 446; 66 L Ed 2d 358 (1980).

To generate a compensable taking, the government must assert its authority to seize title or impair the value of property. This does not occur if the property in question is voluntarily relinquished to the government.[10] As the United States Supreme Court has explained:

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[10] See *Franklin Mem Hosp v Harvey*, 575 F3d 121, 129 (CA 1, 2009) ("[W]here a property owner voluntarily participates in a regulated program, there can be no unconstitutional taking."), citing *Yee v City of Escondito*, 503 US 519, 527-528; 112 S Ct 1522; 118 L Ed 2d 153 (1992).

> [A]s long as [the property owner] is aware of the conditions under which the [property is given to the government], and the conditions [governing the transfer of property] are rationally related to a legitimate Government interest, a voluntary submission of [property] by an [owner] in exchange for . . . economic advantages . . . can hardly be called a taking. [*Ruckelshaus*, 467 US at 1007.]

Put simply, a property owner cannot give property to the government of his or her own volition, and then proceed to argue that the government must compensate the owner for that contribution.

MCL 38.1343e institutes a 3% retiree healthcare contribution that, according to plaintiffs, generates an unconstitutional taking. The statute provides:

> Except as otherwise provided in this section or [MCL 38.1391a], each member who first became a member before September 4, 2012 shall contribute 3% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747. The member contributions under this section shall be deducted by the employer and remitted as employer contributions in a manner that the retirement system shall determine. As used in this section, "funding account" means the appropriate irrevocable trust created in the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747, for the deposit of funds and the payment of retirement health care benefits.

Unlike the 3% retiree healthcare contribution in 2010 PA 75, which the Court of Appeals held to be a taking in *AFT Mich I*, the same contribution arising from 2012 PA 300 is not mandatory. Instead, public school employees may entirely opt out of the retiree healthcare program and thereby avoid making the 3% salary contributions:

> Except as otherwise provided in this section, beginning September 4, 2012 and ending at 5 p.m. eastern standard time on January 9, 2013, the retirement system shall permit each qualified member to make an election to opt out of health insurance coverage premiums that would have been paid by the retirement system under [MCL 38.1391] and opt into the Tier 2 account provisions of this section effective on the transition date. [MCL 38.1391a(5), as amended by 2012 PA 359.]

Any public school employee who does not want to participate in the retirement healthcare plan can elect instead to contribute to a Tier 2 retirement account, and the school district employer will match this contribution up to 2% of the contributing employee's salary. MCL 38.1391a(1). An employee need not contribute anything to his or her Tier 2 retirement account. See MCL 38.1391a(2).

In *AFT Mich II*, the Court of Appeals held that 2012 PA 300 did not give rise to an uncompensated taking because the retiree healthcare contributions are now completely voluntary:

> [T]here is no "taking" under 2012 PA 300 because participation in the retiree healthcare system is now voluntary. Unlike in [*AFT Mich I*], in which the retiree healthcare contributions were mandatory and involuntary, members under the new legislation now have a choice. Thus, it cannot be argued that members' wages have been seized or confiscated . . . . [*AFT Mich II*, 303 Mich App at 678.]

We agree with this analysis. Voluntary healthcare contributions do not violate Const 1963, art 10, § 2 and US Const, Ams V and XIV because, as a general proposition, the government does not, for constitutional purposes, "take" property that has been voluntary given. Here, the state is offering a retirement benefit—publicly subsidized healthcare—to public school em-

ployees who serve for the requisite period of time. The state is not obligated to provide such a benefit to any of its public school employees, but rather has made an affirmative decision to do so.[11] It is therefore entirely reasonable for the state to request in turn that any eligible employee who desires access to this benefit should help to pay for it.

Plaintiffs observe that not all public school employees who opt into the retiree healthcare program will eventually receive any actual healthcare benefits. Some number of employees will inevitably leave public school employment before they acquire sufficient years of service to qualify for these benefits.[12] Under 2012 PA 300, these employees do not forfeit the contributions that they made toward the retiree healthcare program. Rather, MCL 38.1391a(8) provides a separate retirement allowance for these employees, stating:

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[11] Const 1963, art 9, § 24 protects "accrued financial benefits of each pension plan and retirement system of the state" by making them contractual obligations of the state. However, this Court has determined that healthcare benefits are not protected by article 9, § 24 because healthcare benefits are not "financial" and cannot be "accrued." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 653-655; 698 NW2d 350 (2005). Therefore, the state is under no obligation to provide retiree healthcare benefits to any current public school employee, and instead of asking current employees to contribute 3% of their wages to help fund the program, the state could have instead chosen to end the retiree healthcare program entirely.

[12] Plaintiffs also opine that the Legislature may at some future time disadvantageously alter the law governing the eligibility for this benefit and that, as a result, the terms of the MCL 38.1343e contributions are "so unreasonable as to be a Taking without just compensation." However, these concerns are simply too speculative to address at this time. We have no idea if, or in what manner, the Legislature will ever choose to modify the MPSERS retiree healthcare system. If modifications do, in fact, occur, plaintiffs could choose to institute a constitutional challenge at that time, the success of which would depend on the specific character of future changes. As we state in Part IV(C) of this opinion, no court can evaluate a law that does not yet, and may never, exist.

> A member or former member who does not make the election under subsection (5), who is 60 years of age or older, who does not qualify for the payment of health insurance coverage premiums by the retirement system under [MCL 38.1391], and who files an application with the retirement system on or after termination of employment shall receive a separate retirement allowance as calculated under this subsection. Except as otherwise provided under this subsection, the separate retirement allowance under this subsection shall be paid for 60 months and shall be equal to 1/60 of the amount equal to the contributions made by the member under [MCL 38.1343e]. . . . The amount of the separate retirement allowance as determined under this subsection shall be increased in a manner as determined by the retirement system by a percentage equal to 1.5% multiplied by the total number of years that member made contributions under [MCL 38.1343e].

To briefly paraphrase, an employee qualifying for this allowance will receive it over the course of 60 equal monthly installments beginning when the employee reaches the age of 60, and the allowance will equal the total amount that the employee contributed under MCL 38.1343e with the addition of interest. The interest amount is calculated by multiplying 1.5% of the total value of the contributions by the number of years that the employee contributed to the healthcare program.

Plaintiffs have argued before this Court that even if MCL 38.1343e does not "take" portions of *all* public school employees' salaries, it does generate a compensable taking from employees who opt into the retiree healthcare program but, for whatever reason, do not eventually qualify for retiree healthcare benefits. Plaintiffs argue that the retiree healthcare contributions, and any interest generated by those contributions while in the state's possession, remain the private property, or the separate fund, of the contributing employee. Thus, following plaintiffs' reasoning, if an employee fails to

qualify for retiree healthcare benefits, the state has committed an uncompensated taking when it retains those contributions until the employee turns 60 and then does not pay to the employee the entirety of the interest that those contributions have generated while in the state's possession. Plaintiffs broadly conclude that the terms of the separate retirement allowance constitute a taking for which just compensation must be paid:

> [MCL 38.1391a(8)] allows the State of Michigan to keep monies deposited with MPSERS by public school employees who choose to opt in to MPSERS post employment retiree health care but, for myriad reasons, are never eligible to receive that benefit. However, the statute does not require prompt refund of contributions made by these public school employees . . . . Although the deposits are eventually refunded, the State of Michigan is permitted to keep these deposits for decades, invest the deposits and retain the increase in value of the deposits. . . . This is a *per se* Taking . . . .

Plaintiffs here are attempting to create a distinction where none exists. The terms of the separate retirement allowance under MCL 38.1391a(8) are part and parcel of the choice offered to the public school employees under MCL 38.1391a(5). Any employee who chooses to participate in the retiree healthcare program does so with full notice that if he or she fails to qualify for retiree healthcare, he or she will receive the separate retirement allowance as described in MCL 38.1391a(8). It is unreasonable to suggest that the employees who opt into the retiree healthcare program consent to the state's receiving 3% of their salaries, but do not consent to the subsequent terms of MCL 38.1391a(8) if they fail eventually to qualify for retiree healthcare benefits. The 3% contributions and the separate retirement allowance are two sides of the same coin, and if public

school employees voluntarily consent to one, they necessarily consent to the other.

In the wake of the Court of Appeals' holding in *AFT Mich II* that the retiree healthcare contributions do not constitute takings because they are voluntary transactions, plaintiffs continue to argue that the employees' right to be free of an uncompensated taking has nonetheless been violated by 2012 PA 300. Specifically, plaintiffs allege that 2012 PA 300 is invalid because by requiring public school employees to make contributions in order to qualify for retiree healthcare, the state has attached an unconstitutional condition to the receipt of a government benefit:

> [A]s a condition of the receipt of post employment retiree health care (for which the [public school employee] pays), he or she must agree to surrender rights guaranteed to them by both the Constitution of the United States and that of the State of Michigan. The person must consent to having the State of Michigan take the value of their invested contributions. That is a patently unconstitutional requirement. . . . [2012] PA 300 may not require a surrender of the right to be protected from a Taking without just compensation.

This argument essentially disputes the Court of Appeals' conclusion that retiree healthcare contributions are made voluntarily. 2012 PA 300, in plaintiffs' view, requires public school employees seeking access to retiree healthcare to relinquish in exchange their right to demand just compensation if they eventually fail to qualify for retiree healthcare and the state retains possession of their contributions until they reach the age of 60. Plaintiffs argue that, by assuming that the contributions are made voluntarily, the Court of Appeals failed to recognize the unconstitutional condition imposed by 2012 PA 300. According to plaintiffs, the enticement of a governmental benefit—access to the

retiree healthcare program—has in this case effectively, or practically, "coerc[ed]"[13] public school employees into relinquishing their constitutional rights—specifically, the right to be free of an uncompensated governmental taking:

> The Court of Appeals rejected the contention that retention of interest was a Taking because "participation in the retiree healthcare system is now voluntary." [*AFT Mich II*, 303 Mich App at 678.] However, with respect, this conclusion misses the point entirely. The State of Michigan cannot require an individual to waive rights available under the Constitution as a condition of receipt of a state provided benefit.

We disagree and conclude that the state has not attached an unconstitutional condition to the receipt of a governmental benefit.

Individuals may under most circumstances voluntarily waive their constitutional rights.[14] Individuals also have no constitutional right to receive any particular governmental benefits. *Falk v State Bar of Mich*, 411 Mich 63, 107; 305 NW2d 201 (1981) (opinion by RYAN, J.), quoting *Elrod v Burns*, 427 US 347, 361; 96 S Ct 2673; 49 L Ed 2d 547 (1976). However, under limited circumstances, the government may be prevented from *denying* a benefit to an individual because that person has exercised a constitutional right; this is known as the

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[13] Quoting *Koontz*, 570 US at ___; 133 S Ct at 2594.

[14] See, e.g., *People v Buie*, 491 Mich 294, 313-314; 817 NW2d 33 (2012) (criminal defendant may voluntarily waive the right to confront witnesses); *People v Russell*, 471 Mich 182, 188-190; 684 NW2d 745 (2004) (party may voluntarily waive the right to counsel); *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987) (party may voluntarily waive the right to court access and a jury trial). See also *Woodman v Kera LLC*, 486 Mich 228, 284; 785 NW2d 1 (2010) (opinion by MARKMAN, J.) (stating that even minors may voluntarily waive their constitutional rights when charged with a crime).

"doctrine of unconstitutional conditions." *Dolan v City of Tigard*, 512 US 374, 385; 114 S Ct 2309; 129 L Ed 2d 304 (1994). Not every condition attached to a governmental benefit is an unconstitutional one, and although the exact boundaries of the doctrine are difficult to define,[15] the fundamental principle underlying the doctrine is clear: the governmental cannot attach conditions to government benefits that effectively *coerce* individuals into relinquishing their constitutional rights.[16]

The United States Supreme Court has applied the doctrine of unconstitutional conditions to claims arising under the Takings Clause of US Const, Ams V and XIV and has created a specific test of sorts: a governmental benefit given in exchange for a seemingly voluntary transfer of private property interests to the government may violate the doctrine of unconstitutional conditions if the condition lacks a nexus between the burden that the condition imposes on the property owner and the government's interest advanced by the condition, or if the burden that the condition imposes is not roughly proportionate to the governmental interest advanced by the condition.[17] Thus far, the Court has only applied this test

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[15] For one helpful discussion of the doctrine's development, see generally Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989).

[16] See *Koontz*, 570 US at ___; 133 S Ct at 2595 ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). See also *id*. at ___; 133 S Ct at 2610 ("[T]he entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the government may use its control over benefits (like permits) to 'coerc[e]' a person into giving up a constitutional right.") (Kagan, J., dissenting) (citation omitted) (alteration in original).

[17] See *id*. at ___; 133 S Ct at 2595 (opinion of the Court) ("[T]he government [may] condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the

in the context of "land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 702-703; 119 S Ct 1624; 143 L Ed 2d 882 (1999).

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social costs of the applicant's proposal."). See also *Dolan*, 512 US at 385 ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship* to the [relinquished right].") (emphasis added). The nexus/proportionality standard has been derived from the United States Supreme Court's holdings in *Dolan* and *Nollan v California Coastal Comm*, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987). These cases apply the unconstitutional conditions doctrine to "takings" under US Const, Ams V and XIV and conclude that in order for the government to constitutionally condition receipt of a governmental benefit on the uncompensated relinquishment of property rights, the government's condition must have an "essential nexus" to the government's interest advanced by the condition and the burden imposed on the property owner by the condition must have "rough proportionality" to the government interest advanced by the condition. *Dolan*, 512 US at 386, 391.

The 'nexus/proportionality' analysis is unique to unconstitutional conditions claims arising under US Const, Ams V and XIV and, as of yet, has only been applied in the context of land-use permits. "*Nollan* and *Dolan* 'involve a special application' of [the doctrine of unconstitutional conditions] that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 US at ___; 133 S Ct at 2594. Therefore, although plaintiffs rely on *Koontz*, *Dolan*, and *Nollan*, it is not entirely clear that the analyses set forth in those opinions are applicable to the present case. However, because neither party addressed these opinions' applicability, we assume without deciding that their reasoning could be extended to the present context.

We note that in most applications of the doctrine of unconstitutional conditions concerning constitutional rights other than the Fifth Amendment right to be free of an uncompensated taking, the Supreme Court has focused mainly on whether the condition coerces individuals into relinquishing constitutional rights. See, e.g., *O'Hare Truck Serv, Inc v City of Northlake*, 518 US 712, 721; 116 S Ct 2353; 135 L Ed 2d 874 (1996) ("Our cases make clear that the government may not coerce support [by punishing a person for political views], unless it has some justification beyond dislike of the individual's political association."). Under either the nexus/proportionality or the coercion standard, however, plaintiffs' unconstitutional conditions argument fails.

This Court has never applied the doctrine of unconstitutional conditions to Const 1963, art 10, § 2. Because plaintiffs have not argued that we should analyze their unconstitutional conditions argument in a manner in any way distinct from the United States Supreme Court's application of the doctrine to claims arising under US Const, Ams V and XIV, we decline to do so here. For the immediate purposes of plaintiff's unconstitutional conditions argument, we analyze Const 1963, art 10, § 2 and US Const, Ams V and XIV coextensively, although we are not bound to do so.

Accordingly, in order to address plaintiffs' arguments, we will inquire whether 2012 PA 300 "coerces" public school employees into relinquishing their constitutional rights. We will also evaluate 2012 PA 300 under the United States Supreme Court's "rough proportionality" standard, even though the Court has yet to extend this analysis to situations akin to that in the present case. Applying the analytical framework set forth by the United States Supreme Court, we find plaintiffs' unconstitutional conditions argument unavailing. The retiree healthcare contributions made pursuant to MCL 38.1343e are indeed, as the Court of Appeals determined in *AFT Mich II*, voluntary. They are not the product of "coercion" by an unconstitutional condition.

As an initial matter, we note that a necessary premise of plaintiffs' unconstitutional conditions argument is the existence of a situation in which there would have been a compensable taking but for the property owner's *choice* to give property rights to the government. Only in such a situation could a property owner properly argue that he or she had a constitutional right to be free of an uncompensated taking that an unconstitutional condition allegedly coerced the owner to waive. In the

present case, this would require an affirmation of the Court of Appeals' holding in *AFT Mich I* that a *compelled* healthcare contribution under MCL 38.1343e constitutes a taking. *AFT Mich I*, 297 Mich App at 617-621. However, we need not reach the merits of *AFT Mich I* because, even assuming that a compelled healthcare contribution would constitute a taking, plaintiffs have nonetheless failed to demonstrate that 2012 PA 300 would violate the doctrine of unconstitutional conditions if that were the case.

The state here is not coercing public school employees into giving up their rights under Const 1963, art 10, § 2 and US Const, Ams V and XIV, but is merely seeking, as a condition for receiving access to retiree healthcare benefits, the assistance of public school employees in paying for these benefits. Plaintiffs have not demonstrated that the terms controlling MCL 38.1343e contributions (the allegedly unconstitutional condition) are unrelated to the state's purpose furthered by the contributions or that the relationship between the condition and the benefit is so compelling or disproportionate that public school employees are effectively coerced into relinquishing their constitutional rights.

Suggesting that the state's condition here bears no nexus or roughly proportionate relationship to the state's interest advanced by the contributions would strain credulity. The MCL 38.1343e contributions directly fund the MPSERS's retiree healthcare program, advancing the state's strong interest in providing retiree healthcare for its public school employees. If, for example, 2012 PA 300 had required that public school employees grant the state easements on their real property in order to qualify for retiree healthcare benefits, that condition could not similarly be said to advance the same state interest because the condition would be entirely unrelated to the state's

interest in providing for retiree healthcare benefits. The present situation clearly implicates a strong and direct connection, or nexus, between the conditional burden placed on public employees and the state's interest.

Furthermore, the willingness of public school employees to participate in the retiree healthcare program compellingly suggests that any burden imposed on employees by the state's condition is also proportionate to its goal. This is because, in this situation, the interests of the state and public school employees participating in the MPSERS retiree healthcare program are aligned. That is, the state seeks to provide retiree healthcare to its public school employees, and these self-same employees seek to receive retiree healthcare benefits. If the burden imposed by the MCL 38.1343e contributions were disproportionate to the state's interest in requiring these contributions, it would mean that public school employees were contributing more value than they expected to receive from the retiree healthcare program.[18] If that were the case, few employees would presumably participate.

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[18] To understand why this is so, consider the situation in *Dolan*. In that case, the plaintiff landowner sought a permit to expand her store and pave a new parking lot. As a condition of granting the permit, the defendant city required her to allocate a portion of her land as public green space, which could not be developed in the future, in order to mitigate the flooding hazard that the new store and parking lot would pose. The city also demanded that she provide a public pathway on her property to accommodate increased bicycle and pedestrian traffic that her addition was expected to generate. *Dolan*, 512 US at 379-380. The Court in *Dolan* ruled the city's conditions to be unconstitutional because the burden that the conditions would impose on the plaintiff was disproportionate to the anticipated problems regarding drainage and increased pedestrian and bicycle traffic that the city would face if the plaintiff completed her construction project. *Id*. at 393-396. The city had not explained why the green space dedicated to flood control had to be public, as opposed to private, in order to mitigate the flood risk. Furthermore, it had not demonstrated that the increased foot and bicycle traffic warranted an additional pathway through the plaintiff's property. It appeared that the city was trying to improve *its* public space and thoroughfares

We also do not believe that the state has created a coercive situation in which public school employees are compelled to participate in the retiree healthcare system. Unlike the situations in the cases cited by plaintiffs involving land use permits—a benefit within the government's exclusive power to convey—there are multiple sources of healthcare coverage available to public school employees. Public school employees who dislike the terms of the program can explore health insurance options in the open market. If the MPSERS retiree healthcare program achieves a high participation rate, this seems more likely to be attributable to the fact that the program constitutes an attractive retirement benefit, rather than because there is some ongoing coercion in inducing employee participation.[19]

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at *the plaintiff's sole expense*, instead of proportionally offsetting the problems that the plaintiff's particular development project would create for the community.

In the present case, the condition attached to the governmental benefit is the payment of the MCL 38.1343e contributions under the terms provided in 2012 PA 300, which condition directly advances the state's interest in providing healthcare benefits to public school retirees. In order for the condition to be deemed disproportionate to the state's interest, the burden imposed on public school employees by the terms governing MCL 38.1343e contributions would need to exceed the burden incurred by the state in providing the retiree healthcare benefits. Plaintiffs have not alleged this to be the case, and because the state exclusively bore these costs until 2010 PA 75 was passed, we presume that employee contributions only cover a portion of this program's full costs. If anything, it would appear that the present retiree healthcare system still benefits, disproportionately as a class, public school employees who participate and not the state.

[19] See *South Dakota v Dole*, 483 US 203, 211; 107 S Ct 2793; 97 L Ed 2d 171 (1987):

> [South Dakota] contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

In sum, we find unavailing plaintiffs' argument that 2012 PA 300 violates the constitutional prohibitions against an uncompensated taking contained in Const 1963, art 10, § 2 and US Const, Ams V and XIV. Public school employees who have chosen to participate in the retiree healthcare program have voluntarily undertaken to contribute to the program, and the state does not "take" property that is voluntarily given. Furthermore, these contributions are genuinely voluntary because plaintiffs have failed to show that 2012 PA 300 violates the doctrine of unconstitutional conditions. The retiree healthcare contribution is inextricably and directly linked to the governmental benefit being offered, and no public school employee is coerced into participating in the retiree healthcare system. 2012 PA 300 has not infringed public school employees' rights under Const 1963, art 10, § 2 and US Const, Ams V and XIV to be free of uncompensated takings.

B. CONTRACTS

Plaintiffs next argue that 2012 PA 300 impairs the "obligation of contracts" in violation of Const 1963, art 1, § 10 and US Const art I, § 10, cl 1. We again disagree. Both the Michigan and United States Constitutions

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Although the Court did not specifically address the doctrine of unconstitutional conditions in *Dole*, we find its analysis of coerciveness instructive. *Dole* articulated a limitation on the constitutional spending power of the Congress—federal spending must be related to the federal interest advanced by the spending project, and the spending must not be so great that it coerces states into acquiescing to conditions placed on that funding. This limitation is in many ways analogous to the doctrine of unconstitutional conditions—while the doctrine of unconstitutional conditions protects individual constitutional rights from *governmental* incursion, the doctrine set forth in *Dole* and related cases protects the states' right to sovereignty and self-governance from *federal* incursion.

prohibit laws that impair obligations under contracts. Const 1963, art 1, 10 provides:

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

US Const, art I, § 10, cl 1 provides:

> No State shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

This Court has often interpreted these provisions coextensively,[20] and because plaintiffs have not argued that the Michigan Constitution affords additional protection, we will not seek to ascertain otherwise.

1. RETIREE HEALTHCARE BENEFITS

AFT Mich I, 297 Mich App at 610-616, held that 2010 PA 75 violated Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1 because it significantly impaired employment contracts and the state had not demonstrated that the impairment was necessary to serve the public good. Plaintiffs continue to argue that the modifications made to the retiree healthcare plan unconstitutionally impair the employment contracts between public school employees and employer school districts. Specifically, plaintiffs allege that 2012 PA 300 impairs employees' contracted-for right to a particular salary. We reject this argument as asserted against 2012 PA 300, but we do not decide whether the Court of Appeals correctly found 2010 PA 75 to be violative of the aforementioned constitutional provisions.

In *AFT Mich II*, the Court of Appeals analyzed and

[20] We are not bound to interpret these provisions coextensively, but we may in particular situations be persuaded to do so. See *In re Certified Question*, 447 Mich 765, 776 n 13; 527 NW2d 468 (1994).

subsequently rejected plaintiffs' claim that the retiree healthcare modifications enacted by 2012 PA 300 violated the Contracts Clauses:

> In contrast to the scheme established under 2010 PA 75, which was deemed unconstitutional in [*AFT Mich I*], employee contributions under 2012 PA 300 are now voluntary. A member may now choose to either continue to participate in the retiree healthcare program and contribute 3% of his or her salary to do so, or the member may simply opt out of the program altogether. . . . Thus, the constitutional infirmities found in [*AFT Mich I*] have now been cured. [*AFT Mich II*, 303 Mich App at 673.]

We agree with the Court of Appeals' conclusion in *AFT Mich II*. There can be no impairment of a contract when the complaining party can freely avoid the alleged impairment altogether. Under MCL 38.1391a(5), public school employees who do not wish to participate in the retiree healthcare program can simply opt out and instead contribute money into their Tier 2 accounts. By opting out, the employees guarantee that the state will never receive their 3% contributions and that they will be paid the full amount of their bargained-for salaries. The 2012 PA 300 retiree healthcare modifications thus do not impair any employment contracts; rather, the act affords public school employees the option to choose between two potential retirement benefits. The underlying employment contracts between public school employees and employer school districts are unaffected by this exercise of choice.[21]

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[21] The employment contracts of public school employees who opt out of the retiree healthcare program have not also been impaired by the loss of those benefits. This Court held in *Studier*, 472 Mich at 653-655, that the Michigan Constitution does not protect healthcare benefits. See note 11 of this opinion. Only "accrued financial benefits" are protected, and healthcare benefits are not "financial" and cannot be "accrued." *Studier*, 472 Mich at 653-655. Plaintiffs themselves acknowledge that public

2. PENSION BENEFITS

Plaintiffs also argue that 2012 PA 300 impairs separate contracts between the state and public school employees guaranteeing the latter the opportunity to accrue pension benefits at a specific rate.[22] We reject this argument as well.

A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). The party seeking to enforce a contract bears the burden of proving that the contract exists. *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, *Rowe v Montgomery*

school employees have no contractual right (or any other right) to receive retiree healthcare benefits, stating that with respect to those benefits, the employees are "promised nothing." Therefore, public school employees who elect to forgo retiree healthcare benefits have not been harmed in any legally cognizable manner. Those employees continue to receive their bargained-for salaries, and they have not obtained certain benefits—retiree healthcare benefits—that they never had any legal right or entitlement to receive in the first place.

[22] Plaintiffs have argued that 2012 PA 300 has impaired two different classes of contracts. The first are employment contracts between public school employees and their employer school districts, addressed in Part IV(B)(1) of this opinion. The second are contracts that plaintiffs argue exist between the state and public school employees guaranteeing the latter the right to accrue pension benefits at a certain rate. While individual offers of public school employment are made by employer school districts, all public school employees receive retirement benefits directly from the state through the MPSERS. For this reason, any contractual rights to future pension benefits would necessarily be found in contracts between public school employees and the state, and not in employment contracts between the employees and their employer school districts. However, for the reasons described subsequently, we find that no such contracts exist.

Ward & Co, Inc, 437 Mich 627, 672-673; 473 NW2d 268 (1991) (opinion by BOYLE, J.), or the performance of a service in exchange for a promise, *Certified Question*, 432 Mich 438, 446; 443 NW2d 112 (1989).

A contract for employment is typically formed when the employee accepts the employer's promised terms of employment through performance. *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 630-631; 292 NW2d 880 (1980) (separate opinion by RYAN, J.). "The employer's promise constitutes, in essence, the terms of the employment agreement . . . ." *Id*. The terms of an employment contract regarding compensation must be express promises, either oral or written; an employer's policy statements may not form the basis for any rights to specific forms or amounts of compensation. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 528-531; 473 NW2d 652 (1991).

2012 PA 300 requires all current public school employees to increase the amount of their pension contributions in order to continue accruing pension benefits, calculated using a 1.5% multiplier. Members of the Basic Plan must now contribute 4% of their salaries, and members of the MIP must now contribute 7%. These changes are codified in MCL 38.1343g(1):

> Beginning on the transition date and ending upon the member's termination of employment or attainment date, as applicable under [MCL 38.1359(1)], each member who made the election under [MCL 38.1359(1) to continue accruing pension benefits using the 1.5% multiplier] shall contribute an amount equal to a percentage of his or her compensation to the reserve for employee contributions or to the member investment plan as set forth in subdivision (a) or (b), as applicable, to provide for the amount of retirement allowance that is calculated only on the credited service accrued and compensation for that member on or after the transition date. Subject to subsection (2), the

> member shall not contribute any amount under this subsection for any years of credited service accrued or compensation before the transition date. Subject to subsection (2), the amount to be contributed under this subsection is as follows:
>
> (a) For a member who does not contribute to the member investment plan as of September 3, 2012, 4% of compensation to the reserve for employee contributions.
>
> (b) For a member who does contribute to the member investment plan as of September 3, 2012, 7% of compensation to the member investment plan.

The increased salary contributions under MCL 38.1343g are not mandatory; public school employees are given a choice, described in MCL 38.1384b:

> (1) Beginning February 1, 2013, the calculation of a retirement allowance under this act for a member who did not make the election under [MCL 38.1359(1) to pay the additional contributions under MCL 38.1343g] and who made or is considered to have made the alternative election under [MCL 38.1359(2)(a) to continue accruing pension benefits after the transition date] shall include only the following items of credited service, as applicable, multiplied by 1.5% of final average compensation as provided in [MCL 38.1384]:
>
> (a) The years and fraction of a year of credited service accrued to that member before the transition date.
>
> * * *
>
> (2) Beginning February 1, 2013, the calculation of a retirement allowance under this act for a member described in subsection (1) shall also include the following items of credited service, as applicable, multiplied by 1.25% of final average compensation:
>
> (a) The years and fraction of a year of credited service accrued to that member on and after the transition date.
>
> * * *

(3) Beginning February 1, 2013, the calculation of a retirement allowance under this act for a member who did not make the election under [MCL 38.1359(1) to pay the additional contributions under MCL 38.1343g] and who made the alternative election under [MCL 38.1359(2)(b) to cease accruing pension benefits and contribute to a Tier 2 account] shall include only the following items of credited service, as applicable, multiplied by 1.5% of final average compensation as provided in [MCL 38.1384]:

(a) The years and fraction of a year of credited service accrued to that member before the transition date.

* * *

(4) Beginning February 1, 2013, the calculation of a retirement allowance under this act for a member described in subsection (3) shall not include any year or fraction of a year of service performed by that member on and after the transition date or any service credit that is purchased by that member after February 1, 2013, except as provided in subsection (3)(c). Beginning with the first payroll date after the transition date, and ending upon the member's termination of service, the employer of a member described in subsection (3) shall contribute 4% of the member's compensation as defined in [MCL 38.1422(1)] to the member's Tier 2 account. . . .

* * *

(8) The calculation of a retirement allowance under this act for a member who makes the election under [MCL 38.1359(1) to pay the additional contributions under MCL 38.1343g] . . . shall include all items of credited service accrued to that member, regardless of when the service credit was accrued, which shall be multiplied by 1.5% of final average compensation as provided in [MCL 38.1384].[23]

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[23] As amended by 2012 PA 359.

Under MCL 38.1384b, public school employees may choose to pay the additional contributions described in MCL 38.1343g, or they may instead continue making contributions at their current rates. If employees decide to forgo making additional contributions, they will continue accruing pension benefits; however, the benefits that they accrue after the transition date will be calculated using a multiplier of 1.25%. Employees may also elect to forgo accruing additional pension benefits entirely and instead begin making employer-matched contributions to a Tier 2 retirement account. All pension benefits that public school employees have accrued before the effective date of 2012 PA 300 remain unaffected and will be calculated using the 1.5% multiplier.

Plaintiffs claim that public school employees have a contractual right to continue accruing pension benefits calculated using the 1.5% multiplier. They assert that this right has arisen from statements made in publications prepared by the state Office of Retirement Services explaining to public school employees the retirement benefits they would be eligible to receive. These publications contained statements such as: "Your Retirement Plan provides a benefit that is determined by a formula. The formula is your final average salary times 1.5% (.015) times your total years of service credit . . . ." Michigan Public School Employees' Retirement System, *An Introduction to Your Retirement Plan* (1990 rev), p 7. Plaintiffs claim that these statements are unequivocal promises by the state to provide pension benefits under those specific terms, which were made binding contractual guarantees when public school employees entered into their employment. By enacting 2012 PA 300, plaintiffs argue, the state impaired contracts between itself and the employees by altering the manner in which current employees continue to accrue pension benefits.

In *AFT Mich II*, the Court of Appeals rejected plaintiffs' argument because it found that no contracts existed between the state and public school employees creating rights to future pension benefits:

> The Court of Claims did not err by concluding that the [publications] did not form an enforceable contract. The pamphlets and brochures were simply an informational explanation of the then existing formula; the state was not bound, in perpetuity, by the contents of those publications. [*AFT Mich II*, 303 Mich App at 662.]

We agree with the Court of Appeals. Plaintiffs' argument fails because they have not shown that enforceable contracts concerning future pension benefits exist between the employees and the state.[24] This is so for two reasons.

First, plaintiffs cannot demonstrate that the state actually made any promises. Every publication that plaintiffs cite to demonstrate the existence of explicit promises contains a clear *disclaimer* notifying the reader that public school employee retirement benefits

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[24] In *AFT Mich II*, plaintiffs argued before the Court of Appeals that public school employees had contractual rights to *future* pension benefits on the basis of Const 1963, art 9, § 24, which states:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

This argument was properly rejected by the Court of Appeals in *AFT Mich II* on the basis of this Court's holding in *Studier* that Const 1963, art 9, § 24 protects only *accrued*, or *earned*, pension benefits. *AFT Mich II*, 303 Mich App at 666-667, 670, citing *Studier*, 472 Mich at 654-658. The form or availability of *future* pension benefits for state employees is not governed by Const 1963, art 9, § 24.

are governed by the Retirement Act, and that the act will prevail if a conflict arises between the act and the publications. Some disclaimers unambiguously state that the Legislature may alter the pension benefits. For example, the publication issued in 1990 contained the following language:

> DISCLAIMER
>
> This booklet was written as an introduction to your retirement plan. You should find it very helpful in the early stages of your planning for retirement. It is designed to answer commonly asked questions in a simple and easy to understand style. However, information in this booklet is not a substitute for the law. If differences of interpretation occur, the law governs. *The law may change at any time altering information in this booklet.* [*Your Retirement Plan*, p ii (emphasis added).]

Another publication, issued in 1997, included the following in its introduction:

> Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). *If the provisions of the Act conflict with this summary, the Act controls.* [Michigan Public School Employees' Retirement System, Retirement Guidelines (May 1997), p 3 (emphasis added).]

As the Court of Appeals correctly concluded, these disclaimers demonstrate that the publications are merely instructional materials designed to generally explain the retirement benefits available at the time of publication. A person could not read these disclaimers and reasonably believe that the state was legally obligating itself to provide public school employees pension benefits exactly as described in the publications for the duration of their careers, notwithstanding any altered

fiscal circumstances of the state or any altered policy perspectives on the part of the lawmaking branch of the state. The disclaimers are not, as plaintiffs characterize them, "vacuous" and "devoid of substance and meaning." On the contrary, their meaning is plain—retirement benefits are controlled by the law in effect at the time and not by any statements made in ephemeral publications.

Second, assuming arguendo that plaintiffs could demonstrate that the publications *did* make express promises, plaintiffs have failed to show that these promises could be enforced against the state. "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made on its behalf by its officers or agents without previous authority conferred by statute or the Constitution." *Roxborough v Mich Unemployment Compensation Comm*, 309 Mich 505, 510; 15 NW2d 724 (1944) (quotation marks and citation omitted). Individuals dealing with public officers are charged with knowledge of the limits of the officers' authority, and officers cannot act for the state without the express power to do so.[25] Therefore, even if the publications contained express promises of future benefits, in order to form a contract the promises would still need to have been made by a promisor with the legal authority to bind the state in such a matter.

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[25] See *Roxborough*, 309 Mich at 511 (holding that the public employee plaintiff was charged with knowledge of the statutory limitation on the Governor's authority to bind the state to pay the employee a fixed annual salary). See also *Martin v Secretary of State*, 482 Mich 956, 957 (2008) (MARKMAN, J., concurring) ("There cannot be as many laws as there are public servants who dispense guidance or advice on the meaning of the law. Rather, such guidance or advice must always be understood as subordinate to the law actually enacted by the elected representatives of the people.").

The publications at issue were created by the Office of Retirement Services. Retirement benefits for public school employees are governed by the Retirement Act. Nothing in the Retirement Act confers on the Office of Retirement Services the power to contractually bind the state to provide certain retirement benefits, and plaintiffs have cited no such authority. Plaintiffs treat the state as though it were a single entity, but in reality it is a complex amalgamation of various branches, agencies, offices, and individual agents, from the Legislature to tens of thousands of civil servants working in cities and counties across Michigan. The actions or statements of a single office or individual cannot reasonably be held to bind the entire state absent some clear authority on the part of the particular actor to do so; otherwise, the state could be liable for innumerable and inconsistent ultra vires acts, rendering effective and efficient government impossible. Accordingly, even if the statements contained in the publications *could* reasonably be interpreted as constituting promises for future pension benefits, these promises would nonetheless have been made by a public actor lacking the power to bind the state. Public school employees are charged with knowing the limits of the Office of Retirement Services' power, *Roxborough*, 309 Mich at 511, and cannot rely on statements in publications as the source of contractual rights. Public school employees accordingly possess no contractual rights to continue accruing pension benefits, and as a result, plaintiffs' claim that 2012 PA 300 unconstitutionally impairs contractual rights to future pension benefits lacks merit.[26]

[26] Although public school employees have no contractual right to accrue future pension benefits, they do possess a contractual right to receive the pension benefits they have already earned. Const 1963, art 9, § 24 protects "accrued financial benefits" of public pension plans by making them contractual obligations of the state. As previously

C. "SUBSTANTIVE" DUE PROCESS

AFT Mich I held that 2010 PA 75 violated the "substantive" due process guarantees of Const 1963, art 1, § 17 and US Const, Am XIV, § 1. *AFT Mich I*, 297 Mich App at 621. Plaintiffs continue to argue that the modifications made to the retiree healthcare benefit plan infringe public school employees' "substantive" due process rights. We once more disagree. Without offering any pronouncements regarding the constitutionality of 2010 PA 75, we conclude that 2012 PA 300 does not infringe any "substantive" due process rights that public school employees may possess.

The Michigan and United States Constitutions forbid the state from depriving any person of life, liberty, or property without due process of law. Const 1963, art 1, § 17 provides:

> No person shall be . . . deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and

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explained, this Court has interpreted this provision to include only those pension benefits that public employees have earned through their service to date; in other words, it only protects pension benefits " 'arising on account of service rendered in each fiscal year'. . . ." *Studier*, 472 Mich at 654-655, quoting Const 1963, art 9, § 24. Because 2012 PA 300 on its face does not diminish accrued pension benefits, it does not contravene Const 1963, art 9, § 24. However, we do recognize, as amicus curiae Michigan Education Association (MEA) has asserted, that it is an entirely different analysis under Const 1963, art 9, § 24 if any of the funds generated by the salary levy under MCL 38.1343g are used to fund pension benefits *accrued* before 2012 PA 300 took effect. While the state has an obligation to fully fund its pension liabilities, whether it may do this by requiring employees to assist in paying for pension benefits that they have already earned is a matter not before this Court today and is therefore neither addressed nor resolved. Although the MEA has raised this concern and was initially a plaintiff in the present litigation, the MEA chose not to appeal the Court of Appeals' ruling in *AFT Mich II* and has instead submitted a brief as amicus curiae.

> just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

The Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . [US Const, Am XIV, § 1.]

Although these provisions are often interpreted coextensively,[27] Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by US Const, Am XIV, § 1.[28] However, as previously noted, plaintiffs have not argued that Const 1963, art 1, § 17 should be interpreted any differently than US Const, Am XIV, § 1 in the instant case, so we will not seek to determine otherwise.

This Court has stated that the term "due process" encompasses not only procedural protections, but also contains a "substantive" component that protects individuals against "the arbitrary exercise of governmental power." *Bonner v City of Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014). If a challenged law does not infringe any "fundamental rights"—the substantive liberties that are deemed "implicit in the concept of ordered liberty"[29]—this Court has stated that to prevail on a claim of a violation of "substantive" due process, the plaintiff must prove that the challenged law is not "reasonably related to a legitimate governmental interest." *Id*. at 227.

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[27] See, e.g., *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).

[28] The portions of Const 1963, art 1, § 17 and US Const, Am XIV addressing due process are worded differently, so they may grant disparate levels of protection. This Court has, on occasion, applied distinctive due process protections under Const 1963, art 1, § 17 broader than have been afforded under US Const, Am XIV. See, e.g., *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7; 351 NW2d 831 (1984).

[29] *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004) (quotation marks and citations omitted).

Plaintiffs contend that 2012 PA 300 violates "substantive" due process because current employees contribute money to fund current retirees' healthcare benefits absent any guarantee that current employees themselves will ever receive retiree healthcare benefits. Plaintiffs point out that public school employees are required to contribute to either the retiree healthcare fund or a Tier 2 account. Because these employees lack contractual rights to any specific future benefits, plaintiffs argue that 2012 PA 300 is unconstitutional because the Legislature might attempt in the future to modify the retiree healthcare system or the separate retirement allowance provided by MCL 38.1391a(8). By scaling back retiree healthcare coverage or reducing the matching employer contributions to the Tier 2 accounts, the Legislature could diminish the value of whatever option public school employees select. In essence, plaintiffs posit, employees have been compelled to make an irrevocable decision without any guarantee that their chosen benefits will not be diminished or eliminated at some time in the future.

In assessing plaintiffs' "substantive" due process claim, the Court of Appeals in *AFT Mich II* held that the act does not violate "substantive" due process guarantees:

> The state, in enacting 2012 PA 300, has set forth a legitimate governmental purpose: to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It is undisputed that in recent years public schools have been required to pay higher fees for the healthcare of retirees and their dependents. Healthcare costs are expected to continue to rise in the future. By seeking voluntary participation from members, the statute rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressures on public schools. [*AFT Mich II*, 303 Mich App at 676.]

We agree with the analysis of the Court of Appeals. Plaintiffs have not suggested that 2012 PA 300 infringes any fundamental rights, so the pertinent test for 2012 PA 300 under this Court's "substantive" due process precedents is whether the law is reasonably related to a legitimate governmental purpose. We find this test to be fully satisfied. The state may reasonably request that public school employees assist in funding a retiree healthcare benefit system to which they belong. The state's purpose advanced by the challenged portions of 2012 PA 300—implementing a fiscally responsible system by which to fund public school employees' retiree healthcare— is unquestionably legitimate. It is entirely proper for the state to seek the continuation of an important retirement benefit for its public school employees while simultaneously balancing and limiting a strained public budget.[30] The means used by the state—the retiree healthcare modifications made by 2012 PA 300—are also reasonably related to this purpose. It is altogether reasonable for the state to choose to maintain retiree healthcare benefits for all of its current public school retirees, and it is equally reasonable for the state to choose to maintain this program for current public school employees. Moreover, because the Legislature has deemed it fiscally untenable for the state

[30] At the close of the 2010 fiscal year, the MPSERS was underfunded by an estimated $45.2 billion. Of that amount, the retiree healthcare benefits program accounted for approximately $27.6 billion in unfunded liability. Michigan Public School Employees' Retirement System, *Comprehensive Annual Financial Report for the Fiscal Year Ended September 30, 2011* (January 20, 2012), p 34. Between 2010 and 2011, the cost of providing retiree healthcare benefits increased more than 45%, from $705 million to more than $1 billion. *Id*. at 30. It was hardly unreasonable for the state to have concluded at the time that the MPSERS was in need of reform and modification.

to place the entire burden of providing these benefits on the taxpayer, it is also reasonable that the state would choose to have current public school employees assist in contributing to the costs of this program. If the state requires additional financial support to maintain the public school employees' retiree healthcare system, which class of persons is more appropriate to assist in maintaining the fiscal integrity of this program than the participants themselves? We do not believe that the state or federal Constitutions require Michigan taxpayers to fund the entire cost of a retirement benefit for a discrete group of public employees. The state is not generally constrained from modifying its own employee benefits programs to accommodate its fiscal needs.

We recognize that some employees might be dissatisfied if and when, and for whatever reason, they ultimately fail to qualify for retiree healthcare after contributing to fund the retiree healthcare of others. However, to prevail on a "substantive" due process claim, plaintiffs must surmount the exceedingly high hurdle of demonstrating that the law is altogether *unreasonable*, and they have completely failed to do so here. These employees fully recognized that the possibility of not qualifying for retiree healthcare benefits existed when they initially opted into the retiree healthcare program. There is nothing arbitrary or unreasonable about the choice placed before public school employees by 2012 PA 300.

We are also unpersuaded by plaintiffs' concerns about the possibility of subsequent modifications to either the retirement healthcare benefit program or the MCL 38.1391a(8) separate retirement allowance. This Court assesses the constitutionality of enacted

legislation.[31] None can predict with certainty the laws that may be enacted months or years in the future. If the Legislature does indeed attempt to modify the current retiree healthcare system in a manner that plaintiffs believe to be improper, they may assert a separate challenge at that time. We will not speculate at this juncture about the possibility or substance of future legal changes. 2012 PA 300 is the only law challenged in this case, and we conclude that it comports with constitutional guarantees of "substantive" due process.

V. CONCLUSION

On the basis of the preceding analysis, we conclude that plaintiffs have failed to demonstrate that 2012 PA 300 takes private property without providing just compensation in violation of Const 1963, art 10, § 2 or US Const, Ams V and XIV; that it impairs the obligation of contracts in violation of Const 1963, art 1, § 10 or US Const, art I, § 10, cl 1; or that it violates the guarantee of due process found in Const 1963, art 1, § 17 or US Const, Am XIV, § 1. Absent any contractual guarantees to the contrary, the state may prospectively adjust the compensation of its employees without breaching either the state or federal Constitutions. Because plaintiffs have failed to demonstrate

[31] As United States Supreme Court Justice Oliver Wendell Holmes explained more than a century ago, the function of judicial review is to apply and evaluate *current* laws, stating in *Prentis v Atlantic Coast Line Co*, 211 US 210, 226; 29 S Ct 67; 53 L Ed 150 (1908):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

that 2012 PA 300 restructures the retirement benefits offered to public school employees in an unconstitutional manner, we affirm the judgment of the Court of Appeals.

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

BERNSTEIN, J., took no part in the decision of this case.

KRUSAC v COVENANT MEDICAL CENTER, INC

Docket No. 149270. Argued January 13, 2015 (Calendar No. 4). Decided April 21, 2015.

John Krusac, as personal representative of the estate of Dorothy Krusac, brought a medical malpractice action in the Saginaw Circuit Court against Covenant Medical Center, Inc., alleging that Dorothy Krusac died as a result of injuries she sustained when she rolled off an operating table following a cardiac catheterization procedure. During discovery, it became known that one of the attending medical personnel had filled out an incident report shortly after the event and submitted it to her supervisor. Plaintiff filed a motion in limine, asking the court to inspect the incident report in camera and provide plaintiff with the facts contained in it. The court, Fred L. Borchard, J., denied plaintiff's motion on the ground that the peer-review privilege set forth in MCL 333.20175(8) and MCL 333.21515 protected the report from discovery. On plaintiff's motion for reconsideration, however, the court reviewed the report in camera and subsequently ordered defendant to provide plaintiff with a portion of the incident report that contained only objective facts in light of *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014), which held that the peer-review privilege does not apply to objective facts contained in an incident report. Defendant sought leave to appeal the order in the Court of Appeals and moved to stay the proceedings, both of which motions the Court of Appeals denied. Defendant then sought leave to appeal in the Supreme Court and again moved to stay the proceedings. The Supreme Court granted both motions. 496 Mich 855 (2014).

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

MCL 333.20175(8) and MCL 333.21515 do not contain an exception to the peer-review privilege for objective facts. To the extent that *Harrison* held otherwise, it was wrongly decided and was overruled. MCL 333.20175(8) and MCL 333.21515 make privileged all records, data, and knowledge collected for or by a peer-review committee in furtherance of its statutorily mandated

purpose of reducing morbidity and mortality and improving patient care. This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report. The trial court's order for defendant to produce the objective facts, which was based on *Harrison*'s holding, was vacated, and the case was remanded for further proceedings.

Trial court order vacated; case remanded for further proceedings.

Justice BERNSTEIN took no part in the decision of this case.

HOSPITALS — PEER-REVIEW COMMITTEES — DISCLOSURE OF COMMITTEES' RECORDS, DATA, AND KNOWLEDGE — INCIDENT REPORTS — PRIVILEGE.

MCL 333.20175(8) and MCL 333.21515 make privileged all records, data, and knowledge collected for or by a peer-review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care; this includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report.

Mark Granzotto, PC (by *Mark Granzotto*) and *Law Office of Cy Weiner PLC* (by *Carlene J. Reynolds*), for plaintiff.

Hall Matson, PLC (by *Thomas R. Hall* and *Samuel B. Oberman*), for defendant.

Amici Curiae:

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus*), for the Regents of the University of Michigan.

Chris E. Davis for the Michigan Protection & Advocacy Service, Inc.

Miller, Canfield, Paddock and Stone, PLC (by *Irene Bruce Hathaway*), for Michigan Defense Trial Counsel.

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*), for the Michigan State Medical Society and the American Medical Association.

Smith Haughey Rice & Roegge (by *Stephanie C. Hoffer*) for the Michigan Society of Healthcare Risk Management.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree*), for Munson Healthcare, Inc.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter*) for the Michigan Health and Hospital Association.

Charfoos & Christensen, PC (by *David R. Parker*), for the Michigan Association for Justice.

Thomas C. Miller for Jeanne Harrison.

Olsman Mueller Wallace & MacKenzie, PC (by *Jules B. Olsman*), for Michigan's State Long Term Care Ombudsman Program.

Reiter & Walsh, PC (by *Emily G. Thomas*), for Health Care Administrator Brenda Keeling, R.N.

PER CURIAM. In this interlocutory appeal, we are once again asked to consider the scope of the peer review privilege found in MCL 333.20175(8) and MCL 333.21515 of the Public Health Code, MCL 333.1101 *et seq*. Specifically, we must decide whether the trial court erred by ordering production of the objective facts contained in an incident report authored by an employee of defendant Covenant Healthcare. The trial court's decision was based on *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; 851 NW2d 549 (2014), which held, in part, that the peer review privilege does not protect objective facts gathered contemporaneously with an event.

We hold that §§ 20175(8) and 21515 do not contain an exception to the peer review privilege for objective facts. As a result, this portion of *Harrison* was wrongly decided. In this case, the trial court erred by relying on *Harrison* to order production of the objective-facts portion of the incident report. Therefore, we vacate the trial court's May 8, 2014 order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In September 2008, Pramod K. Sanghi, M.D., performed a cardiac catheterization on 80-year-old decedent Dorothy Krusac, successfully placing stents in Krusac's heart. Immediately following the procedure, however, Krusac began moving her legs around and rolled off the operating table. Three medical personnel were present when this happened: Deborah Colvin, R.N., Heather Gengler, R.N., and Rogers Gomez, the lab technician. According to the deposition testimony of Colvin and Gomez, they were able to catch Krusac and cradle her gently to the floor, where she came to rest on her left side. At that time, Krusac denied hitting her head, but later complained of neck and back pain from the fall. The CT scan performed later that day showed no evidence of injury from the fall. Shortly after the surgery and fall, Krusac died.

Plaintiff John Krusac, as personal representative of the estate of Dorothy Krusac, filed a medical malpractice complaint in the Saginaw Circuit Court against defendant, alleging that Krusac died as a result of injuries sustained from the fall. During discovery, it became known that Colvin had filled out an incident report shortly after the event and submitted it to her supervisor. Plaintiff filed a motion in limine on the eve of trial, asking the court to conduct an in camera inspection of the incident report and provide plaintiff with the facts contained in it. Relying on *Harrison*, plaintiff argued that the facts were necessary to cross-examine the hospital staff and that it would be unethical for defendant to offer a defense inconsistent with the facts contained in the report. Defendant responded that the peer review privilege under §§ 20175(8) and 21515 protected the report from discovery. After hearing oral arguments, the trial court denied plaintiff's

motion. Plaintiff thereafter sought reconsideration, which the court granted. The court ordered defendant to produce a copy of the report for in camera review. After reviewing the report, on May 8, 2014, the trial court issued an order requiring defendant to provide plaintiff with the first page of the incident report, which contained only objective facts. The court based its decision on the Court of Appeals' recent holding in *Harrison* that the peer review privilege does not apply to objective facts contained in an incident report.

Defendant sought leave to appeal in the Court of Appeals, and moved for immediate consideration and a stay of the proceedings. The Court of Appeals granted immediate consideration, but denied defendant's application for leave to appeal for failure to persuade the Court of the need for immediate appellate review. The Court also denied the motion to stay the proceedings. Defendant then sought review by this Court. After granting defendant's motion to stay the trial court proceedings, we granted leave to appeal and directed the parties to address

> (1) whether *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014), erred in its analysis of the scope of the peer review privilege, MCL 333.21515; and (2) whether the Saginaw Circuit Court erred when it ordered the defendant to produce the first page of the improvement report based on its conclusion that "objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege." [*Krusac v Covenant Med Ctr, Inc*, 496 Mich 855-856 (2014).]

II. STANDARD OF REVIEW

This case involves a question of statutory interpretation, which we review de novo. *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014). As with any statutory interpretation, our goal is to give effect to the

Legislature's intent, focusing first on the statute's plain language. *Id*. at 696. When the language of a 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. *Id*. (citation and quotation marks omitted).

III. ANALYSIS

The peer review privilege is a creature of statute, not the common law. See Scheutzow & Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 JL & Health 169, 181 (1992-1993) ("It is generally accepted that the privilege ascribed to peer review proceedings does not arise from any recognized common law principle, but is rather a legislative creation . . . ."). Therefore, in assessing whether the peer review privilege applies to objective facts contained in an incident report, we must turn first to the language of the relevant statutes. See *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 33; 594 NW2d 455 (1999).

MCL 333.21513(d) imposes a duty on hospitals to create peer review committees "for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." Essential to the peer review process is the candid and conscientious assessment of hospital practices. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680; 719 NW2d 1 (2006). To encourage such an assessment by hospital staff, the Legislature has protected from disclosure the records, data, and knowledge collected for or by peer review committees. *Id*. at 680-681. To this end, MCL 333.20175(8) reads:

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

Similarly, MCL 333.21515 provides:

> The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.[1]

These statutes, and their predecessors,[2] have been interpreted as "fully protect[ing] quality assurance/peer review records from discovery . . . ." *Dorris*, 460 Mich at 40. For example, in *Attorney General v Bruce*, 422 Mich 157, 164-165; 369 NW2d 826 (1985), we rejected the Attorney General's argument that the privilege "was intended only to protect the confidentiality of peer review proceedings from discovery in circuit court proceedings (i.e., malpractice actions) . . . ." Instead, we held that the privilege protects from disclosure records sought by the Board of Medicine and the Department of Licensing and Regulation and ordered by investigative subpoena to be produced. *Id*. at 173. Similarly, in *In re Investigation of Lieberman*, 250 Mich App 381, 389; 646 NW2d 199 (2002), the Court of Appeals held that the

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[1] In this opinion, we use "peer review committee" to refer generally to "individuals or committees assigned a professional review function" under MCL 333.20175(8) and "individuals or committees assigned a review function" under MCL 333.21515.

[2] The first peer review statutes were enacted by our Legislature nearly 50 years ago. See MCL 331.422(1) and (2) of the Hospital Licensing Act, 1968 PA 17, repealed by 1978 PA 368.

privilege protects from disclosure records sought pursuant to a search warrant in a criminal investigation. Indeed, after reviewing the language of § 21515, the court concluded that "the Legislature has imposed a *comprehensive ban* on the disclosure of [peer review materials.]" *Id*. at 387 (emphasis added).

The Court of Appeals took a more constricted view of the peer review privilege in *Harrison*. In that case, the plaintiff sued a surgeon and the hospital (the defendants) after receiving a burn from a surgical instrument during surgery. At trial, the plaintiff learned that an operating room nurse had authored an incident report. The plaintiff sought to introduce the report. The defendants objected, claiming that the peer review privilege protected the report from introduction. The trial court reviewed the report at an in camera hearing and determined that the facts in the report contradicted the operating room nurse's deposition testimony. The court found that the report itself was protected by the peer review privilege but ruled that the facts contained in the report, as opposed to the conclusions drawn, should have been documented in the plaintiff's medical record and made available to the plaintiff. The court declared a mistrial and imposed sanctions totaling roughly $54,000 on the defendants and their attorney based on their presentation of a defense inconsistent with the facts contained in the report.

In a published opinion, the Court of Appeals addressed whether the peer review privilege applied to the incident report at issue. Relying heavily on caselaw from foreign jurisdictions, the panel found a distinction between "factual information objectively reporting contemporaneous observations or findings and 'records, data, and knowledge' gathered to permit an effective review of professional practices." *Harrison*, 304 Mich

App at 30. It held that "[o]bjective facts gathered contemporaneously with an event do not fall within [the peer review privilege.]" *Id*. at 32. It reasoned that "[t]o hold otherwise would grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk manager would prefer remain concealed" and that "[t]he peer-review statutes do not sweep so broadly." *Id*. at 34. The panel concluded that the facts recorded on the first page of the incident report were not privileged, but that the remainder of the incident report was protected because it reflected a deliberative review process.[3]

However, contrary to the *Harrison* panel's conclusion, the peer review statutes do not contain an exception for objective facts contained in an otherwise privileged incident report. Both §§ 20175(8) and 21515 protect the "records, data, and knowledge" collected for or by a peer review committee. While the words "record," "data," and "knowledge" are so common they hardly bear defining, a review of the dictionary definitions of each demonstrates that the *Harrison* panel's interpretation contradicts the plain language of the peer review statutes. See *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (recognizing that a court "may consult dictionary definitions to give words their common and ordinary meaning") (citation omitted). "Record" is defined as "an account in writing or the like preserving the memory or knowledge *of facts* or events." *Random House Webster's College Dictionary* (2001) (emphasis added). "Data" is defined as "*individual facts*, statistics, or items of information." *Id*. (emphasis added). "Knowl-

[3] The panel also affirmed the trial court's decision to sanction defendants but remanded for redetermination of the proper apportionment of the sanctions. *Harrison*, 304 Mich App at 43-45.

edge" is defined as "*acquaintance with facts*, truths, or principles" or "familiarity or conversance, as by study or experience." *Id*. (emphasis added). Because the ordinary meaning of these statutory terms plainly encompasses objective facts, we hold that objective facts are subject to the peer review privilege. We therefore disagree with the *Harrison* panel's conclusion that the Legislature intended to exclude from protection objective facts contained in an otherwise peer review privileged incident report.[4]

Plaintiff argues that an interpretation of §§ 20175(8) and 21515 that protects objective facts from disclosure would conflict with MCL 333.20175(1), which requires a hospital to "keep and maintain a record for each patient, including a full and complete record of tests and examinations performed, observations made, treatments provided, and . . . the purpose of hospitalization."[5] However, § 20175(1) does not alter the scope of

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[4] To create the objective-facts exception, the *Harrison* panel relied on several cases from outside our jurisdiction. However, resort to these cases was not permitted because the peer review statutes are unambiguous. See *Madugula*, 496 Mich at 696. In any event, the cases utilized by the *Harrison* panel do not support the creation of such an exception. The panel relied upon three cases cited by this Court in *Monty v Warren Hosp Corp*, 422 Mich 138, 146-147; 366 NW2d 198 (1985): *Davidson v Light*, 79 FRD 137 (D Colo, 1978), *Bredice v Doctors Hosp*, 50 FRD 249 (D DC, 1970), and *Coburn v Seda*, 101 Wash 2d 270; 677 P 2d 173 (Wash, 1984). However, the *Monty* court relied on those cases as guidance for determining whether a hospital committee was assigned a peer review function, not whether the content of an incident report was protected by the peer review privilege. In addition, a reading of these cases indicates that they shed no light on the scope of our peer review statutes as they either do not discuss a statutory privilege at all (e.g., *Bredice* and *Davidson*), or pertain to a statutory privilege materially different from ours (e.g., *Coburn*).

[5] Essentially, plaintiff asks us to read the statutes *in pari materia*—i.e., construing them together as one law to resolve the alleged conflict. See *Int'l Business Machines v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014) (opinion by VIVIANO, J.).

the peer review privilege. Whereas §§ 20175(8) and 21515 pertain to a hospital's duty under MCL 333.21513(d) to create a peer review committee that collects and reviews information in an effort to reduce morbidity and mortality and improve patient care, § 20175(1) imposes on a hospital an entirely distinct and unrelated duty—to make a full and complete medical record concerning a patient's current care. Because these provisions pertain to entirely distinct duties, no conflict exists, and we cannot conclude that the Legislature intended § 20175(1) to create an exception to the peer review privilege. See *Bruce*, 422 Mich at 167-169 (rejecting an argument that disclosures required by another subsection of § 20175 defeated the peer review privilege).[6]

The *Harrison* panel, certain amici, and plaintiff have expressed concern that a holding that the peer review privilege applies to objective facts in an incident report "would grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk manager would prefer remain concealed." *Harrison*, 304 Mich App at 34. However, although the terms "records," "data," and "knowledge" are broad enough to include objective facts, the scope of the privilege is not without limit. Instead, the privilege only applies to

[6] Plaintiff argues, in essence, that since a hospital is required to publish certain factual information in the patient's medical record, it cannot claim the same information is protected by the peer review privilege. However, this argument misapprehends the nature of a privilege under Michigan law. We have long ago "repudiated the theory that once . . . confidential information ha[s] been published, the privilege of objecting to its repetition ha[s] been waived . . . ." *Polish Roman Catholic Union of America v Palen*, 302 Mich 557, 562; 5 NW2d 463 (1942) (citation omitted). Rather, even though the information may properly be proved from another source—i.e., the medical record or witness testimony—a hospital may still claim an exemption from disclosing materials that are subject to the peer review privilege.

records, data, and knowledge that are collected for or by the committee under §§ 20175(8) and 21515 "for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513(d). See also *Dorris*, 460 Mich at 40.[7] Moreover, while the peer review privilege may make it more difficult for a party to obtain evidence,[8] the burden on a litigant is mitigated by the fact that he or she may still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record.[9] Finally, if a litigant remains unsatisfied with the statu-

[7] In providing guidance to courts on how to engage in this statutory inquiry, we have previously stated:

> In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement so as to bring the information within the protection of the statute. Also, in deciding whether a particular committee was assigned a review function so that information it collected is protected, the court may wish to consider the hospital's bylaws and internal regulations, and whether the committee's function is one of current patient care or retrospective review. [*Monty*, 422 Mich at 146-147 (citations omitted).]

[8] Indeed, by their very nature, privileges "are not designed or intended to facilitate the fact-finding process or to safeguard its integrity," but "[t]heir effect instead is clearly inhibitive; rather than facilitate the illumination of truth, they shut out the light." *People v Warren*, 462 Mich 415, 428; 615 NW2d 691 (2000), quoting 1 McCormick, Evidence (5th ed), § 72, pp 298-299.

[9] To the extent plaintiff is arguing that defendant's *failure* to comply with its statutory duty to publish certain information in the medical record should be deemed a waiver of the peer review privilege, we reject that claim as well. As noted earlier, hospitals have a statutory duty to maintain a full and complete medical record for each patient, which includes, among other things, observations made and treatments provided to the patient. MCL 333.20175(1). However, deeming the peer review privilege waived is not among the sanctions provided by the Legislature for violations of § 20175(1). See, e.g., MCL 333.20175a, 333.20176(1); see also *Fischer v WA Foote Mem Hosp*, 261 Mich App 727,

tory balance struck between disclosing information to patients and protecting peer review materials, any recalibration must be done by the Legislature. See *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) ("Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.").

For the reasons stated above, we reject the *Harrison* panel's holding that objective facts gathered contemporaneously with an event do not fall within the peer review privilege. Accordingly, we overrule *Harrison* to the extent that it is inconsistent with our opinion today.[10] Instead, we hold that §§ 20175(8) and 21515 make privileged all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care. This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report.

IV. APPLICATION

Because *Harrison* was wrongly decided and the trial court relied on *Harrison* to order production of a

730-731; 683 NW2d 248 (2004) (discussing the ways within the Public Health Code to enforce its provisions).

[10] The *Harrison* panel also found support for its decision in *Centennial Healthcare Mgt Corp v Dep't of Consumer & Indus Servs*, 254 Mich App 275; 657 NW2d 746 (2002). However, *Centennial* is inapposite. *Centennial* does not address whether a private litigant has a right to review objective facts contained in an otherwise privileged incident report, but instead involves whether an administrative rule promulgated by the Michigan Department of Consumer and Industry Services infringed the peer review privilege. But, to the extent *Centennial* may be read as contrary to our opinion today, we limit its reasoning and holding to its specific facts.

portion of the incident report, we vacate the trial court's May 8, 2014 order in its entirety. The scope of this interlocutory appeal is limited to whether the trial court erred by relying on *Harrison* to order production of the objective facts found in the incident report. Having answered that question, we remand to the trial court for further proceedings.

V. CONCLUSION

We conclude that *Harrison* was wrongly decided, and we overrule the portions of it that are inconsistent with this opinion. Because the trial court in the instant case erred by relying on *Harrison* to order production of the objective facts contained in the incident report authored by Colvin, we vacate the trial court's May 8, 2014 order and remand to the trial court for further proceedings consistent with this opinion.

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

BERNSTEIN, J., took no part in the decision of this case.

FRASER TREBILCOCK DAVIS & DUNLAP PC v BOYCE TRUST 2350

Docket Nos. 148931, 148932, and 148933. Argued January 15, 2015. Decided June 3, 2015.

Fraser Trebilcock Davis & Dunlap, PC, brought an action for breach of contract in the Midland Circuit Court against Boyce Trust 2350, Boyce Trust 3649, and Boyce Trust 3650, after defendants failed to pay plaintiff in full for legal services its member lawyers had rendered. The case was tried by a jury after defendants rejected a case evaluation of $60,000. The jury found in plaintiff's favor, and the court, Jonathan E. Lauderbach, J., entered a judgment of $73,501.90. Defendants moved for a new trial, and plaintiff moved for case-evaluation sanctions under MCR 2.403(O), including a reasonable attorney fee under MCR 2.403(O)(6)(b). The trial court denied defendants' motion for a new trial and granted plaintiff's motion for case-evaluation sanctions, awarding plaintiff $80,434 in attorney fees, plus interest, and also allowed plaintiff to seek supplemental fees for time spent litigating the sanctions request. Plaintiff sought $38,566.50 in such fees and the court awarded $21,253.60, plus interest, resulting in a total award of approximately $102,000. Defendants appealed the judgment and both of the sanctions orders, and the appeals were consolidated. The Court of Appeals, FITZGERALD and BORRELLO, JJ. (MURPHY, C.J., concurring in part and dissenting in part), affirmed the judgment for plaintiff and partially affirmed the award of case-evaluation sanctions, but reversed the award to the extent it encompassed services related to the pursuit of case-evaluation sanctions and remanded to the trial court for recalculation of the award amount. 304 Mich App 174 (2014). Plaintiff appealed in the Supreme Court, which ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 497 Mich 873 (2014).

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

Plaintiff could not recover a reasonable attorney fee under MCR 2.403(O)(6)(b) for the legal services performed by its member lawyers in connection with its suit to recover unpaid attorney fees from defendants. Because the requisite distinction in identity

between plaintiff and its member lawyers was lacking, there was no attorney-client relationship from which an attorney fee could arise.

1. Under MCR 2.403(O)(6)(b), if a party has rejected a case evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs, including a reasonable attorney fee for services necessitated by the rejection of the evaluation, unless the verdict is more favorable to the rejecting party than the case evaluation. The meaning of the phrase "attorney fee" was addressed in *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423 (2007), which held that the term "attorney" requires an agency relationship between an attorney and the client whom he or she represents and, with that relationship, separate identities between the attorney and the client. Because, in the case of an individual attorney-litigant, the requisite distinction in identity between attorney and client is lacking, there is no attorney-client relationship from which an attorney fee may arise. This rationale applied to and foreclosed plaintiff's request for attorney fees under MCR 2.403(O)(6)(b). Although plaintiff, as a corporation, was a legal entity distinct from its shareholders, and although plaintiff used its member lawyers as agents to litigate its interests in this suit, plaintiff routinely identified itself as its attorney throughout the litigation, and the record betrayed no distinction between the firm and the member lawyers who appeared on its behalf. This conflation of identity was consistent with MCR 2.117(B)(3)(b), under which the appearance of plaintiff's member lawyers was tantamount to the appearance of every member of the firm. There was also no indication that plaintiff's member lawyers viewed or treated plaintiff as a client distinct from themselves. The nature of the fee plaintiff sought, which was remuneration for the legal services that it was forced to direct to the instant suit rather than to its clients by virtue of the defendants' rejection of the case evaluation, confirmed that plaintiff's fee request was analogous to, and no more recoverable than, that of an individual attorney-litigant.

2. Michigan law does not prohibit a corporation such as plaintiff from representing itself. While a corporation generally may appear in court only through licensed counsel, and plaintiff, as a professional corporation, could only provide legal services through its duly licensed officers, employees, and agents under MCL 450.1285(1), those propositions limited, but did not eliminate, plaintiff's ability to represent itself; nor did it mean that plaintiff

necessarily entered into the sort of relationship with its member lawyers that would be sufficient to support the recovery of an attorney fee under *Omdahl*.

3. The holding in this case was not at odds with *Kay v Ehrler*, 499 US 432 (1991), which held that an attorney who successfully represented himself in a civil-rights action was not entitled to recover attorney fees under 42 USC 1988(b) as part of his costs. Although some federal circuits have relied on a footnote in *Kay* to conclude that law firms represented by their own member lawyers may recover attorney fees for that representation, the footnote was nonbinding dictum that sought to reconcile an aspect of 42 USC 1988 with *Kay*'s central holding and was not applicable to the circumstances of this case.

Court of Appeals judgment reversed in part; trial court order awarding attorney fee vacated; case remanded to the trial court for further proceedings.

ACTIONS — CASE EVALUATIONS — CASE-EVALUATION SANCTIONS — ACTUAL COSTS — ATTORNEY FEES — ATTORNEY-CLIENT RELATIONSHIPS.

The status of a law firm as a legally distinct corporate entity does not, in itself, give rise to a distinction in identity between the firm and its member lawyers that would allow the firm to recover attorney fees under MCR 2.403(O)(6)(b) for legal services the firm provided to itself through its member lawyers.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael H. Perry*), for plaintiff.

Brown Law PLC (by *W. Jay Brown*) for defendants.

MCCORMACK, J. Before us is whether the plaintiff law firm can recover, as case-evaluation sanctions under MCR 2.403(O)(6)(b), a "reasonable attorney fee" for the legal services performed by its own member lawyers in connection with its suit to recover unpaid fees from the defendants, former clients of the firm. Contrary to the determinations of the trial court and the Court of Appeals majority, we conclude it cannot. Accordingly, we reverse the Court of Appeals in part, vacate the trial court's award of a "reasonable attorney fee" to the plaintiff under MCR 2.403(O)(6)(b), and remand to the

trial court for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Fraser Trebilcock Davis & Dunlap, P.C. ("Fraser Trebilcock"), is a law firm organized as a professional corporation under the laws of Michigan. Fraser Trebilcock provided legal services to the defendants, a group of trusts, in connection with the financing and purchase of four hydroelectric dams. Dissatisfied with the representation they received, the defendants refused to pay the full sum of fees billed by Fraser Trebilcock. To recover these unpaid fees, Fraser Trebilcock brought the instant suit against the defendants for breach of contract. Pursuant to MCR 2.403, the matter was submitted for a case evaluation, which resulted in an evaluation of $60,000 in favor of Fraser Trebilcock. Fraser Trebilcock accepted the evaluation, but the defendants rejected it. The case proceeded to trial, resulting in a verdict for Fraser Trebilcock and a judgment totaling $73,501.90.

Throughout the litigation of this breach-of-contract action, Fraser Trebilcock appeared through Michael Perry, a shareholder of the firm, and other lawyers affiliated with the firm (collectively, "member lawyers").[1] At no point did Fraser Trebilcock retain outside counsel, and there is no indication that the firm entered into a retainer agreement with its member lawyers or received or paid a bill for their services in connection with the litigation. On its pleadings, Fraser Trebilcock identified the firm itself as "Attorneys for Plaintiff."

[1] According to Fraser Trebilcock, all member lawyers of the firm, including its shareholders, are salaried employees of the firm.

After receiving the verdict, the parties filed post-trial motions: the defendants moved for a new trial, and Fraser Trebilcock moved for case-evaluation sanctions under MCR 2.403(O), seeking to recover, *inter alia*, a "reasonable attorney fee" under MCR 2.403(O)(6)(b) for the legal services performed by its member lawyers—including the litigation of these posttrial motions. The trial court denied the defendants' motion for a new trial, and granted Fraser Trebilcock's motion for case-evaluation sanctions, ruling in particular that Fraser Trebilcock could recover an attorney fee as part of its sanctions. The court recognized that an individual litigant (including one who is an attorney) cannot recover attorney fees for engaging in self-representation, but, relying on certain language from *Kay v Ehrler*, 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991), concluded that this prohibition did not extend to a corporation such as Fraser Trebilcock seeking to recover a fee for legal services performed by its member lawyers. After an evidentiary hearing, the court awarded Fraser Trebilcock $80,434 in attorney fees, plus interest—roughly two-thirds of the amount of fees the firm had requested—and also permitted Fraser Trebilcock to seek supplemental fees for additional time spent litigating the sanctions request. Fraser Trebilcock requested $38,566.50 in such fees, of which the court awarded $21,253.60, plus interest—resulting in a total award of approximately $102,000, pre-interest, as a "reasonable attorney fee" sanction under MCR 2.403(O)(6)(b).

The defendants appealed the judgment and each of the two sanctions orders. In a split decision, the Court of Appeals affirmed the trial court in all respects but one, reversing the trial court's award of attorney fees to Fraser Trebilcock for time spent pursuing its request for case-evaluation sanctions. See *Fraser Trebilcock*

Davis & Dunlap PC v Boyce Trust 2350, 304 Mich App 174; 850 NW2d 537 (2014). The panel unanimously agreed on this reversal,[2] but divided over whether the remainder of the trial court's fee award under MCR 2.403(O)(6)(b) could stand. After surveying Michigan and federal authority, the Court of Appeals majority upheld the trial court's determination that Fraser Trebilcock could recover attorney fees for the legal services performed by its member lawyers in the breach-of-contract action, despite caselaw establishing that an individual attorney-litigant may not recover such fees for self-representation. Like the trial court, the majority relied significantly on certain language from the United States Supreme Court in *Kay*, as well as federal authority interpreting that language. Chief Judge MURPHY disagreed with the majority's reasoning on this point, concluding instead that Michigan authority precluding an award of attorney fees to an individual attorney-litigant—most notably, *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007)—extended to and foreclosed Fraser Trebilcock's request for fees.[3]

The defendants then filed the instant application for leave to appeal, seeking this Court's review of the Court of Appeals majority's partial affirmance of the fee award to Fraser Trebilcock.[4] Fraser Trebilcock cross-appealed, challenging the Court of Appeals' partial

[2] The panel also unanimously rejected the defendants' challenges to the trial court's exclusion of certain proposed testimony and its refusal to give a certain jury instruction.

[3] The Court of Appeals majority also affirmed the trial court's assessment of the reasonableness of Fraser Trebilcock's requested fees. In light of his determination that no such fees could be awarded, Chief Judge MURPHY did not join this portion of the majority's opinion.

[4] The defendants did not challenge the Court of Appeals' unanimous affirmance of the trial court's handling of certain trial-related matters, or

reversal of the fee award. We denied leave as to Fraser Trebilcock's cross-appeal, and ordered oral argument on the defendants' application. See *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust*, 497 Mich 873 (2014). For the reasons set forth below, we agree with the defendants that Fraser Trebilcock cannot recover a "reasonable attorney fee" under MCR 2.403(O)(6)(b) for the legal services performed by its member lawyers in connection with the instant suit. Accordingly, in lieu of granting the defendants' application, we reverse the Court of Appeals in part and vacate the trial court's attorney-fee award to Fraser Trebilcock.

II. ANALYSIS

Our disposition of this fee dispute turns on the proper interpretation of MCR 2.403(O), which this Court reviews de novo and under the same principles that govern the construction of statutes. See *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Namely, the court rule is to be interpreted according to its plain language, " 'giving effect to the meaning of the words as they ought to have been understood by those who adopted them.' " *Id*., quoting *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971). Unless expressly defined, "[e]very word or phrase of . . . [the] court rule should be given its commonly accepted meaning[.]" *Id*.

MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party

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the majority's affirmance of the trial court's fee-reasonableness determination. Accordingly, these matters are not before us.

> is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> * * *
>
> (6) For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.
>
> For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

As a general matter, the purpose of MCR 2.403(O) "is to encourage settlement by plac[ing] the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award." *Watkins v Manchester*, 220 Mich App 337, 344; 559 NW2d 81 (1996) (quotation marks omitted); see *Smith v Khouri*, 481 Mich 519, 527-528; 751 NW2d 472 (2008). "Although one of the aims of the mediation rule is to discourage needless litigation, the rule is not intended to punish litigants for asserting their right to a trial on the merits." *McAuley*, 457 Mich at 523. Nor is it "designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." *Smith*, 481 Mich at 528. Correspondingly, the "reasonable attorney fee" authorized under MCR 2.403(O)(6)(b) is not punitive but "compensatory in nature." *McAuley*, 457 Mich at 520.

The parties do not dispute that Fraser Trebilcock is entitled to recover, as case-evaluation sanctions under MCR 2.403(O), the "actual costs" of its breach-of-contract action against the defendants, which pro-

ceeded to trial as a result of the defendants' rejection of the case evaluation. The question before us is whether such costs include a "reasonable attorney fee" for the legal services performed by Fraser Trebilcock's member lawyers over the course of that action. According to the defendants, this cannot be, because Fraser Trebilcock's self-representation did not give rise to an "attorney fee." We agree.

This Court most recently addressed the commonly accepted meaning of the phrase "attorney fee" in *Omdahl*, explaining:

> "Attorney" is defined as a "lawyer" or an "attorney-at-law." *Random House Webster's College Dictionary* (2001). The definition of "lawyer" is "a person whose profession is *to represent clients* in a court of law or to advise or act for them in other legal matters." *Id*. (emphasis added). And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy." *Id*. (emphasis added). Clearly, the word "attorney" connotes an agency relationship between two people. "Fee" is relevantly defined as "a sum charged or paid, as for professional services or for a privilege." *Id*. [*Omdahl*, 478 Mich at 428.]

At issue in *Omdahl* was whether an individual attorney-litigant could recover attorney fees for the representation he provided to himself in the successful pursuit of a claim under the Open Meetings Act (OMA), MCL 15.261 *et seq*., which provides that if a person prevails in an action under that statute, "the person shall recover court costs and actual attorney fees for the action." MCL 15.271(4). Looking to the above definitions, this Court concluded that there were no such attorney fees for the individual attorney-litigant to recover. As this Court explained, the "plain and unambiguous meaning of the term 'attorney' " requires "an agency relationship between an attorney and the client

whom he or she represents" and, with that relationship, "separate identities between the attorney and the client." *Omdahl*, 478 Mich at 428 n 1, 432. And see *id*. at 430 n 4 ("[B]oth a client and an attorney are necessary ingredients for an attorney fee award."). Because, in the case of an individual attorney-litigant, the requisite distinction in identity between attorney and client is lacking, there is no attorney-client relationship from which an "attorney fee" may arise, *id*. at 432—an outcome this Court deemed consistent with decisions by "[t]he courts of this state as well as the federal courts," which "have, in deciding cases of this sort, focused on the concept that an attorney who represents himself or herself is not entitled to recover attorney fees because of the absence of an agency relationship." *Id*. at 428-429.[5]

We agree with the defendants that this same rationale applies to the instant case, and is fatal to Fraser Trebilcock's request for attorney fees under MCR 2.403(O)(6)(b). Fraser Trebilcock does not challenge the commonly accepted meaning of "attorney fee" set forth in *Omdahl*, nor do we see any reason to assign that phrase a different meaning under the plain language of MCR 2.403(O)(6)(b).[6] Instead, Fraser Trebilcock fo-

[5] This Court also noted that, while the OMA expressly permits recovery of only "actual" attorney fees, Omdahl's fee request did not fail because of that term or any distinction there may be between it and "reasonable"; rather, Omdahl could not recover fees for his self-representation because of the absence of the attorney-client relationship that inheres in and is necessary to an "attorney fee." See *Omdahl*, 478 Mich at 430 n 4.

[6] MCR 2.403 provides no express definition of "attorney fee." While MCR 2.403(O)(6)(b) specifies that any "reasonable attorney fee" awarded as a case-evaluation sanction must be "based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation," nothing in this language purports to supplant or modify the commonly accepted meaning of "attorney fee" quoted above, or to suggest that such a fee can be

cuses on distinguishing that precedent from the instant case, contending that *Omdahl* and its ilk do not foreclose the request for fees in this case because, unlike an individual attorney-litigant, an incorporated law firm such as Fraser Trebilcock enjoys an identity distinct from its member lawyers; thus, when those lawyers appeared on behalf of Fraser Trebilcock in the underlying breach-of-contract action, the agency relationship necessary to give rise to an "attorney fee" was present.

There is no dispute that Fraser Trebilcock, as a corporation, is a legal entity distinct from its shareholders. See, e.g., *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950). There is also no dispute that Fraser Trebilcock used its member lawyers as agents to litigate its interests in the instant suit; indeed, there is no other way the firm could act on its own behalf. See generally *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938) (recognizing that a corporation can "only act through its agents"). These facts alone, however, do not mean that the firm and its member lawyers necessarily enjoyed separate identities as client and attorney for the purposes of that litigation, such that the agency relationship between them would be sufficient to give rise to an "attorney fee" under *Omdahl*. To the contrary, we see no more of that relationship here than when an indi-

awarded under MCR 2.403(O)(6)(b) in the absence of the type of attorney-client relationship discussed in *Omdahl*. To the contrary, in concluding that such a relationship was necessary for a fee award under the OMA, this Court relied in part on authority interpreting the "attorney fee" available under MCR 2.403(O)(6)(b). See *Omdahl*, 478 Mich at 431 (explaining that its interpretation of "attorney fee" was supported by *Watkins*, 220 Mich App 337, which held that an individual attorney-litigant may not recover a "reasonable attorney fee" for self-representation under MCR 2.403(O)(6)(b) and which likewise "focused on the availability of any attorney fees when the [attorney-client] agency relationship was missing").

vidual attorney engages in self-representation. For instance, Fraser Trebilcock routinely identified itself as its attorney throughout the litigation, and the record betrays no distinction in that regard between the firm and the member lawyers who physically appeared on its behalf—a conflation of identity consistent with our court rules, which make clear that the appearance of Fraser Trebilcock's member lawyers was tantamount to "the appearance of every member of the firm," MCR 2.117(B)(3)(b). Nor is there any indication that those member lawyers viewed or treated the firm as a client distinct from themselves. The nature of the fee sought by Fraser Trebilcock further confirms this analogy to an individual attorney-litigant; like such a litigant, the firm is seeking to recover for the legal services that it was forced to direct to the instant suit rather than to its clients, by virtue of the defendants' rejection of the case evaluation. As recognized in *Omdahl*, an individual attorney-litigant typically cannot seek such remuneration as an "attorney fee"—a general rule to which MCR 2.403(O)(b)(6) provides no exception. See *McAuley*, 457 Mich at 520 (explaining that the compensatory nature of an attorney-fee award under MCR 2.403(O)(6)(b) "is illustrated by the well-established body of law holding that a litigant representing himself may not recover attorney fees as an element of costs or damages under either a statute or a court rule"). We are not convinced that the outcome should be any different for Fraser Trebilcock here.

In sum, while we acknowledge that Fraser Trebilcock is a legally distinct corporate entity, we do not find that status sufficient to distinguish the representation it provided to itself through its member lawyers from the self-representation at issue in *Omdahl*, such that Fraser Trebilcock may recover a "reasonable attorney fee" under MCR 2.403(O)(6)(b) for its member lawyers'

services. In resisting this conclusion, Fraser Trebilcock stresses that a corporation, unlike an individual, may only appear in court through licensed counsel. We agree with this general proposition, see, e.g., *Detroit Bar Ass'n v Union Guardian Trust Co* (*On Reconsideration*), 282 Mich 707, 711; 281 NW 432 (1938), and further recognize that, as a professional corporation, Fraser Trebilcock may only provide legal services through its duly licensed "officers, employees, and agents," MCL 450.1285(1). Contrary to Fraser Trebilcock's suggestion, however, Michigan law does not prohibit a corporation from representing itself. See MCL 450.681 ("It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person *other than itself* in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person *other than itself*, in any of said courts . . . .") (emphasis added). That the corporation may only do so through an appropriately licensed agent limits, but does not eliminate, this ability; nor does it mean that a corporation necessarily enters into the sort of relationship with its agent sufficient to support recovery of an attorney fee under *Omdahl*. And as discussed above, we fail to see such a relationship in Fraser Trebilcock's self-representation here.

According to Fraser Trebilcock, this conclusion is at odds with the United States Supreme Court's decision in *Kay*, which this Court discussed favorably in *Omdahl*. In *Kay*, an attorney successfully represented himself in a civil-rights action challenging the constitutionality of a state statute; he sought attorney fees under 42 USC 1988(b), which provides that the trial court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The United States Supreme Court unanimously

affirmed the lower courts' rejection of this claim, citing the well-established "proposition that a pro se litigant who is *not* a lawyer is *not* entitled to attorney's fees," *Kay*, 449 US at 435, and concluding that the outcome should be no different for individual attorney-litigants seeking fees under § 1988. As noted in *Omdahl*, the *Kay* Court supported this conclusion in part with its observation that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." *Id*. at 435-436 (footnote omitted). Fraser Trebilcock stresses, however, that the *Kay* Court immediately—and critically, for the purposes of its claimed fees—qualified this observation with the following footnote:

> Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship. [*Id*. at 436 n 7.]

As summarized by the Court of Appeals majority in this case, some federal circuits have relied upon this footnote in *Kay* to conclude that law firms represented by their own member lawyers can recover attorney fees for that representation.[7] Fraser Trebilcock urges us, like the Court of Appeals majority, to do the same. We,

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[7] See *Treasurer, Trustees of Drury Indus, Inc Health Care Plan & Trust v Goding*, 692 F3d 888, 898 (CA 8, 2012), cert den 133 S Ct 1644 (2013); *Baker & Hostetler LLP v US Dep't of Commerce*, 473 F3d 312, 325 (CA DC, 2006); *Bond v Blum*, 317 F3d 385 (CA 4, 2003); *Gold, Weems, Bruser, Sues & Rundell v Metal Sales Mfg Corp*, 236 F3d 214, 218-219 (CA 5, 2000).

however, do not find *Kay*'s nonbinding dictum instructive here, and decline to follow suit. As discussed, we fail to see a meaningful distinction under Michigan law between Fraser Trebilcock's request for attorney fees under MCR 2.403(O)(6)(b) and that of an individual attorney-litigant; *Kay*'s passing commentary on fee requests by organizations under 42 USC 1988 does not convince us otherwise. This commentary sought to reconcile *Kay*'s central holding—that individual attorney-litigants may not recover fees for self-representation—with Congress's apparent intent that unspecified "organizations" be able to recover fees for representation provided by pro bono or in-house counsel under § 1988. Nothing in this dictum suggests that it was intended to reach beyond this limited task of interpretive reconciliation, let alone that it was meant to affirmatively distinguish an individual attorney-litigant from a law firm seeking fees for the representation it provided to itself through its member lawyers—a distinction we particularly hesitate to read into *Kay*'s footnote, given the overall thrust of the opinion.

Nor do we see a good fit between the circumstances expressly contemplated in this dictum and those presently before us. *Kay*'s footnote spoke to the attorney-client relationship that may arise between an organization and its in-house or pro bono counsel. Hoping to duck under *Kay*'s umbrella, Fraser Trebilcock likens the member lawyers who appeared on its behalf to such in-house counsel, but we find this characterization inapt. As *Kay*'s dictum reflects, the relationship between an organization and its in-house counsel is typically one of attorney and singular client; the attorney is employed by the organization in order to provide legal services to the organization. There is no indication, however, that Fraser Trebilcock enjoyed this same type

of relationship with its member lawyers in the instant suit—namely, that these lawyers were employed by and affiliated with the firm to provide legal services to the firm as a distinct and exclusive client, rather than to provide such services on behalf of the firm to its clients. Whether and under what circumstances a law firm may recover fees for representation provided to it by in-house counsel is not before us, and we decline to reach that question here. For present purposes, it is enough to say that, to the extent *Kay* can be read to recognize the existence of an attorney-client relationship between a law firm and its in-house counsel, this recognition does nothing to further Fraser Trebilcock's request for fees here.

III. CONCLUSION

For the reasons set forth above, we conclude that Fraser Trebilcock cannot recover a "reasonable attorney fee" under MCR 2.403(O)(6)(b) for the legal services performed by its member lawyers in connection with the instant suit. Accordingly, we reverse the Court of Appeals in part, vacate the trial court's award of a "reasonable attorney fee" to Fraser Trebilcock under MCR 2.403(O)(6)(b), and remand to the trial court for further proceedings consistent with this opinion.

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

MICHIGAN ASSOCIATION OF HOME BUILDERS v CITY OF TROY

Docket No. 149150. Argued on application for leave to appeal March 11, 2015. Decided June 4, 2015.

The Michigan Association of Home Builders, the Associated Builders and Contractors of Michigan, and the Michigan Plumbing and Mechanical Contractors Association brought an action in the Oakland Circuit Court against the city of Troy, alleging that the city's building department fees violated MCL 125.1522 (a provision of the Single State Construction Code Act, MCL 125.1501 *et seq*.) and Const 1963, art 9, § 31 (a provision of the Headlee Amendment). The city had entered into a contract with SafeBuilt Michigan, Inc., under which SafeBuilt assumed the duties of the city's building inspection department. SafeBuilt received up to 80% of the building department fees associated with its services, and the city retained the rest. The court, Shalina D. Kumar, J., granted summary disposition in favor of the city, ruling that the court did not have jurisdiction over plaintiffs' lawsuit because they had failed to exhaust their administrative remedies under MCL 125.1509b before filing their complaint. The Court of Appeals, JANSEN, P.J., and OWENS and SHAPIRO, JJ., affirmed in an unpublished opinion per curiam, issued March 13, 2014 (Docket No. 313688), agreeing that because the act provided an administrative procedure through which plaintiffs could have raised their claims, they were required to exhaust that administrative procedure before proceeding to circuit court. Plaintiffs applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant plaintiffs' application or take other peremptory action. 497 Mich 862 (2014).

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

The circuit court erred by concluding that plaintiffs were required to exhaust their administrative remedies. The act creates a state construction code that applies throughout the state. Under MCL 125.1502a(v), the city is a governmental subdivision that has assumed responsibility for the administration and enforcement of the act and the code within its jurisdiction. Under MCL 125.1502a(t), an enforcing agency is

the governmental agency that is responsible for administering and enforcing the code within a governmental subdivision (in this case the city's building inspection department). MCL 125.1522(1) provides that the legislative body of a governmental subdivision (in this case, the Troy City Council) must establish reasonable fees that the governmental subdivision will charge for acts and services performed by the enforcing agency. MCL 125.1509b(1) states that the director of the Department of Licensing and Regulatory Affairs may conduct a performance evaluation of an enforcing agency to assure that it is properly administering and enforcing the act and the code, and MCL 125.1509b(3) establishes a procedure to appeal should the State Construction Code Commission issue a notice of its intent to withdraw a governmental subdivision's responsibility for administering and enforcing the act and code after receiving the results of an evaluation. The performance evaluation is only done on the enforcing agency (the city's building inspection department), and MCL 125.1509b establishes no administrative procedure pertaining to the legislative body that establishes fees under MCL 125.1522(1) (the city council). Because the administrative procedures established by MCL 125.1509b do not apply to the city's legislative body, plaintiffs were not required to exhaust their administrative remedies.

Reversed and remanded.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for plaintiffs.

Lori Grigg Bluhm, City Attorney, and *Allan T. Motzny*, Assistant City Attorney, for defendant.

MEMORANDUM OPINION. Plaintiffs, a group of associations representing builders, contractors, and plumbers, filed suit against defendant, the city of Troy, claiming that defendant's building department fees violated § 22 of the Single State Construction Code Act (CCA), MCL 125.1522, as well as a provision of the Headlee Amendment, Const 1963, art 9, § 31. The circuit court granted summary disposition to defendant, holding that the court lacked jurisdiction over the matter because plain-

tiffs had failed to exhaust the administrative procedure outlined in § 9b of the CCA, MCL 125.1509b.

The plain language of MCL 125.1509b, however, provides that the director[1] may conduct performance evaluations of defendant's "enforcing agency" and does not provide *any* administrative procedure relative to the entity responsible for establishing fees pursuant to MCL 125.1522(1): "[t]he legislative body of a governmental subdivision." Because the administrative proceedings in § 9b do not purport to provide the director with the authority to evaluate defendant's legislative body, the circuit court erred by granting summary disposition to defendant on the basis of plaintiffs' failure to exhaust their administrative remedies.

We reverse the judgment of the Court of Appeals and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

After several years of operating its building department at a deficit, defendant—which is a "governmental subdivision" within the meaning of the CCA[2]—privatized the building department in July 2010. It entered into a contract with SafeBuilt Michigan, Inc.,[3]

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[1] The "director" is the director of the Department of Licensing and Regulatory Affairs or an authorized representative of the director. See MCL 125.1502a(q) and (r).

[2] MCL 125.1502a(v) provides:

> "Governmental subdivision" means a county, city, village, or township that, in accordance with [MCL 125.1508a or MCL 125.1508b], has assumed responsibility for administration and enforcement of this act and the code within its jurisdiction.

[3] Under the terms of the contract, SafeBuilt received 80% of the building department fees associated with its services, and defendant retained the remaining 20%. The contract provided that if the fees

under which SafeBuilt assumed the duties of defendant's building inspection department, which is the "enforcing agency" within the meaning of the CCA.[4]

On December 15, 2010, plaintiffs filed the instant complaint, seeking declaratory and injunctive relief. Plaintiffs claimed that the fees generated under the contractual arrangement with SafeBuilt produced "significant monthly surpluses"[5] that were used to augment defendant's general fund in violation of MCL 125.1522 and constituted an unlawful tax increase in violation of Const 1963, art 9, § 31.

After discovery, plaintiffs moved for summary disposition under MCR 2.116(C)(10), and defendant sought summary disposition under MCR 2.116(I)(2). After conducting a hearing, the circuit court granted summary disposition to defendant, ruling that the court did not have jurisdiction over plaintiffs' lawsuit because plaintiffs had failed to exhaust their administrative remedies under § 9b of the CCA before filing their complaint.

Plaintiffs appealed, arguing that they were entitled to proceed in circuit court without first seeking administrative action. The Court of Appeals affirmed,[6] holding that because § 9b of the CCA provided an adminis-

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totaled more than $1 million in a fiscal year, SafeBuilt's compensation would be reduced to 75% of the fees.

[4] MCL 125.1502a(t) provides:

> "Enforcing agency" means the governmental agency that, in accordance with [MCL 125.1508a or MCL 125.1508b], is responsible for administration and enforcement of the code within a governmental subdivision.

[5] The complaint alleges that defendant had retained $140,607.83 over a three-month period.

[6] *Mich Ass'n of Home Builders v City of Troy*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2014 (Docket No. 313688), p 4.

trative procedure in which plaintiffs could have raised their claim, plaintiffs were required to exhaust that administrative procedure before proceeding to circuit court. Furthermore, the panel held that although plaintiffs' complaint alleged a constitutional violation, plaintiffs were still required to exhaust their administrative remedies when the constitutional claim was intermingled with an issue properly before an administrative agency.[7] We ordered and heard oral argument on whether to grant plaintiffs' application for leave to appeal or take other preemptory action.[8]

II. STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition.[9] Moreover, whether the circuit court has subject matter jurisdiction over a particular matter is a question of law that this Court reviews de novo.[10] Additionally, to the extent that the resolution of this case involves questions of statutory interpretation, our review is also de novo.[11]

III. ANALYSIS

The CCA creates a state construction code that governs innumerable aspects related to the construction, use, and occupation of residential and commercial buildings and structures.[12] The CCA and the construc-

[7] *Id*.

[8] *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 862 (2014).

[9] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[10] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001).

[11] *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002).

[12] MCL 125.1504(1) provides:

tion code "apply throughout the state,"[13] and the CCA provides that, except as otherwise provided, the director is responsible for administering and enforcing both the CCA and the construction code.[14] The language "except as otherwise provided"—an exception to the director's plenary authority—permits governmental subdivisions to assume responsibility for administering and enforcing, as well as prosecuting violations of, the CCA and construction code.[15]

Plaintiffs contend that the transfer of building department monies to defendant's general fund violates MCL 125.1522(1), which provides:

> The *legislative body of a governmental subdivision* shall establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The

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> The director shall prepare and promulgate the state construction code consisting of rules governing the construction, use, and occupation of buildings and structures, including land area incidental to the buildings and structures, the manufacture and installation of building components and equipment, the construction and installation of premanufactured units, the standards and requirements for materials to be used in connection with the units, and other requirements relating to the safety, including safety from fire, and sanitation facilities of the buildings and structures.

[13] MCL 125.1508a(1).

[14] MCL 125.1508b(1).

[15] MCL 125.1508b.

> enforcing agency shall collect the fees established under this subsection. *The legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose*. [Emphasis added.]

Defendant cites MCL 125.1509b as the basis of its claim that plaintiffs are required to exhaust their administrative remedies before proceeding to circuit court. This statutory provision provides in relevant part:

> (1) The director, as prescribed in this section, may conduct a *performance evaluation of an enforcing agency* to assure that the administration and enforcement of this act and the code is being done pursuant to either [MCL 125.1508a or MCL 125.1508b]. A performance evaluation may only be conducted either at the request of the local enforcing agency or upon the receipt of a written complaint. . . .
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> (2) When conducting a performance evaluation of an enforcing agency, the director may request that the local enforcing agency accompany the director or other state inspectors on inspections. The inspections shall be for the enforcement of this act and the code. The enforcing agency shall maintain all official records and documents relating to applications for permits, inspection records including correction notices, orders to stop construction, and certificates of use and occupancy. The enforcing agency shall make available for review all official records between 8 a.m. and 5 p.m. on business days.
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> (3) . . . The [State Construction Code Commission] may issue a notice of intent to withdraw the responsibility for the administration and enforcement of this act and the code from a governmental subdivision after receiving the results of a performance evaluation. The notice shall include the right to appeal within 30 business days after receipt of the notice of intent to withdraw the responsibility. [MCL 125.1509b (emphasis added).]

The plain language of MCL 125.1509b provides that the director may conduct a "performance evaluation" of the *enforcing agency*—here, the City of Troy Building Inspection Department—to assure that the "administration and enforcement of this act and the code is being done pursuant to either [MCL 125.1508a or 125.1508b]." The administrative proceeding articulated in MCL 125.1509b is simply inapplicable to the entity identified in MCL 125.1522(1) as being responsible for establishing the fees to be charged for building department services—the "*legislative body*" of the city of Troy.

Defendant maintains that § 9b applies to the "entire city." However, the Legislature made a clear distinction between the "enforcing agency" and the "governmental subdivision." Under the definitional sections of the CCA, the "governmental subdivision" is the municipality that has assumed responsibility for code enforcement,[16] whereas the "enforcing agency" is the governmental agency *within* the governmental subdivision that is responsible for code enforcement.[17] Had the Legislature intended to permit the director to conduct a performance evaluation of the Troy City Council, it surely could have said so. We presume that the Legislature intended the meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature.[18] Thus, the plain language of § 9b indicates that it applies only to the "enforcing agency" and not the "legislative body of a governmental subdivision." For that reason, the circuit court erred by concluding that plaintiffs were required to exhaust the administrative remedy in MCL 125.1509b.

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[16] MCL 125.1502a(v).

[17] MCL 125.1502a(t).

[18] *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007).

The judgment of the Court of Appeals is reversed, and the case is remanded to the circuit court for further proceedings consistent with this opinion.

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

FAIRLEY v DEPARTMENT OF CORRECTIONS
STONE v MICHIGAN STATE POLICE

Docket Nos. 149722 and 149940. Decided June 5, 2015.

In Docket No. 149722, Michelle R. Fairley brought an action in the Court of Claims against the Michigan Department of Corrections (MDOC) after an MDOC employee driving an MDOC vehicle ran a red light and struck her car, seriously injuring her. Plaintiff's counsel filed and signed a notice of intent to file a claim against MDOC in the Court of Claims; however, plaintiff herself did not sign the notice, as MCL 600.6431(1) requires. Defendant moved for summary disposition on the ground that the notice was defective for that reason. The Court of Claims, James S. Jamo, J., denied defendant's motion, ruling that defendant had waived this argument by failing to plead it as an affirmative defense. The Court of Appeals, CAVANAGH, P.J., and OWENS and STEPHENS, JJ., affirmed in an unpublished opinion per curiam issued June 10, 2014 (Docket No. 315594). Defendant applied for leave to appeal in the Supreme Court.

In Docket No. 149940, Lori L. Stone brought an action in the Court of Claims against the Michigan State Police (MSP) for injuries she sustained when her stopped vehicle was struck by two MSP patrol cars. Plaintiff filed a notice of intent to file a claim against the MSP in the Court of Claims; however, the notice did not indicate that it had been verified before an officer authorized to administer oaths, as MCL 600.6431(1) requires. Defendant moved for summary disposition on the ground that the notice was defective for that reason. The Court of Claims, David S. Swartz, J., granted the motion, ruling that, although plaintiff's counsel had later averred that he was a notary public authorized to administer oaths, that fact was not apparent from the notice. The Court of Appeals, CAVANAGH, P.J., and OWENS and STEPHENS, JJ., reversed in an unpublished opinion per curiam issued July 8, 2014 (Docket No. 314848), holding that MCL 600.6431(1) did not require evidence of the oath or affirmation to appear on the face of the notice and that a failure to comply with the procedural prerequisites of MCL 600.6431(1) was an affirmative defense that is waived if not timely raised. Defendant applied for leave to appeal in the Supreme Court.

In a memorandum opinion signed by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A notice of intent to file a claim against a department of the state under MCL 600.6431 that lacks any indication that it was signed and verified before an officer authorized to administer oaths is defective and provides a complete defense that may be raised at any time by a defendant entitled to governmental immunity. While MCL 600.6431 does not confer governmental immunity, it establishes conditions precedent for avoiding the governmental immunity conferred by the governmental tort liability act, MCL 691.1401 *et seq*. As a result, plaintiffs were required to adhere to the conditions precedent in MCL 600.6431(1) to successfully expose defendants to liability. The notice in *Fairley* was not signed by the claimant, and the notice in *Stone* did not indicate that it had been verified before an officer authorized to administer an oath. The affidavit of Stone's attorney indicating that he was a notary public did not cure this deficiency because it was untimely. Therefore, plaintiffs' claims should have been dismissed.

In *Fairley*, Docket No. 149722, Court of Appeals judgment reversed; case remanded to the Court of Claims for entry of an order granting summary disposition in favor of defendant.

In *Stone*, Docket No. 149940, Court of Appeals judgment reversed; case remanded to the Court of Claims for reentry of its original order granting summary disposition in favor of defendant.

ACTIONS — COURT OF CLAIMS — NOTICE OF INTENT TO FILE A CLAIM AGAINST THE STATE — GOVERNMENTAL IMMUNITY — DEFECTIVE NOTICE.

A notice of intent to file a claim against the state or a department of the state must indicate that it was signed and verified before an officer authorized to administer oaths under MCL 600.6431(1); a notice that does not conform to this provision is defective and provides a complete defense that may be raised at any time by a defendant entitled to governmental immunity.

Speaker Law Firm, PLLC (by *Steven A. Hicks* and *Liisa R. Speaker*), and *Gursten Koltonow Gursten Christensen & Raitt, PC* (by *David E. Christensen*), for Michelle R. Fairley.

Kline Legal Group, PLC (by *John Kenneth Kline* and *Elizabeth Kitchen-Troop*), for Lori L. Stone.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Joseph T. Froehlich*, Assistant Attorney General, for the Department of Corrections and the Michigan State Police.

MEMORANDUM OPINION. We consider in these consolidated cases whether a claimant's failure to comply with the notice verification requirements of MCL 600.6431 provides a complete defense in an action against the state or one of its departments. We conclude that a notice lacking any indication that it was signed and verified before an officer authorized to administer oaths is defective and, contrary to the Court of Appeals' conclusion, is a complete defense that may be raised at any time by a defendant entitled to governmental immunity. Accordingly, and in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in both *Stone v Michigan State Police* and *Fairley v Department of Corrections* and remand the cases to the Court of Claims for reinstatement of the order granting defendant's motion for summary disposition in the former and for entry of an order granting defendant's motion for summary disposition in the latter.

The purpose of MCL 600.6431 is to establish those conditions precedent to pursuing a claim against the state. One of these conditions provides:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail

> the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [MCL 600.6431(1).]

Plainly, then, unless a claimant's notice is "signed and verified by the claimant before an officer authorized to administer oaths," a claim cannot proceed against the state. In both cases here, plaintiffs claim that nothing in the statute requires anyone other than the claimant to sign the notice and successfully argued in the Court of Appeals that defendants' arguments for summary disposition regarding notice were waived because the plaintiffs' alleged noncompliance with the statutory notice requirements was an affirmative defense that was not timely pleaded. Alternatively, defendants, both state agencies entitled to governmental immunity unless an exception applies, contend that complainants must "strictly" comply with the notice requirements in order to proceed. We conclude that failing to indicate anywhere on or with the notice that the document was verified before an officer authorized to administer oaths falls short of "strict" compliance and, as a result, plaintiffs' cases must be dismissed.

I. FACTS AND PROCEEDINGS BELOW

A. *FAIRLEY v DEP'T OF CORRECTIONS*

On March 11, 2011, plaintiff Michelle Fairley was injured in an automobile accident after a Michigan Department of Corrections (MDOC) vehicle, operated by an MDOC employee, ran a red light and struck Fairley's car. Plaintiff faced life-altering injuries—to the brain, neck, and back—as well as associated pain, suffering, and emotional harm. Plaintiff's counsel subsequently filed a notice of injury and intent to hold MDOC liable in the Court of Claims. The parties do not

dispute the timeliness of the notice[1] or the propriety of MDOC's designation as the responsible governmental agency.[2] The notice plainly stated the facts surrounding the accident, including the location of the accident and the parties involved. While Fairley herself did not sign the notice, her attorney's signature and the date appeared below the following disclaimer:

> This notice is intended to comply with all requirements of the law and all applicable statutes, ordinances, rules, and regulations. . . . If you believe this notice does not comply in any way with the notice requirement of the governing bodies of the State of Michigan and/or MDOC, or with an statute, ordinance, rule or regulation, you should immediately notify by written notice. Any additional information required by statute[,] ordinance, rule, or regulation will be promptly furnished.

After Fairley filed her complaint with the court, defendant responded with more than 20 affirmative defenses. Although none of these defenses argued that plaintiff's notice of intent to file a claim was defective, defendant MDOC filed a motion for summary disposition arguing that plaintiff's notice of intent to file a claim failed to meet the standards set out in MCL 600.6431(1). The Court of Claims denied defendant's motion for summary disposition, citing *Kielb v Wayne State University Board of Governors*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2012 (Docket No. 305927) in which the Court held that a defendant waives an issue of noncompliance with

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[1] MCL 600.6431(3) provides, in pertinent part, that "claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action."

[2] MCL 600.6431(2) likewise provides, in part, that "[s]uch claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim . . . ."

MCL 600.6431 if it is not pleaded as an affirmative defense. The Court of Appeals affirmed in an unpublished opinion per curiam.[3]

B. *STONE v MICHIGAN STATE POLICE*

Lori Stone injured her neck when her stopped car was struck by two Michigan State Police patrol cars on May 19, 2007. Following the accident, Stone underwent surgery to fuse two of her neck vertebrae.

Stone subsequently filed a notice of intent to file a claim with the Court of Claims. As was the case in *Fairley*, the parties do not dispute the timeliness of the notice or that, at the time of filing, this notice plainly stated the facts surrounding the accident including the location of the accident and the parties involved. The notice concluded with the statement "I declare that the statements above are true to the best of my information, knowledge, and belief." The notice, undated, was signed by plaintiff and signed and "respectfully submitted" by her attorney, John Kline. Nevertheless, more than two years after responding to plaintiff's complaint, defendant filed a motion for summary disposition arguing that the notice supplied by plaintiff's counsel failed to meet the requirements of MCL 600.6431(1). Specifically, at the hearing on the motion, defendant argued:

> What these notices are about is governmental immunity. It's exactly about putting up . . . restraints on cases that can be brought against the State. The Supreme Court can't be more clear, if you don't meet the requirements you don't abrogate governmental immunity. And the issue isn't what verify or verification means, it's what verify before an officer authorized to administer oaths means, and there's

[3] *Fairley v Mich Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2014 (Docket No. 315594).

> just no evidence anywhere in this notice, the notice itself, that it was verified before an officer authorized to administer oaths.

The Court of Claims agreed with defendant and signed an order granting summary disposition in its favor. In an unpublished opinion per curiam, the Court of Appeals reversed, concluding that the Court of Claims had erred and that the "the statute [MCL 600.6431(1)] does not . . . require that evidence of the oath or affirmation be on the face of the notice."[4] The panel further stated that a failure to comply with "purely procedural prerequisites," such as those enumerated in MCL 600.6431, was an affirmative defense that must be timely raised or is waived.[5] The case is now before this Court on appeal.

II. STANDARD OF REVIEW

This Court reviews de novo a lower court's decision to grant or deny a motion for summary disposition.[6] Further, the meaning of the final provision in MCL 600.6431(1)—requiring the notice to be "signed and verified by the claimant before an officer authorized to administer oaths"—is a question of statutory interpretation, which we likewise review de novo.[7] The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most "reliable evidence" of that intent, the language of the statute

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[4] *Stone v Dep't of State Police*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2014 (Docket No. 314848) p 7.

[5] *Id*. at 7, quoting *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 212-213; 840 NW2d 730 (2013).

[6] *McCahan v Brennan*, 492 Mich 730, 735; 822 NW2d 747 (2012).

[7] *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

itself.[8] When legislative intent is clear from the language, no further construction is required or permitted.[9]

III. ANALYSIS

The issue in these cases is whether plaintiffs' notices were "signed and verified by the claimant before an officer authorized to administer oaths" and if not, whether an ineffective notice in a case involving governmental immunity must nonetheless be pleaded as an affirmative defense or be waived.

Under the government tort liability act (GTLA), MCL 691.1401 *et seq*., governmental agencies are broadly shielded from tort liability. Here, the defendants are two such agencies: the Department of Corrections and the Michigan State Police. However, the accidents involving plaintiffs Fairley and Stone are alleged to fall within the motor vehicle exception to governmental immunity.[10] In accordance with MCL 691.1410(1), a claim satisfying an exception to governmental immunity against a state agency must be "brought in the manner provided in [the Revised Judicature Act]," including MCL 600.6431. That is, while MCL 600.6431 does not "confer governmental immunity," it establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431.[11] As a

[8] *Id*.

[9] *Id*. at 534, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[10] MCL 691.1405.

[11] This is contrary to the Court of Appeals' observation in *Fairley* that "the text of the statute makes no mention of governmental immunity" and "rather than precluding the filing of suit against the state . . . establishes procedures for doing so." *Fairley*, unpub op, at 2.

result, plaintiffs must adhere to the conditions precedent in MCL 600.6431(1) to successfully expose the defendant state agencies to liability.

It is well established that governmental immunity is not an affirmative defense, but is instead a characteristic of government. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). "[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions [to governmental immunity]." *Id*. at 201. Furthermore, as we explained in *McCahan*:

> [W]hen the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain notice requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed.[12]

In MCL 600.6431(1), the Legislature has qualified a claimant's ability to bring a claim against the state by requiring that "the claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths." While the Court of Appeals observed that "[t]he statute does not prescribe the kind of inquiry that must be made nor does any language in the statute require that evidence of the oath or affirmance be on the face of the notice,"[13] this Court's decision in *McCahan v Brennan* provided insight into the purpose to be served by the notice provision:

> [T]he Legislature has established a clear procedure that eliminates any ambiguity about whether an attempted

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[12] *McCahan*, 492 Mich at 746; relied on in *Zelek v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 305191).

[13] *Stone v Mich State Police*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2014 (Docket No. 314848), p 7.

> notice is effective. A claimant who complies with MCL 600.6431 need not worry about whether a notice was properly received and processed by the correct governmental entity. By the same token, state entities can be secure knowing that only timely, verified claims in notices filed with the Court of Claims can give rise to potential liability . . . .[14]

If a notice, such as those here, fails to *show* that it was signed and verified before an officer authorized to administer oaths, how would a governmental entity be assured that the notice, which seeks to impose liability, was actually verified? It is for this very reason that MCL 600.6431 requires more than the mere *act* of verification and instead requires some *proof* of that verification—that, as defendant states, "the notice bear an indication that the signature was signed and sworn to before an officer authorized to administer oaths."[15]

A. APPLICATION TO *FAIRLEY*

We are satisfied that there is no material factual dispute regarding the notice submitted by plaintiff Fairley, as it is undisputed that she failed to sign the notice of intent. Accordingly, plaintiff did not submit a notice "signed by the claimant" as required by the plain language of the statute. Further, because the MDOC is a state agency entitled to governmental immunity, we

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[14] *McCahan*, 492 Mich at 744 n 24; see *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212; 731 NW 2d (2007) (stating that "additional reasons . . . for requiring notice [in cases involving governmental immunity] . . . include[] . . . creating [monetary] reserves . . . reducing the uncertainty of the extent of future demands, or even to force a claimant to an early choice regarding how to proceed").

[15] Moreover, as this Court stated in *Rowland*, common sense counsels in favor of this outcome, given that "the Legislature is not even required to provide [any] exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational limits." *Id*. at 212.

conclude that defective notice need not be pleaded as an affirmative defense because defendants are presumed to be entitled to governmental immunity, and the burden is on plaintiff to prove that one of the exceptions to governmental immunity is applicable.

For these reasons, we conclude that plaintiff Fairley's notice was insufficient to maintain a claim against MDOC and, as a result, Fairley's claim should be dismissed. Accordingly, the Court of Claims improperly denied defendant's motion for summary disposition.

B. APPLICATION TO *STONE*

We also reject plaintiff Stone's notice for the similar reason that it was not clear from the face of the document that it was verified "before an officer authorized to administer oaths." We are unpersuaded that the belated affidavit of plaintiff's counsel asserting his dual role as attorney and notary public can cure this deficiency. Plaintiff Stone's notice was either unverified but timely or untimely but verified, and in either circumstance it fails to meet the conditions precedent to maintaining a suit against the Michigan State Police.[16]

For these reasons, we likewise conclude that Stone's claim should be dismissed. Accordingly, the Court of Claims properly granted defendant summary disposition and the Court of Appeals erred by reversing that order.

IV. CONCLUSION

In *Fairley*, we hold that the lower courts erred by concluding that defendant was not entitled to summary disposition based on the plaintiff's failure to comply

[16] MCL 600.6431(1) and (3).

with the notice requirements of MCL 600.6431(1). In *Stone*, we hold that the Court of Appeals erred by reversing the Court of Claims' ruling granting defendant's motion for summary disposition on that same basis. Accordingly, we reverse both judgments of the Court of Appeals. Because the notices supplied by each plaintiff failed to meet the requirements of MCL 600.6431(1), plaintiffs failed to defeat the protection of governmental immunity to which MDOC and the Michigan State Police are entitled.[17]

In lieu of granting defendants' application for leave to appeal, we reverse the judgment of the Court of Appeals in *Fairley* and remand that case to the Court of Claims for entry of an order granting summary disposition in favor of defendant. We also reverse the judgment of the Court of Appeals in *Stone* and remand that case to the Court of Claims for reentry of its original order granting summary disposition in favor of defendant.

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

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[17] Again, *Fairley* and *Stone* present questions of the adequacy of notice in a governmental immunity case. Thus, and contrary to both Court of Appeals opinions, the outcome of these cases is entirely separate from the analysis on statutory notice provisions in medical malpractice actions found in *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208 (2013), oral argument on application granted 497 Mich 910 (2014); compare *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403; 716 NW2d 236 (2006) (involving a medical malpractice claim against defendants entitled to governmental immunity).

PEOPLE v MAZUR

Docket No. 149290. Argued January 15, 2015. Decided June 11, 2015.

Cynthia A. Mazur was charged in the Oakland Circuit Court, Colleen A. O'Brien, J., with possession with intent to deliver less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), and with manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, *id*. Defendant moved to dismiss the charges under the immunity provision of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424. The court denied the motion. Defendant sought leave to appeal in the Court of Appeals, which granted the application. In an unpublished opinion per curiam, issued April 1, 2014 (Docket No. 317447), the Court of Appeals, METER, P.J., and JANSEN and WILDER, JJ., affirmed. Defendant sought leave to appeal in the Michigan Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other action. 497 Mich 883 (2014).

In an opinion by Justice BERNSTEIN, joined by Justices KELLY, MCCORMACK, and VIVIANO, the Supreme Court *held*:

Because the conduct at issue in this case occurred before the enactment of 2012 PA 512 and 2012 PA 514, the Supreme Court considered the MMMA as originally enacted. A defendant claiming that he or she was solely in the presence or vicinity of the medical use of marijuana was not entitled to immunity under MCL 333.26424(i) when the medical use of marijuana was not in accordance with the MMMA. Nor was a defendant entitled to immunity under MCL 333.26424(i) when the defendant's conduct went beyond assisting with the use or administration of marijuana. However, the Court of Appeals erred in interpreting the phrase "marihuana paraphernalia" as used in MCL 333.26424(g). "Marihuana paraphernalia" as used in MCL 333.26424(g) included items that were both specifically designed or actually employed for the medical use of marijuana. "Medical use" was broadly defined in the MMMA to include cultivation. In this case, defendant provided her husband, who was both a qualifying patient and a registered caregiver under the MMMA, with sticky notes for the purpose of detailing the harvest dates of his plants. This activity

constituted the provision of marijuana paraphernalia for the medical use of marijuana under MCL 333.26424(g) because the sticky notes were actually used in the cultivation of marijuana. Accordingly, the prosecution was prohibited from relying on the evidence of defendant's provision of the sticky notes in bringing charges against defendant.

1. Under the MMMA, immunity was available to people who were neither registered qualifying patients nor primary caregivers under MCL 333.26424(i) and (g). A person could claim immunity under MCL 333.26424(i) either (1) for being in the presence or vicinity of the medical use of marijuana in accordance with the MMMA, or (2) for assisting a registered qualifying patient with using or administering marijuana. In this case, the evidence showed that the marijuana operation was not in accordance with the MMMA and that defendant assisted her husband with the cultivation of marijuana, not the ingestion of marijuana. Therefore, defendant was not entitled to lay claim to immunity under either provision of MCL 333.26424(i).

2. Under MCL 333.26424(g), an individual could claim immunity for providing a registered qualifying patient or a registered primary caregiver with marijuana paraphernalia for purposes of a qualifying patient's medical use of marijuana. In MCL 333.7451, the Public Health Code defines drug paraphernalia as any equipment, product, material, or combination of equipment, products, or materials, that is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. The Court of Appeals erred when it concluded that the MMMA and the Offenses and Penalties provisions of Article 7 of the Public Health Code, in which the definition of "drug paraphernalia" is found, were *in pari materia*. The MMMA's purpose is to allow medical marijuana use for certain individuals under limited circumstances, whereas the purpose of the Offenses and Penalties provisions is to criminalize marijuana use and related activities. The aim of each statute is distinct; in fact, they are contrary to one another. And the Legislature specifically limited application of the statutory definition of "drug paraphernalia" to certain provisions of the Public Health Code. As commonly understood, "paraphernalia" means equipment, apparatus, or furnishings used in or necessary for a particular activity. A specific design need not be intended. In context, as used in § 4(g), the phrase "marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana" meant that an item may or may

not have been marijuana paraphernalia depending on the use to which it was put. Under the MMMA, "medical use" referred to activities beyond just administration or ingestion, including transportation, internal possession, and cultivation. In this case, defendant provided her husband, who was both a qualifying patient and a registered caregiver under the MMMA, with sticky notes for the purpose of detailing the harvest dates of his plants. This activity constituted the provision of marijuana paraphernalia for the medical use of marijuana under MCL 333.26424(g), because the sticky notes were actually used in the cultivation of marijuana. Accordingly, the prosecution was prohibited from relying on the evidence of defendant's provision of the sticky notes in bringing charges against defendant. If that evidence was the only basis for the criminal charges, the charges had to be dismissed. But if there was other evidence supporting the charges, the prosecution could proceed on the basis of the remaining evidence.

Reversed; case remanded to the circuit court for further proceedings.

Justice MARKMAN, concurring in part and dissenting in part, would have affirmed the judgment of the Court of Appeals. Justice MARKMAN agreed with the majority to the extent it held that a defendant claiming that he or she was solely in the presence or vicinity of the medical use of marijuana was not entitled to immunity under § 4(i) when the medical use of marijuana was not in accordance with the act and that a defendant was not entitled to immunity under § 4(i) when the defendant's conduct went beyond assisting with the use or administration of marijuana, and that, therefore, defendant was not entitled to immunity under § 4(i). Justice MARKMAN disagreed, however, with the majority to the extent that it held that "marihuana paraphernalia" as used in § 4(g) included items either specifically designed or actually employed for the medical use of marijuana. The MMMA and Article 7 of the Public Health Code are *in pari materia* because they share the same general purpose—the regulation of controlled substances, including, specifically, marijuana. Using the definition from the Public Health Code, "marihuana paraphernalia" meant any equipment, product, material, or combination of equipment, products, or materials, that was specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing marijuana into the human body. Because the

sticky notes were not specifically designed for any such use, they were not marijuana paraphernalia and defendant was not entitled to immunity under § 4(g).

Justice ZAHRA, joined by Chief Justice YOUNG, concurring in part and dissenting in part, would have affirmed the judgment of the Court of Appeals, agreeing with the majority that defendant was not entitled to immunity under § 4(i) of the MMMA, but disagreeing with the majority that "marihuana paraphernalia" under § 4(g) included any items employed for the medical use of marijuana. A plain reading of MCL 333.26424(g) revealed that a person claiming immunity must have provided (1) marijuana paraphernalia (2) to a registered qualifying patient or a registered primary caregiver (3) for purposes of a qualifying patient's medical use of marijuana. The third element did not explain the meaning of "marihuana paraphernalia." Rather, the third element defined the specific intent of the person claiming immunity for providing marijuana paraphernalia. Reading the MMMA as a whole, "marihuana paraphernalia" must have been an item or items intended to assist in the administration of marijuana to a qualifying patient under the MMMA. Because the sticky notes at issue in this case were not used for the administration of marijuana to a qualifying patient, defendant's act of assisting her husband with the cultivation of marijuana through the use of sticky notes was not immune under MCL 333.26424(g).

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY — MARIJUANA PARAPHERNALIA DEFINED.

Under MCL 333.26424(g) of the Michigan Medical Marihuana Act (MMMA), an individual may claim immunity for providing a registered qualifying patient or a registered primary caregiver with marijuana paraphernalia for purposes of a qualifying patient's medical use of marijuana; "marihuana paraphernalia" as that term is used in § 4(g) includes items that are both specifically designed or actually employed for the medical use of marijuana; "medical use" is broadly defined in the MMMA to include cultivation, and the provision of items actually used in the cultivation of marijuana may constitute the provision of marijuana paraphernalia for purposes of a qualifying patient's medical use of marijuana—even if those items are not specifically designed for the cultivation of marijuana—entitling the provider of the items to immunity under MCL 333.26424(g).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Kathryn G. Barnes*, Assistant Prosecuting Attorney, for the people.

Rudoi Law PLLC (by *David Adam Rudoi*) for defendant.

BERNSTEIN, J. This case requires us to examine immunity under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. We are specifically concerned with the application of the MMMA's immunity provisions to individuals who are neither registered qualifying patients nor primary caregivers. See MCL 333.26424(g); MCL 333.26424(i).

We hold that a defendant claiming that he or she is solely in the presence or vicinity of the medical use of marijuana is not entitled to immunity under MCL 333.26424(i) when the medical use of marijuana was not in accordance with the act. Nor is a defendant entitled to immunity under MCL 333.26424(i) when the defendant's conduct goes beyond assisting with the use or administration of marijuana. However, we hold that "marihuana paraphernalia," as that phrase is used in MCL 333.26424(g), includes items that are both specifically designed or actually employed for the medical use of marijuana. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant Cynthia Mazur is the wife of David Mazur, who was himself both a registered qualifying patient and a registered primary caregiver for two medical

marijuana patients. David Mazur grew marijuana in their marital home. Officers of the Holly Police Department, acting on a tip, searched the residence for marijuana. Marijuana plants, dried marijuana, and pipes with marijuana residue were found. In executing the search, an officer questioned defendant, who used the first-person plural pronoun "we" when describing the marijuana operation. Although the use of this pronoun led the officers to conclude that defendant was a participant in her husband's marijuana operation, defendant maintains that her involvement was limited to writing the date of harvest for marijuana plants on several sticky notes.

The Oakland County Prosecutor charged both defendant and David with marijuana-related offenses. In a separate proceeding, David pleaded guilty to one count of possession with intent to deliver less than five kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*), and one count of manufacturing less than five kilograms or fewer than 20 plants of marijuana, *id*. Defendant was charged with the same two offenses. Defendant moved to dismiss the charges against her citing the immunity provision of the MMMA, MCL 333.26424. The circuit court held that MCL 333.26424(g) did not apply because there was no evidence that defendant provided marijuana paraphernalia to either a registered qualifying patient or a caregiver; the circuit court also held that MCL 333.26424(i) did not apply because David's use of medical marijuana was not in compliance with the MMMA. The Court of Appeals affirmed. *People v Mazur*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 317447).

Defendant then sought leave to appeal in this Court. We directed the Clerk of the Court to schedule oral

argument on whether to grant the application or take other action, asking the parties to address:

> [W]hether the defendant is entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, specifically MCL 333.26424(g) and/or MCL 333.26424(i), where [defendant's] spouse was a registered qualifying patient and primary caregiver under the act, but his marijuana-related activities inside the family home were not in full compliance with the act. [*People v Mazur*, 497 Mich 883 (2014).]

II. STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *Michigan v McQueen*, 493 Mich 135, 146-147; 828 NW2d 644 (2013). Statutes enacted by the Legislature are interpreted in accordance with legislative intent; similarly, statutes enacted by initiative petition are interpreted in accordance with the intent of the electors. *Id*. at 147. We begin with an examination of the statute's plain language, which provides "the most reliable evidence" of the electors' intent. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

This Court reviews a trial court's findings of fact for clear error. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172-173; 848 NW2d 95 (2014). A factual finding is clearly erroneous if it either lacks substantial evidence to sustain it, or if the reviewing court is left with the definite and firm conviction that the trial court made a mistake. *Id*.

III. IMMUNITY UNDER THE MICHIGAN MEDICAL MARIHUANA ACT

The MMMA was enacted by voter referendum in 2008 and allows for the medical use of marijuana to

treat or alleviate the pain associated with a debilitating medical condition. Although the Legislature has since amended the MMMA by enacting 2012 PA 512 and 2012 PA 514, the conduct at issue occurred before the date these amendments took effect. Therefore, we consider only the MMMA as originally enacted.

Section 4 of the MMMA concerns immunity. A qualifying patient who receives a registry identification card is entitled to immunity, provided that certain conditions are met. MCL 333.26424(a). A primary caregiver who receives a registry identification card is entitled to the same protection. MCL 333.26424(b). Both Subsections (a) and (b) state that this protection only applies to the "medical use of marihuana in accordance with this act." MCL 333.26424(a) and (b). "Medical use" is defined as:

> [T]he acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [MCL 333.26423(e), as enacted by 2008 IL 1.]

Two additional provisions of the MMMA provide immunity to people who are neither registered qualifying patients nor primary caregivers: MCL 333.26424(g) and MCL 333.26424(i). These are the two provisions under which defendant claims immunity.

Section 4(g) states:

> A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, *for providing* a registered qualifying patient or a registered primary caregiver with *marihuana*

paraphernalia for purposes of a qualifying patient's *medical use* of marihuana. [MCL 333.26424(g) (emphasis added).]

Section 4(i) states:

A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, *solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana*. [MCL 333.26424(i) (emphasis added).]

IV. APPLICATION

Defendant claims entitlement to the immunity defense under both §§ 4(g) and 4(i) of the MMMA. Because we agree with the Court of Appeals that defendant is not entitled to immunity under § 4(i), we begin our analysis with an examination of that section.

A. MCL 333.26424(i)

Section 4(i) of the MMMA offers two distinct types of immunity, as evidenced by the use of the disjunctive "or." A person may claim immunity either: (1) "for being in the presence or vicinity of the medical use of marihuana in accordance with this act," or (2) "for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i). These clauses are also preceded and modified by the adverb "solely," which places a limitation on both claims of immunity.

We hold that defendant is not entitled to either type of immunity under § 4(i) of the MMMA. As to the first immunity provision in § 4(i), a person is only entitled to

immunity when the underlying medical use of marijuana is in accordance with the MMMA. Although we decline to state whether defendant's husband's convictions should have been persuasive in deciding whether defendant was eligible for immunity, we agree with the Court of Appeals that the evidence showed that the marijuana operation was *not* in accordance with the MMMA.[1]

Defendant argues that she has no control over the acts of another autonomous being, and that if one is merely limited to being present, one is necessarily unable to intervene. But to read § 4(i) in the manner that defendant requests would render the phrase "in accordance with this act" superfluous, and "[t]his Court '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 Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). We recognize the apparent inequity of holding one individual responsible for another's wrongdoing; however, the plain language of the statute does not allow for another reading.[2]

This Court has previously addressed the second claim of immunity in § 4(i):

> Notably, § 4(i) does not contain the statutory term "medical use," but instead contains two of the nine activities that encompass medical use: "using" and "administering" marijuana. . . . In this context, the terms "using" and

[1] Additionally, we directed the parties to address whether defendant was entitled to immunity when "[defendant's husband's] marijuana-related activities inside the family home *were not* in full compliance with the act." *Mazur*, 497 Mich at 883 (emphasis added).

[2] It bears noting that traditional criminal defenses, such as challenges to the sufficiency of the evidence, are still available to defendant.

> "administering" are *limited to conduct involving the actual ingestion of marijuana*. Thus, by its plain language, § 4(i) permits, for example, the spouse of a registered qualifying patient to assist the patient in ingesting marijuana, regardless of the spouse's status. [*McQueen*, 493 Mich at 158 (emphasis added).]

"Medical use", as defined in former § 3(e),[3] is a term that encompasses nine different actions. Because the second type of immunity available under § 4(i) refers generically to "using and administering" marijuana and not to the statutorily defined "medical use" of marijuana, this Court read § 4(i) narrowly in *McQueen*. Because the defendants in *McQueen* were engaged in the transfer, delivery, and acquisition of marijuana—activities that are found under the umbrella of "medical use"—but were not engaged in the mere use and administration of marijuana, this Court found that they were not entitled to immunity under § 4(i). *Id*. Similarly, defendant here was not merely assisting her husband with conduct involving the actual *ingestion* of marijuana; instead, she assisted him with the *cultivation* of marijuana. Because assisting in the cultivation of marijuana does not constitute assistance with "using" or "administering" marijuana, defendant cannot lay claim to immunity under this provision of the MMMA.

B. MCL 333.26424(g)

Under § 4(g) of the MMMA, an individual may claim immunity "for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana." MCL 333.26424(g). At issue here is

[3] "Medical use" is now defined in MCL 333.26423(f).

the definition of the term "marihuana paraphernalia," which is not explicitly defined in the MMMA.

In parsing this term, the Court of Appeals adopted the definition of "drug paraphernalia" used in the Public Health Code, MCL 333.1101 *et seq*.:

> [A]ny equipment, product, material, or combination of equipment, products, or materials, *which is specifically designed for use* in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance[.] [MCL 333.7451 (emphasis added).]

The Court of Appeals reasoned that it was appropriate to refer to this definition, given that the Public Health Code and the MMMA are *in pari materia*, because both "restrict the use of controlled substances." *Mazur*, unpub op at 3. In particular, the Court of Appeals focused on the phrase "specifically designed for use in," which modifies the list of activities that follows.

As an initial matter, we note that the Court of Appeals erred by relying on the doctrine of *in pari materia* to determine the meaning of "marihuana paraphernalia." Under the doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). An act that incidentally refers to the same subject is not *in pari materia* if its scope and aim are distinct and unconnected. *Palmer v State Land Office Bd*, 304 Mich 628, 636; 8 NW2d 664 (1943). Here, the MMMA and the Offenses and Penalties provisions of the Controlled Substances article of the Public

Health Code[4] have two diametrically opposed purposes. The MMMA's purpose is to allow medical marijuana use for certain individuals under limited circumstances, whereas the purpose of the Offenses and Penalties provisions is to *criminalize* marijuana use and related activities. See MCL 333.7401. The Court of Appeals was wrong to state that these two provisions "relate to the same subject, i.e., *restrict the use* of controlled substances[.]" The aim of each statute is distinct, and indeed they are contrary to one another.

Furthermore, MCL 333.7451 begins with an important qualifier: "*As used in sections 7453 to 7461 and section 7521*, 'drug paraphernalia' means . . . ." By specifically limiting the applicability of this definition to certain statutory provisions, the Legislature expressed a clear intent that the definition should not be applied elsewhere. Application of the *in pari materia* doctrine would, therefore, be contrary to legislative intent. This Court held similarly in *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), which addressed the meaning of the phrase "board certified" in MCL 600.2169. The Legislature did not specifically define "board certified" in MCL 600.2169. Plaintiffs argued that the Court should read MCL 600.2169 *in pari materia* with the Public Health Code's definition, MCL 333.2701(a). This Court disagreed given that "the Legislature specifically limited the use of the Public Health Code's definition of 'board certified' to the Public Health Code . . . ." *Woodard*, 476 Mich at 563.[5] Because the Legislature specifi-

[4] Article 7 of the Public Health Code, MCL 333.7101 *et seq*., concerns controlled substances. Part 74 of Article 7, MCL 333.7401 *et seq*., concerns controlled-substance offenses and penalties.

[5] A separate concurrence agreed with the majority on this point:

> We decline to impute the definition of "board certified" from MCL 333.2701(a) to MCL 600.2169 for several reasons. First, the

cally limited the use of the Public Health Code's definition of "drug paraphernalia" to certain provisions of the Public Health Code, it would be antithetical to the interpretive enterprise to apply the definition of "drug paraphernalia" beyond the scope prescribed.

Because we decline to rely on the definition of "drug paraphernalia" set forth in the Public Health Code to inform our understanding of the phrase "marihuana paraphernalia" as used in the MMMA, we turn instead to other conventional means of statutory interpretation. Generally, when a word used in a statute is not specifically defined, it bears "its common and approved usage of the language." MCL 8.3a. Accordingly, in order to decipher what the electors meant by "marihuana paraphernalia," we turn to the dictionary. "Marihuana" is quite well understood in this context. "Paraphernalia" is defined as "equipment, apparatus, or furnishings used in or necessary for a particular activity." *Random House Webster's College Dictionary* (2005). Nothing in this definition states that a specific design must be intended.

Because "[t]he law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions," *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 168; 680 NW2d 840 (2004), we must also read the phrase "marihuana paraphernalia" in light of the rest

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Legislature made clear that the definition of "board certified" set forth in MCL 333.2701(a) applies only to the Public Health Code by prefacing it with the statement "*As used in this part* [of the Public Health Code] . . . 'Board certified' means . . . ." (Emphasis added.) Especially in light of such clear words of limitation, we must presume that the Legislature intended that the definition of "board certified" set forth in MCL 333.2701(a) would not be applied to other statutes using the same phrase. [*Woodard*, 476 Mich at 610-611 (TAYLOR, C.J., concurring) (alteration in original)].

of § 4(g). In particular, "marihuana paraphernalia" must be read in light of the adjacent phrase "medical use of marihuana."[6] Read as a whole, the statute states that "marihuana paraphernalia" is employed for the "medical use" of marijuana. As previously noted, "medical use" is defined by statute, and includes several activities. When modified by the expansive definition of "medical use," it becomes clear that "marihuana paraphernalia" cannot be so limited as to only include those items that are specifically designed for the medical use of marijuana.

First, the phrase "for purposes of a qualifying patient's medical use of marihuana" indicates that an item may or may not be "marihuana paraphernalia," depending on the use to which it is put. Second, "medical use" is a broader term than mere use or administration. As discussed in *McQueen*, the drafters could easily have chosen the narrower language we see in § 4(i), but they did not. "Medical use" refers to activities as broad as transportation, internal possession, and cultivation. To only include items that were *specifically designed* for the medical use of marijuana would be to turn the statutorily defined phrase "medical use" into meaningless surplusage. See, e.g., *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (explaining that "it is well established that '[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory' ") (citation omitted). Although one might conceive of paraphernalia that is specifically designed for the use

[6] "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Nothing in the statute indicates that the words of this sentence are not meant to be read together as a single, grammatically linked unit.

or internal possession of marijuana, one is necessarily stymied when attempting to identify paraphernalia that is specifically designed for the cultivation of marijuana; surely a trowel that one uses for growing cherry tomatoes could also be employed in a marijuana operation and vice versa.

The statutory definition of "medical use" is the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition[.]" Former MCL 333.26423(e).[7] The dissents point to the use of the phrase "relating to the administration of marihuana" to suggest that objects must be used to administer or ingest marijuana in order to be considered marihuana paraphernalia. But this reading conflates the more expansive definition of "medical use" with the narrower definition of use and administration. In *McQueen*, this Court outlined the difference between the mere "use" and "administration" of marijuana, which is "*limited* to conduct involving the actual ingestion of marijuana." *McQueen*, 493 Mich at 158 (emphasis added). In contrast, this Court acknowledged that the definition of "medical use" was broader and incorporated activities such as "[t]he transfer, delivery, and acquisition of marijuana." *Id*. Therefore, a qualifying patient's transfer, delivery, acquisition, or cultivation of marijuana is a medical use according to a plain-language reading of the statute.

The use of conventional means of statutory interpretation thus leads us to hold that "marihuana paraphernalia" applies both to those items that are specifically designed for the medical use of marijuana as well as

[7] See note 3 of this opinion.

those items that are actually employed for the medical use of marijuana. In this case, defendant provided her husband, who was both a qualifying patient and a registered caregiver, with sticky notes for the purpose of detailing the harvest dates of his plants.[8] This activity constitutes the provision of "marihuana paraphernalia" because the objects were actually used in the cultivation or manufacture of marijuana. See former MCL 333.26423(e).

The provision of sticky notes in this case therefore falls within the scope of § 4(g). The prosecution is therefore prohibited from introducing or otherwise relying on the evidence relating to defendant's provision of marihuana paraphernalia—i.e., the sticky notes—as a basis for the criminal charges against defendant.[9] If that is the only basis for criminal charges, then a successful showing under § 4(g) will result in the dismissal of charges. However, if there is additional evidence supporting criminal charges against defendant, nothing in § 4(g) prohibits the prosecution from proceeding on the basis of the remaining evidence.

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[8] The trial court's contrary finding that "there is no evidence that she provided [marihuana paraphernalia] to a registered qualifying patient or registered caregiver" is clearly erroneous because elsewhere in its opinion the trial court refers to evidence that defendant's husband was a registered caregiver. It is also belied by a letter from the Department of Licensing and Regulatory Affairs, admitted by stipulation of the parties, stating that defendant's husband was a patient and a caregiver for two other patients.

[9] While § 4(g) grants immunity for "providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia," immunity does not extend under that provision to other conduct, such as the use of marijuana paraphernalia. Accordingly, even if § 4(g) prohibits the prosecution from relying on defendant's provision of marihuana paraphernalia to her husband, § 4(g) does not necessarily exclude all references to the paraphernalia if the evidence supports the conclusion that defendant engaged in conduct for which she is not entitled to immunity under § 4(g).

V. CONCLUSION

Although we hold that defendant is not entitled to immunity under § 4(i) of the MMMA, we conclude that the Court of Appeals erred in its interpretation of § 4(g) of the MMMA. We reverse the judgment of the Court of Appeals and remand to the circuit court for further proceedings consistent with this opinion.[10] We do not retain jurisdiction.

KELLY, MCCORMACK, and VIVIANO, JJ., concurred with BERNSTEIN, J.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree with the majority opinion to the extent that it holds that "a defendant claiming that he or she is solely in the presence or vicinity of the medical use of marijuana is not entitled to immunity under MCL 333.26424(i) when the medical use of marijuana was not in accordance with the act[;] [n]or is a defendant entitled to immunity under MCL 333.26424(i) when the defendant's conduct goes beyond assisting with the use or administration of marijuana," and, therefore, "defendant is not entitled to immunity under § 4(i) . . . ." However, I respectfully disagree with the majority opinion to the extent that it holds that " 'marihuana paraphernalia,' as that phrase is used in MCL 333.26424(g), includes items that are both specifically designed or actually employed for the medical use of marijuana" and that because the sticky notes at issue here were "actually used in the cultivation or manufacture of marijuana," they are "marihuana paraphernalia," and, therefore, defendant is entitled to immunity

[10] We deny leave to appeal with respect to defendant's remaining issue because we are not persuaded that the question presented should be reviewed by this Court.

under MCL 333.26424(g). Instead, I would hold that "marihuana paraphernalia" as that phrase is used in MCL 333.26424(g) means "any equipment, product, material, or combination of equipment, products, or materials, which is *specifically designed* for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing [marijuana] into the human body," MCL 333.7451 (emphasis added), and that because sticky notes are not "specifically designed" for any such use, they are not "marihuana paraphernalia," and therefore defendant is not entitled to immunity under MCL 333.26424(g). Accordingly, I would affirm the judgment of the Court of Appeals.

The Michigan Medical Marihuana Act (MMMA) provides in pertinent part:

> A person shall not be subject to arrest, prosecution, or penalty in any manner . . . for providing a registered qualifying patient or a registered primary caregiver with *marihuana paraphernalia* for purposes of a qualifying patient's *medical use* of marihuana. [MCL 333.26424(g) (emphasis added).]

Although the MMMA does not define "paraphernalia," the Controlled Substances provisions that constitute Article 7 of the Public Health Code (PHC) do. It is well established that "[s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). That is, "[i]t is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or

having the same *general* purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another." *IBM v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014), quoting *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW 35 (1938) (emphasis added). "[S]tatutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and . . . courts will regard all statutes upon the same *general* subject matter as part of 1 system." *People v McKinley*, 496 Mich 410, 421 n 11; 852 NW2d 770 (2014), quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953) (emphasis added). There is no doubt that the MMMA and Article 7 of the PHC pertain to the same general subject and have the same general purpose—the regulation of controlled substances, including, specifically, marijuana.

As this Court has explained, "the MMMA introduced into Michigan law an *exception* to the Public Health Code's prohibition on the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions." *People v Bylsma*, 493 Mich 17, 27; 825 NW2d 543 (2012) (emphasis added). "[T]he MMMA exists only as an *exception* to, and not a displacement of, the Public Health Code." *Id*. (emphasis added). An exception to a general rule cannot be fully understood when read in isolation from the general rule. This is exactly why every one of the opinions that this Court has written regarding the MMMA expressly refers to the PHC. See *People v Kolanek*, 491 Mich 382, 394 n 24; 817 NW2d 528 (2012) ("Marijuana remains a schedule 1 substance in Michigan's Public Health Code, MCL 333.7212(1)(c)."); *Michigan v McQueen*, 493 Mich 135, 148; 828 NW2d 644 (2013) ("Marijuana is a controlled

substance as defined in MCL 333.7104 [of the PHC]."); *Bylsma*, 493 Mich at 27 ("[T]he MMMA introduced into Michigan law an exception to the Public Health Code's prohibition on the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions."). The MMMA provides immunity, or an affirmative defense, to a violation of the PHC. Therefore, one cannot fully understand the MMMA, in particular its breadth of immunity and the scope of its affirmative defenses, without first understanding the PHC and its prohibitions.

Further, the Legislature's stated purpose for the PHC is "the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2). Likewise, the stated purpose of the MMMA is the protection of "the health and welfare of [the state's] citizens." MCL 333.26422(c). See also *Kolanek*, 491 Mich at 393-394, quoting MCL 333.26422(c) ("The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an 'effort for the health and welfare of [Michigan] citizens.' "). Thus, the MMMA and PHC have the same general purpose—the protection of the health and welfare of Michigan citizens. For these reasons, the MMMA and the PHC are *in pari materia* and must be read together as a whole.[1]

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[1] The majority holds that the MMMA and the PHC are not *in pari materia* because they have "two diametrically opposed purposes." In reaching this holding the majority relies on *Palmer v State Land Office Bd*, 304 Mich 628, 636; 8 NW2d 664 (1943), which held that "although an act may *incidentally* refer to the same subject as another act, it is not in *pari materia* if its scope and aim are *distinct and unconnected*." (Emphasis added.) However, the MMMA and the PHC do not "*incidentally* refer to the same subject." Rather, the whole purpose of Article 7 of the PHC is to regulate controlled substances, including marijuana; and the whole purpose of the MMMA is to regulate marijuana. The overlap or intersec-

As noted earlier in this opinion, while the MMMA

tion between these acts can in no way be described as "incidental." The purposes of these acts also cannot be described as being "distinct and unconnected." The purpose of both is to regulate marijuana. Just because one prohibits its use and the other allows it under limited and delineated circumstances does not make the "general purpose" of these acts "distinct and unconnected." See *id*. at 636-637 ("[A]ll statutes . . . having the same *general* purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another.") (emphasis added). The majority's very narrow construction of the *in pari materia* doctrine is at odds with this Court's own prior constructions of the doctrine. For example, this Court has repeatedly recognized the "well-noted principle of construction that a subsequently enacted specific statute is regarded as an exception to a prior general one, especially if they are *in pari materia*." *Husted v Dobbs*, 459 Mich 500, 516; 591 NW2d 642 (1999) (quotation marks and citation submitted) (this Court held in *Husted* that to the extent that the essential insurance act created an exception to the no-fault act, the two acts are *in pari materia* and thus should be read together); see also *Rathbun*, 284 Mich at 544 (this Court held in *Rathbun* that "[s]tatutes *in pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each"); *Malcolm v East Detroit*, 437 Mich 132, 145; 468 NW2d 479 (1991) (this Court held in *Malcolm* that although the emergency medical services act created an exception to governmental immunity that is not found in the governmental tort liability act, these acts are *in pari materia* and must be read together); *State Bar v Galloway*, 422 Mich 188, 193; 369 NW2d 839 (1985) (this Court held in *Galloway* that the Michigan Employment Security Act, which allows non-lawyers to represent employers in proceedings before Michigan Employment Security Commission referees, and the unauthorized-practice of law statutes are *in pari materia* and therefore must be read together). However, under the majority's construction of this doctrine, a statute creating an exception to a prior general statute would never be *in pari materia* with the prior statute because the two would be "diametrically opposed." Indeed, the majority's construction of the *in pari materia* doctrine is inconsistent even with *Palmer* on which the majority relies. In *Palmer*, 304 Mich at 637, this Court held that "[w]here a statute embraces only part of a subject covered comprehensively by a prior law, the two should be construed together unless a different legislative intent appears; the later being an exception or qualification of the prior only so far as they are repugnant." The MMMA embraces part of a subject covered comprehensively by Article 7 of the PHC, i.e., the regulation of marijuana, and therefore these two acts should be "construed together" and the MMMA

does not define the term "paraphernalia," the PHC does. Specifically, the PHC defines "drug paraphernalia" as "any equipment, product, material, or combination of equipment, products, or materials, which is *specifically designed* for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . ." MCL 333.7451 (emphasis added).[2] In addition, MCL 333.7451 contains a nonex-

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viewed as an "exception" to Article 7 of the PHC "only so far as they are repugnant." With regard to the meaning of "paraphernalia" in particular, there is nothing in either Article 7 of the PHC or the MMMA that suggests that they are "repugnant" in this regard.

[2] Relying on this Court's decision in *Woodard v Custer*, 476 Mich 545, 563; 719 NW2d 842 (2006), in which we declined to apply the PHC's definition of "board certified" to the Revised Judicature Act (RJA) because the Legislature specifically limited the use of the PHC's definition of "board certified" to the PHC, the majority holds that we should not apply the PHC's definition of "drug paraphernalia" to the MMMA because "the Legislature specifically limited the use of the Public Health Code's definition of 'drug paraphernalia' to certain provisions of the Public Health Code." However, the majority overlooks the critical distinction between *Woodard* and the instant case, which is that the statutes at issue in *Woodard* were not *in pari materia* and therefore this Court was not obligated to read those statutes together as a whole. The statutes at issue in *Woodard* were the PHC and the RJA. "The Legislature's purpose in enacting the Public Health Code was to protect the public health, safety, and welfare," while "[i]ts purpose in enacting the Revised Judicature Act . . . was to set forth the organization and jurisdiction of the judiciary and to effect procedural improvements in civil and criminal actions," which obviously is "unrelated to protecting the health, safety, and welfare of the general public." *Woodard*, 476 Mich at 611-612 (TAYLOR, C.J., concurring). Given that these statutes were not *in pari materia*, this Court sensibly did not apply one statute's definition of a term to an unrelated statute especially given that the former expressly stated that its definition was only to be applied to that statute. Here, however, the statutes at issue are *in pari materia*, and thus these statutes "must be read together as a whole." *Harper*, 479 Mich at 621. This

clusive list of items that are considered to be "drug paraphernalia," and each of the 13 pertinent subsections employs the phrase "specifically designed," which underscores that only items that are "specifically designed" to be used with controlled substances constitute "drug paraphernalia." Finally, MCL 333.7457(d) expressly *excludes* from the definition of "drug paraphernalia" things that are not "specifically designed for" drug production or use, such as bowls and spoons. Given these provisions, I agree with the Court of Appeals that "[o]bjects that serve as ordinary household and office supplies, such as sticky notes, are outside the ambit of what the Legislature contemplated when it

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specific approach is consistent with this Court's precedent. For example, in *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), this Court held that "[b]ecause these provisions should be read in *pari materia*, we deem it appropriate to use the definition of gross negligence as found in [MCL 691.1407] of the [Government Tort Liability Act (GTLA)], as the standard for gross negligence under the [Emergency Medical Services Act]" even though the Legislature *specifically limited* the use of the GTLA's definition of gross negligence to the GTLA. Similarly, in *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997), this Court held that it was appropriate to rely on the definition of "personal representative" found in MCL 700.9(3) of the Revised Probate Code (RPC) for purposes of interpreting that same term in MCL 600.5852 of the RJA even though the Legislature *specifically limited* the use of the RPC's definition of "personal representative" to the RPC because "[u]nder the rule of construction of statutes in pari materia, it is appropriate to harmonize statutory provisions that serve a common purpose when attempting to discern the intent of the Legislature." This approach "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul Thomson-West, 2012), p 252. "Statutes," Justice Frankfurter once wrote, "cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." *Id*. (citation and quotation marks omitted). It simply cannot be that "drug paraphernalia" means one thing under the PHC and something entirely different under the MMMA, which, as this Court has recognized, constitutes an "exception to the [PHC]." *Bylsma*, 493 Mich at 27.

created the paraphernalia-immunity provision." *People v Mazur*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 317447), pp 3-4. Because sticky notes are not "specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance," MCL 333.7451, they are not "marihuana paraphernalia" and accordingly defendant is not entitled to immunity under MCL 333.26424(g).[3]

As also noted earlier in this opinion, MCL 333.26424(g) provides in pertinent part:

> A person shall not be subject to arrest, prosecution, or penalty in any manner . . . for providing a registered qualifying patient or a registered primary caregiver with *marihuana paraphernalia* for purposes of a qualifying patient's *medical use* of marihuana. [Emphasis added.]

For the reasons already explained, sticky notes do not constitute "marihuana paraphernalia" and for that reason alone defendant is not entitled to immunity under MCL 333.26424(g). However, I agree with Justice ZAHRA, also in dissent, that there is an additional reason why defendant is not entitled to immunity under

[3] During oral argument, defendant's own attorney recognized that "paraphernalia is defined as something that is specifically intended for the use or help in manufacture," and stated, "I don't think the post-it note is paraphernalia" because "the post-it note is not specifically designed to aid in the manufacture of marijuana." Defendant's attorney's real concern in this case is the prosecutor's reliance on these sticky notes as evidence that defendant aided and abetted her husband in manufacturing marijuana. However, that seems to be more of a "sufficiency of the evidence" question, which, as the majority recognizes, is not now before this Court.

MCL 333.26424(g) and that is because defendant did not provide the sticky notes to her husband "for purposes of a qualifying patient's *medical use* of marihuana." (Emphasis added.) MCL 333.26423(e) defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or *paraphernalia relating to the administration of marihuana* to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[4] (Emphasis added.) This Court has already explained that "administering" marijuana "involv[es] the actual ingestion of marijuana." *McQueen*, 493 Mich at 158. Therefore, even assuming that the sticky notes at issue here constitute "marihuana paraphernalia," which, for the reasons already discussed I do not believe they do, they most certainly do not constitute "paraphernalia relating to the administration of marihuana" as they were in no way used, or intended to be used, to "administer" or "ingest" marijuana. That is, even assuming that the sticky notes *are* "marihuana paraphernalia," defendant is still not entitled to immunity because she did not provide her husband with the sticky notes "for purposes of a qualifying patient's medical use of marihuana" since "medical use" in this context means the "transfer . . . of . . . paraphernalia relating to the administration of marihuana," and defendant's transfer of the sticky notes to her husband was not done for purposes of administering marijuana.[5] Instead, if anything, defendant's trans-

[4] At the time this action arose, the definition of "medical use" was found in MCL 333.26423(e). This same definition is now found in MCL 333.26423(f).

[5] Contrary to the majority's contention, I do not "conflate[] the more expansive definition of 'medical use' with the narrower definition of use and administration." In fact, I agree with the majority that the statutory

fer of the sticky notes with harvest dates on them to her husband was done for purposes of assisting her husband in the cultivation or manufacture of marijuana. These sticky notes were not, nor were they ever intended to be, used to administer or ingest marijuana. Accordingly, for this additional reason, defendant is not entitled to immunity under MCL 333.26424(g).[6]

Because I agree with the Court of Appeals that defendant is not entitled to immunity under either MCL 333.26424(i) or MCL 333.26424(g), I would affirm the judgment of the Court of Appeals.

ZAHRA, J. (*concurring in part and dissenting in part*). I agree with Part IV(A) of the majority opinion, which concludes that defendant is not entitled to immunity under § 4(i) of the Michigan Medical Marihuana Act (MMMA), MCL 333.2624(i). I write separately because I respectfully disagree with the conclusion reached in Part IV(B) of the majority opinion, which holds that

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definition of "medical use" "incorporate[s] activities such as '[t]he transfer, delivery, and acquisition of marijuana.' " What the majority does not recognize, however, is that unlike the transfer of *marijuana*, which does not have to "relat[e] to the administration of marihuana" in order to fall within the definition of "medical use," the transfer of *paraphernalia* does have to do so. See MCL 333.26423(e) (defining "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana *or paraphernalia relating to the administration of marihuana* to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition") (emphasis added).

[6] Although the majority opinion recognizes that "defendant here was not merely assisting her husband with conduct involving the actual *ingestion* of marijuana" but was instead "assisting in the cultivation of marijuana" and that this does not constitute "assistance with 'using' or 'administering' marijuana," the majority overlooks that this necessarily means that defendant did not provide the sticky notes to her husband "for purposes of a qualifying patient's *medical use* of marihuana" and that, therefore, defendant is not entitled to immunity under MCL 333.26424(g).

" 'marihuana paraphernalia,' as that phrase is used in MCL 333.26424(g), includes [any] items that are . . . employed for the medical use of marihuana." I therefore disagree with the proposition that because the sticky notes at issue here were "used in the cultivation or manufacture of marijuana," they are "marihuana paraphernalia" entitling defendant to immunity under MCL 333.26424(g). In my view, when reading the MMMA as a whole and with an eye toward producing a harmonious and consistent enactment, marijuana paraphernalia must be an item or items intended to assist in the administration of marijuana to a qualifying patient under the MMMA. Because the sticky notes in question here were not used for the administration of marijuana to a qualifying patient, defendant's act of assisting her husband with the cultivation and manufacture of marijuana through the use of sticky notes was not immune under MCL 333.26424(g). Accordingly, I would affirm the judgment of the Court of Appeals.

The statute at issue, MCL 333.26424(g), states in relevant part:

> A person shall not be subject to arrest, prosecution, or penalty in any manner . . . for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

Without citing any rule of statutory construction that gives deference to an adjacent phrase, the majority does just that by relying on the adjacent phrase "medical use of marihuana," including the expansive statutory definition of medical use under former MCL 333.26423(e),[1] to define marijuana paraphernalia in a

[1] Former MCL 333.26423 was amended by 2012 PA 512, but the definition of "medical use" provided under former MCL 333.26423(e) was retained with identical content. See MCL 333.26423(f). Because former

manner in which the meaning of marijuana paraphernalia "cannot be so limited as to only include those items that are specifically designed for the medical use of marijuana." Other than grammatical proximity, there is apparently no other justification offered for subverting the phrase "marihuana paraphernalia" in favor of an overly broad definition of "medical use" of marijuana. Having determined that the phrase "marihuana paraphernalia" is subservient to the phrase "medical use" the majority asserts that the phrase, " 'for purposes of a qualifying patient's medical use of marihuana' indicates that an item may or may not be 'marihuana paraphernalia,' depending on the use to which it is put." I respectfully disagree.

A plain reading of MCL 333.26424(g) reveals that a person claiming immunity must have provided (1) marijuana paraphernalia (2) to a registered qualifying patient or a registered primary caregiver (3) for purposes of a qualifying patient's medical use of marijuana. The third element does not explain the meaning of marijuana paraphernalia. Rather, the third element defines the specific intent of the person claiming immunity for providing marijuana paraphernalia. By defining marijuana paraphernalia in terms of medical use, however, the majority has improperly conflated the meaning of marijuana paraphernalia with the specific intent of the person providing marijuana paraphernalia to a registered qualifying patient or a registered primary caregiver. Specific intent involves "a subjective standard,"[2] which is "[a] legal standard that is peculiar to a particular person and based on the person's individual

MCL 333.26423(e) was in place at the time this action arose, this opinion will refer to that statute when addressing the definition of "medical use."

[2] *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 109; 595 NW2d 832 (1999).

views and experiences."[3] Thus, by holding that an item "may or may not be 'marihuana paraphernalia,' depending on the use to which it is put," the majority has placed the meaning of "marihuana paraphernalia"—as with . . . "[b]eauty . . . in things"—"merely in the mind which contemplates them[.]"[4] In doing so, the majority improperly renders the phrase "marihuana paraphernalia" impotent and without any discernable independent meaning. Under the majority's holding MCL 333.26424(g) provides that an individual may claim immunity "for providing a registered qualifying patient or a registered primary caregiver with [*anything imaginable*] for purposes of a qualifying patient's medical use of marihuana." Because this interpretation fails to provide any discernable independent meaning to the phrase "marihuana paraphernalia," the majority's interpretation has in part rendered MCL 333.26424(g) nugatory.[5]

The majority's definition of marijuana paraphernalia is also not consistent with the definition of the medical use of marijuana in former MCL 333.26423(e).[6] MCL 333.26424(g) provides that a person may have immunity when providing marijuana paraphernalia to either a registered qualifying patient or a registered primary caregiver, but, importantly, only if the marijuana paraphernalia is intended for a registered qualifying *patient's* medical use of marijuana. No immunity is provided if the marijuana paraphernalia is intended for a registered *primary caregiver's* medical use of mari-

[3] See *Black's Law Dictionary* (9th ed.).

[4] 1 Hume, *Essays and Treatises on Several Subjects* (1760), p 368.

[5] See *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007), citing *Black's Law Dictionary* (7th ed) (defining "nugatory" as "of no force or effect; useless; invalid").

[6] See note 3 of this opinion.

juana. A person cannot provide marijuana paraphernalia for *any* intended medical use merely because the broad definition of medical use includes uses for both a registered qualifying patient and a registered primary caregiver. Former MCL 333.26423(e) defines "medical use" broadly as

> the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana *or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.*[7]

While this definition includes broad protections for both registered qualifying patients and registered primary caregivers, MCL 333.26424(g) limits immunity for providing marijuana paraphernalia for only a registered qualifying *patient's* medical use of marijuana. Plainly, "cultivation" and "manufacture" do not pertain to a registered qualifying patient's medical use of marijuana.[8]

But, more importantly, the majority ignores the portion of former MCL 333.26423(e) that limits the medical use of paraphernalia to only that which is "relating to the administration of marihuana." It is a long-accepted principle of statutory interpretation that an "entire act must be read and the interpretation to be

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[7] Emphasis added.

[8] We nonetheless observe that a patient may manufacture marijuana for personal medical use as long as the patient did not elect to have a primary caregiver manufacture the marijuana on the patient's behalf. In the absence of this election, we often refer to the patient as being his "own caregiver," but technically the patient is not his "own caregiver." The patient simply is a patient who has not made the caregiver election. Thus, a patient who did not make the caregiver election may cultivate and manufacture marijuana for personal medical use as permitted in the MMMA. See MCL 333.26426(a)(7).

given to a particular word in one section arrived at only after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole."[9] Rather than rendering the term "marihuana paraphernalia" subservient to the phrase "medical use," the majority should have sought to render the two provisions harmonious and consistent.

The definition of "medical use" of marijuana explains that paraphernalia has a more limited meaning that does not, contrary to the majority's reasoning, "depend[] on the use to which it is put." Former MCL 333.26423(e) expressly limits the "medical use" of "paraphernalia" to only that which is "relating to the *administration* of marijuana."[10] "Administering" marijuana, as the majority states, is " 'limited to conduct involving the actual ingestion of marijuana.' "[11] Therefore, while, as the majority notes, medical use is "a broader term than mere use or administration," the medical use of paraphernalia is limited only to the *administration*, or "actual ingestion," of marijuana. This limitation of paraphernalia is entirely consistent with the language in MCL 333.26424(g) that provides a person may have immunity for providing marijuana paraphernalia to either a registered qualifying patient or a registered primary caregiver, but, again, only if the marijuana paraphernalia is intended for a registered qualifying patient's use or administration of marijuana.

There is no dispute that marijuana paraphernalia is not expressly defined under the MMMA. But from the

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[9] *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). See also *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014).

[10] Emphasis added.

[11] Quoting *Michigan v McQueen*, 493 Mich 135, 158; 828 NW2d 644 (2013).

definition of "medical use" of marijuana, we glean that paraphernalia only relates to the administration of marijuana to a qualifying patient. While a person may still claim immunity if he or she were to provide marijuana paraphernalia to a registered patient or a primary caregiver, the person must have ultimately intended the paraphernalia be used for the administration of a registered qualifying patient's medical use of marijuana.

The majority appropriately turns to a common dictionary to give the phrase "marijuana paraphernalia" meaning. The majority notes that "[p]araphernalia" is defined as " 'equipment, apparatus, or furnishings used in or necessary for a particular activity.' "[12] But the majority then goes on to say "[n]othing in this definition states that a specific design must be intended." I agree that the definition does not contain the actual phrase "specifically designed," but the definition does refer to "a particular activity." This language suggests that paraphernalia is indeed particular, i.e., specific, to a definite purpose. In my view, the common definition of paraphernalia certainly would not exclude equipment, apparatus, or furnishings specifically intended for a particular activity, such as administering marijuana. One would be hard-pressed to conclude that paraphernalia is equipment, apparatus, or furnishings that have not been specifically intended "to be used in or necessary for a particular activity." Yet the majority contends that "[t]o only include items [as marijuana paraphernalia] that were *specifically designed* for the medical use of marijuana would be to turn the statutorily defined phrase 'medical use' into meaningless surplusage." I disagree. The phrase "medical use" is statutorily defined in former MCL 333.26423(e) (and as retained in

[12] Quoting *Random House Webster's College Dictionary* (2005).

current MCL 333.26423(f)) and its meaning is law. That is, the definition of medical use is independent from and neither subverts nor dilutes the meaning ascribed to any nonstatutorily defined phrase, including marijuana paraphernalia.

In this case, when applying the relevant provisions of former MCL 333.26423(e) and MCL 333.26424(g) along with the common definition of paraphernalia, it is clear that the phrase "marihuana paraphernalia" includes equipment, apparatus, or furnishings specifically intended for the administration of marijuana to a registered qualifying patient. The phrase "marihuana paraphernalia" under former MCL 333.26423(e) simply does not include paraphernalia related to the role of a registered primary caregiver.

Further, the essence of the rule of law is to know in advance the rules of society.[13] Accordingly, the meaning given to the phrase "marihuana paraphernalia" must be ascertainable *before* a person provides marijuana paraphernalia, not afterwards. The majority opinion, however, attempts to define marijuana paraphernalia as that which is "actually employed for the medical use of marijuana." This retrospective definition of "marihuana paraphernalia" based solely on how equipment, apparatus, or furnishings *has been used* offers little guidance to a person assessing whether his or her future conduct complies with the rule of law.

I would hold that the phrase "marihuana paraphernalia" includes equipment, apparatus, or furnishings and refers to items specifically intended for the administration of marijuana to a qualifying patient. Because there is no dispute that the sticky notes at issue here are not equipment, apparatus, or furnishings specifi-

[13] *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000).

cally intended for the administration of marijuana to a qualifying patient, they are not marijuana paraphernalia under MCL 333.26424(g), and therefore defendant is not entitled to immunity. Accordingly, I would affirm the judgment of the Court of Appeals.[14]

YOUNG, C.J., concurred with ZAHRA, J.

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[14] The Court of Appeals concluded that the MMMA should be read *in pari materia* with the Public Health Code. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). There is no doubt that the MMMA and the Public Health Code relate to the same general subject and have the same general purpose of regulating controlled substances, including marijuana. Because I rely on the actual language of the MMMA, though, I do not rely on the *in pari materia* canon to affirm the holding of the Court of Appeals in this case. The majority, however, erroneously finds error in the Court of Appeals' application of *in pari materia*, concluding that the MMMA and the Public Health Code are "distinct and unconnected." This is simply not true. Without the Public Health Code's regulation of marijuana, there would be no need for the MMMA's exception. Also of significance is the fact that in previous opinions interpreting the MMMA, this Court has repeatedly refered to the Public Health Code without concluding that it is "distinct and unconnected" from the MMMA. See *People v Kolanek*, 491 Mich 382, 395 n 24; 817 NW2d 528 (2012) ("Marijuana remains a schedule 1 substance in Michigan's Public Health Code, MCL 333.7212(1)(c)."); *McQueen*, 493 Mich at 148 ("Marijuana is a controlled substance as defined in MCL 333.7104 [of the Public Health Code]."); *People v Bylsma*, 493 Mich 17, 27; 825 NW2d 543 (2012) ("[T]he MMMA introduced into Michigan law an exception to the Public Health Code's prohibition on the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions.").

AROMA WINES & EQUIPMENT, INC v COLUMBIAN DISTRIBUTION SERVICES, INC

Docket Nos. 148907 and 148909. Argued March 10, 2015 (Calendar No. 1). Decided June 17, 2015. Rehearing denied 498 Mich ___.

Aroma Wines & Equipment, Inc., brought an action in the Kent Circuit Court against Columbian Distribution Services, Inc., alleging (1) breach of contract, (2) violation of the Uniform Commercial Code, (3) common-law conversion, and (4) statutory conversion under MCL 600.2919a(1)(a). Aroma had rented climate-controlled warehouse space from Columbian to store its wine while awaiting sale. Columbian was required to maintain the wine within a specific temperature range. After Aroma fell behind in its monthly rental payments, Columbian removed the wine from its climate-controlled space to an uncontrolled environment. Aroma alleged that Columbian moved the wine to rent the space to higher-paying customers and that the temperature changes destroyed the wine's salability. Columbian claimed that the move was temporary, to allow it to renovate the climate-controlled space and increase its storage capacity, and that none of the wine was exposed to extreme temperature conditions. In its statutory conversion claim, Aroma alleged that Columbian converted Aroma's wine inventory to its own use and sought treble damages. Columbian countersued for breach of contract in light of Aroma's nonpayment of rent. At the close of Aroma's proofs, Columbian moved for a directed verdict on the statutory conversion claim. Columbian asserted that implicit in the word "use" in MCL 600.2919a is an inference limiting the definition of that word to using something for the purpose intended by the nature of the product or good, such as drinking or selling the wine. Aroma, however, argued for a broader interpretation, namely, that use encompassed acts by which the converter exercised its dominion and control over the wine, such as Columbian's using the wine as leverage in the contract dispute. The court, Dennis B. Leiber, J., agreed with Columbian and granted its motion for a directed verdict on Aroma's statutory conversion claim. The jury then found that Columbian had breached its contract with Aroma and converted Aroma's wine. The jury also found that Aroma did not breach its contract with Columbian. The court denied Aroma's motion for attorney fees. Aroma appealed,

and the Court of Appeals, WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ., affirmed in part, reversed in part, and remanded, concluding that the most relevant definition of "use" in the context of conversion was to employ the property for some purpose. The panel held that if the jury believed the evidence showing that Columbian moved Aroma's wine for its own purposes, whether to sell the space to other customers, complete a construction project, or use the wine as leverage against Aroma, the jury could have determined that Columbian converted the wine to its own use. The panel also affirmed the trial court's ruling on attorney fees. 303 Mich App 441 (2013). Aroma and Columbian filed separate applications for leave to appeal, which the Supreme Court granted, limited to the issue regarding the proper interpretation of the language "converting property to the other person's own use" in MCL 600.2919a. 497 Mich 864 (2014).

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

The statutory action for conversion under MCL 600.2919a(1)(a) is not the same as an action for common-law conversion. Rather, by requiring the conversion of property to be to the defendant's own use, MCL 600.2919a(1)(a) requires the plaintiff to show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose was not the property's ordinarily intended purpose.

1. At common law, conversion was any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with that person's rights therein. MCL 600.2919a(1)(a) created a remedy against a person who steals or embezzles property or converts property to the other person's own use. A defendant who violates the statute may be liable for treble damages. A plaintiff who has proved common-law conversion does not necessarily have a cause of action under MCL 600.2919a(1)(a) because the Legislature's inclusion of the phrase "to the other person's own use" indicated its intent to limit the statute's application to a subset of common-law conversions in which the common-law conversion was to the other person's own use. Converting property to the defendant's own use means only that the defendant employs another person's property for any purpose, as long as it is to the defendant's own purposes, that is, for a purpose personal to the converter.

2. The circuit court erred by granting Columbian's motion for directed verdict on the statutory conversion claim. Aroma prof-

fered evidence that would have allowed the jury to conclude that Columbian used the wine for some purpose personal to its interests. If the jury believed Aroma's evidence that Columbian moved the wine from the controlled-temperature storage area for its own purposes (whether to sell the space to other customers, complete a construction project, or use the wine as leverage against Aroma), the jury could have determined that Columbian converted the wine to its own use.

Affirmed and remanded to the circuit court for further proceedings.

TORTS — CONVERSION — STATUTORY CAUSE OF ACTION — USE OF CONVERTED PROPERTY.

MCL 600.2919a(1)(a) provides for a cause of action against someone who converts property to his or her own use; the tort of converting property to one's own use under MCL 600.2919a, is not coextensive with common-law conversion but is a separate statutory cause of action in addition to any other right or remedy a victim of conversion could obtain at common law; conversion of property to the defendant's own use requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the property's ordinarily intended purpose; it requires only that the defendant employ another person's property for any purpose, as long as it is to the defendant's own purposes.

Visser and Associates, PLLC (by *Donald R. Visser* and *Rebecca J. Baker*), for Aroma Wines & Equipment, Inc.

Varnum LLP (by *Jon M. Bylsma*, *Conor B. Dugan*, and *Jeffrey D. Koelzer*), and *Kuiper Orlebeke PC* (by *Thomas A. Kuiper*) for Columbian Distribution Services, Inc.

KELLY, J. By 2005 PA 44, the Legislature amended MCL 600.2919a(1)(a) to create a cause of action against someone "converting property to [that] person's own use." In this case, we consider whether this statutory language is coextensive with the common-law tort of

conversion or, if not, what additional conduct is required to show that a defendant converted property to his, her, or its "own use."

We hold that "converting property to [that] person's own use," as used in MCL 600.2919a, is not coextensive with common-law conversion. By enacting MCL 600.2919a, the Legislature intended to create a separate statutory cause of action for conversion "in addition to any other right or remedy" a victim of conversion could obtain at common law.[1] In this case, defendant argues that conversion "to the other person's own use" requires a showing that the other person used the converted property for the property's common or intended purpose. We decline to adopt such a narrow interpretation of "own use." Rather, we hold that the separate statutory cause of action for conversion "to the other person's own use" under MCL 600.2919a(1)(a) requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose.

In this case, plaintiff proffered evidence at trial that would allow the jury to conclude that defendant used the wine for some purpose personal to defendant's interests. As a result, the circuit court erred by granting defendant's motion for directed verdict on this claim. We affirm the judgment of the Court of Appeals and remand this case to the Kent Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Aroma Wines & Equipment, Inc., is a wholesale wine importer and distributor. Defendant,

[1] MCL 600.2919a(2). See *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 10; 779 NW2d 237 (2010).

Columbian Distribution Services, Inc., operates warehouses in Michigan. Starting in 2006, Aroma agreed to rent some of Columbian's climate-controlled warehouse space to store its wine while awaiting sale.[2] According to the parties' agreement, Columbian was required to maintain the wine within a temperature range of 50 to 65 degrees Fahrenheit. While the agreement required Columbian to provide Aroma with notice before Columbian could transport Aroma's wine to a different warehouse complex, Columbian reserved the right under the agreement to move the wine without notice "within and between any one or more of the warehouse buildings which comprise the warehouse complex" identified in the agreement.

Aroma's sales declined sharply during 2008, and Aroma began falling behind on its monthly payments to Columbian. In January 2009, Columbian notified Aroma that it was asserting a lien on Aroma's wine and that Aroma could not pick up any more wine or ship any more orders until past due invoices were paid. In March 2009, Columbian released to Aroma a small portion of its wine in exchange for a $1,000 payment on Aroma's account. Notwithstanding this payment, Columbian asserted that Aroma had accrued a past-due balance of more than $20,000 on the account.

At some point during this dispute, and contrary to the terms of the contract, Columbian removed the wine from its climate-controlled space and transported it to an uncontrolled environment.[3] Aroma alleges that Columbian moved its wine to rent the space to higher-paying customers. Columbian concedes that it moved

[2] The parties signed a second agreement in February 2008, and this agreement governs the dispute arising here.

[3] For the purposes of our review, the exact timing of Columbian's removal of the wine is irrelevant.

Aroma's wine but claims that the move was temporary, that its purpose was to renovate the climate-controlled space and thereby increase its storage capacity, and that none of the wine was exposed to extreme temperature conditions. Aroma claims that the temperature changes destroyed the wine's salability.

Aroma filed the instant suit in the Kent Circuit Court. Its second amended complaint alleged four separate causes of action: (1) breach of contract, (2) violation of the Uniform Commercial Code, (3) common-law conversion, and (4) statutory conversion under MCL 600.2919a(1)(a). As part of its statutory conversion claim, Aroma alleged that Columbian "converted [Aroma's] wine inventory to its own use" and sought treble damages for the alleged statutory conversion. In response, Columbian countersued for breach of contract based on Aroma's nonpayment of rent.

The case proceeded to trial. At the close of Aroma's proofs, Columbian moved for a directed verdict on Aroma's fourth count, the statutory conversion claim, arguing that Aroma had failed to provide any evidence to support its assertion that Columbian converted Aroma's wine to its own use. In support of the motion, Columbian emphasized that implicit in the definition of the word "use" is an inference limiting the definition to "using something for the purpose . . . intended by the nature of the product or good." Aroma sought a broader interpretation of "use" that did not limit its scope to acts involving the wine's intended purpose but instead encompassed acts by which the converter exercised its dominion and control over the wine. Under this interpretation, then, Columbian could "use" Aroma's wine by asserting dominion and control over that wine as leverage in the dispute over the balance due Columbian. The court agreed with Columbian's interpretation of

"use," concluded that "one would have to drink [the wine] or perhaps sell it" to use it, and granted Columbian's motion for a directed verdict on Aroma's statutory conversion claim.

Trial continued on Aroma's remaining counts and on Columbian's counterclaim. At the conclusion of the trial, the jury found that Columbian had breached its contract with Aroma and converted Aroma's wine, awarding Aroma damages totaling $275,000. The jury also found that Aroma did not breach its contract with Columbian and, as a result, did not offset the award granted to Aroma by any amount.

Aroma appealed the circuit court's decision to grant Columbian's motion for a directed verdict on Aroma's statutory conversion claim. The Court of Appeals reversed, holding that the circuit court's interpretation of "use" was too narrow.[4] While the panel noted the various definitions of "use," it determined that "most relevant in the context of conversion, 'use' is defined as 'to employ for some purpose[.]' "[5] The panel explained that contrary to the circuit court's conclusion, "drinking or selling the wine are not the only ways that [Columbian] could have employed [Aroma's] wine to its own purposes."[6] Because Aroma "presented some evidence to support its theory that [Columbian] filled the temperature-controlled storage space that [Aroma's] wine was moved out of with other customers' products," and because Columbian's claim that it was engaged in an expansion project "itself could be considered an act of employing the wine to [its] own

[4] *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441-448; 844 NW2d 727 (2013).

[5] *Id*. at 447-448, quoting *Random House Webster's College Dictionary* (1992) (alteration in original).

[6] *Aroma Wines*, 303 Mich App at 448.

purposes," Columbian was not entitled to a directed verdict.[7] Rather, the panel concluded that

> [i]f a jury believed the evidence showing that [Columbian] moved [Aroma's] wine for its own purposes—whether it be to sell the space to other customers or complete a construction project—or that it used the wine as leverage against [Aroma], it could have determined that [Columbian] converted the wine to its own use.[8]

As a result, the Court of Appeals remanded this case to the circuit court for such a jury determination.[9]

Both parties then sought leave to appeal the Court of Appeals' interpretation of "own use." Aroma's appeal (Docket No. 148907) claimed that, like the circuit court, the Court of Appeals had erroneously defined statutory conversion as containing an additional element beyond those required to show common-law conversion. On this theory, and on the basis of the jury's finding of common-law conversion at trial, no further proceedings on the question of statutory conversion would be necessary and Columbian would be liable for statutory conversion. Columbian agreed with the Court of Appeals that statutory conversion requires a separate finding that the conversion was to the converter's "own use," but filed a separate application for leave to appeal (Docket No. 148909) that sought to reinstate the circuit court's narrower definition of "own use."

We granted both parties' applications for leave to appeal, limited to the single issue regarding "the proper

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[7] *Id*. at 448-449.

[8] *Id*. at 449.

[9] The Court of Appeals also held that it "cannot simply order treble damages upon a finding of [statutory] conversion" and that if on remand the jury were to find that Columbian committed statutory conversion, the jury must also determine whether to award treble damages. *Id*. at 449-450.

interpretation of 'converting property to the other person's own use,' as used in MCL 600.2919a."[10]

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for a directed verdict.[11] A party is entitled to a directed verdict if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law.[12]

We also review de novo questions of statutory interpretation.[13] "When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature."[14] The language of the statute is the most reliable evidence of that intent, and we enforce the clear and unambiguous language of the statute as

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[10] *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 864 (2014). Aroma's application for leave to appeal in Docket No. 148907 also asserted an issue outside this Court's limited order granting leave: that the Court of Appeals erred by concluding that treble damages were discretionary upon a finding of statutory conversion. We deny the application for leave to appeal with respect to this issue because we are not persuaded that the question presented should be reviewed by this Court. Our order granting leave to appeal also indicated that an application for leave to appeal as cross-appellant by Aroma in Docket No. 148909 remained pending. Because this application as cross-appellant raised the same issues presented in Aroma's application for leave to appeal in Docket No. 148907, the application for leave to appeal as cross-appellant in Docket No. 148909 is denied as moot.

[11] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

[12] *Id*., citing *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003).

[13] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

[14] *Id*., citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

written.[15] "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory."[16]

III. LEGAL ANALYSIS

Under the common law, conversion is " 'any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' "[17] At issue here is whether a plaintiff who has proved common-law conversion necessarily has a cause of action under MCL 600.2919a(1)(a) and, if not, what additional conduct is required to show that a defendant converted property to his, her, or its own use.

We begin, then, with the text of MCL 600.2919a, which states in full:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

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[15] *Whitman*, 493 Mich at 311, citing *Sun Valley Foods*, 460 Mich at 236.

[16] *Whitman*, 493 Mich at 311-312, citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[17] *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960), quoting *Nelson & Witt v Texas Co*, 256 Mich 65, 70; 239 NW 289 (1931).

> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.[18]

Aroma's second amended complaint alleges that Columbian "converted [Aroma's] wine inventory to its own use" and that, as a result, MCL 600.2919a(1)(a) "applies to the facts of this case."[19]

Words in a statute are interpreted "according to the common and approved usage of the language," but "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."[20] In addition, "when the Legislature chooses to employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning."[21] The word "converting," used

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[18] While the parties and this Court refer to a claim pursued under MCL 600.2919a as a "statutory conversion" claim, the plain language of MCL 600.2919a(1)(a) makes clear that a claim also accrues to the victim of "[a]nother person's stealing or embezzling" property. Moreover, MCL 8.3*l* provides that "[t]he word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." As a result, whether one or both of the parties involved in an action pursuant to MCL 600.2919a are corporations does not alter the foregoing analysis.

[19] In disputing the meaning of "conversion . . . to [Columbian's] own use," the parties essentially concede that no "stealing" or "embezzling" occurred within the meaning of MCL 600.2919a(1)(a) and that MCL 600.2919a(1)(b) is not at issue in this case. Indeed, under any reading of the statute, MCL 600.2919a applies to all "stealing" and "embezzling." Furthermore, we note that "possessing . . . converted property" with the knowledge "that the property . . . was converted" also exposes a person to liability under MCL 600.2919a(1)(b). But because Aroma has not alleged Columbian's potential violation of MCL 600.2919a(1)(b), we leave for another day the interpretation of that provision.

[20] MCL 8.3a.

[21] *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013), citing *Stone v Williamson*, 482 Mich 144, 170; 753 NW2d 106 (2008) (opinion by CAVANAGH, J.).

in MCL 600.2919a(1)(a), is one word that has acquired a peculiar and appropriate meaning in the law because it is derived from the common-law tort identified above and is used in that context here.[22]

Nevertheless, that is only the beginning of our analysis of the phrase "converting property to the other person's own use." Aroma claims that the jury's verdict against Columbian for common-law conversion necessarily means that Columbian had violated its statutory counterpart, namely, MCL 600.2919a(1)(a). Under this theory, common-law conversion originated as "conversion to the other person's own use" and, as a result, the Legislature's use of the phrase "converting to the other person's own use" simply identified common-law conversion as, by itself, sufficient to establish a defendant's fault for purposes of MCL 600.2919a(1)(a). To assess the validity of this argument we turn to the history of common-law conversion.

A. COMMON-LAW CONVERSION

According to Blackstone, several distinct actions in tort originated from the principle that "if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning" and all other people "could never be secure of their possessions."[23] The common law secures this right to personal property by allowing someone wrongfully deprived of his or her property to recover either that property or monetary damages, or both, for the wrongful deprivation.

Three distinct causes of action are relevant to our analysis. Each arose out of the distinct ways that a

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[22] See *Appletree*, 485 Mich at 9 (referring to MCL 600.2919a as "the statutory conversion provision").

[23] 3 Blackstone, Commentaries on the Law of England, p *145.

wrongful deprivation could occur. Someone who wrongfully took property was liable in trespass to the property owner.[24] Someone who wrongfully detained property that came to that person legally was liable in detinue to the property owner.[25] Someone who refused to return lost property to its rightful owner, instead using it himself or herself or disposing of it to another, was liable in trover.[26] This latter cause of action, arising out of the finder's *conversion* of the property, was "invented through the ingenuity of some long forgotten common law pleader" who sought "to fill in the gaps left by the actions of trespass . . . and detinue . . . ."[27]

Correspondingly, Blackstone explained the origin of trover as allowing the "recovery of damages against such person as had found another's goods, and refused to deliver them on demand, but converted them to his own use."[28] In a technical sense, trover was originally actionable only when the property was "lost to the true owner" in perpetuity, because to convert goods meant to dispose of them, that is, "to make away with them, to deal with them in such a way that neither owner nor wrongdoer had any further possession of them; for example, by consuming them, or by destroying them, or by selling them, or otherwise delivering them to some third person."[29] "[M]ere detention" of another person's

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[24] Prosser, *Nature of Conversion*, 42 Cornell L Rev 168, 169 (1957). See also Salmond, *Observations on Trover and Conversion*, 21 Law Q Rev 43, 44 (1905).

[25] Salmond, 21 Law Q Rev at 44.

[26] Prosser, 42 Cornell L Rev at 169.

[27] *Id*.

[28] 3 Blackstone, p *152 (emphasis omitted).

[29] Salmond, 21 Law Q Rev at 44. Trover initially arose out of an allegation that the plaintiff "was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant 'converted them to his own use.' " Prosser, 42 Cornell L Rev at 169.

property "is not a conversion in the original sense."[30]

Nevertheless, "[a]lmost from the beginning . . . the effort was made to expand trover into the field of the wrongful detention of chattels [that were] not found."[31] A plaintiff who brought an action for trover was able to claim that the defendant refused to deliver property upon the plaintiff's demand as "evidence of a conversion—evidence, that is to say, that the defendant has already made away with the property and therefore cannot and does not restore it."[32] Eventually, "[j]uries were directed as a matter of law to find a conversion on proof of demand and refusal without lawful justification."[33]

Before the turn of the twentieth century, the meaning of conversion as originally understood at common law began to evolve. Justice COOLEY's treatise on torts defined conversion as "[a]ny distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it . . . ."[34] Importantly, Justice COOLEY quoted Georgia caselaw from 1846 for the proposition that " 'it is not necessary that it should be shown that he has applied [the converted property] to his own use.' "[35] While "it is a conversion where one takes the plaintiff's property and sells or otherwise

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[30] Salmond, 21 Law Q Rev at 47.

[31] Prosser, 42 Cornell L Rev at 169.

[32] Salmond, 21 Law Q Rev at 47 (emphasis omitted). See also 3 Blackstone, p *152 ("[A]ny man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein . . . and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the other: for which reason such refusal alone is, *prima facie*, sufficient evidence of a conversion.").

[33] Salmond, 21 Law Q Rev at 47.

[34] Cooley, Torts (2d ed), p *448.

[35] *Id*., quoting *Liptrot v Holmes*, 1 Ga 381, 391 (1846).

disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right[,] . . . though he return [the property] to the owner."[36]

This Court's conversion caselaw bears out this development in the common law. Justice COOLEY's 1874 decision for this Court in *Kreiter v Nichols* involved the conversion of beer and emphasized that if someone "converts [beer] to his own use in any form, a civil action will lie to recover from him the value," and "this civil action would not depend in any degree upon the method or purpose of the conversion."[37] In explaining that conversion of beer to the other person's "own use" was broad in purpose, the Court observed that "the legal responsibility to pay for [the beer's] value would be the same" whether the converter "destroyed [it] from a belief in its deleterious effects, or made way with [it] in carousals or private drinking . . . ."[38] By 1884, Justice COOLEY's decision for this Court in *Daggett v Davis* recognized that under certain circumstances, there may be "a technical conversion . . . , though no use was made of the" property.[39] Under those circumstances, a plaintiff is "entitled to recover only his actual damages," not the full value of the property.[40]

From this development in the common law, the scope of a common-law conversion is now well-settled in Michigan law as " 'any distinct act of dominion wrong-

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[36] Cooley, pp *448-449.

[37] *Kreiter v Nichols*, 28 Mich 496, 498 (1874). Note that, to the extent *Kreiter* held that "the brewing of beer is a lawful business," *id*., the decision was abrogated by US Const, Am XVIII, and subsequently unabrogated by US Const, Am XXI. See generally Kyvig, *Repealing National Prohibition* (Kent, Ohio: Kent State Univ Press, 2d ed 2000).

[38] *Kreiter*, 28 Mich at 498-499.

[39] *Daggett v Davis*, 53 Mich 35, 38; 18 NW 548 (1884).

[40] *Id*. at 39.

fully exerted over another's personal property in denial of or inconsistent with his rights therein.' "[41] More recently, *Thoma v Tracy Motor Sales, Inc* reaffirmed this definition of conversion and adopted the Restatement of Torts to illustrate examples of "the ways in which a conversion may be committed."[42] The excerpt adopted by the Court states:

> "A conversion may be committed by
>
> "(a) intentionally dispossessing another of a chattel,
>
> "(b) intentionally destroying or altering a chattel in the actor's possession,
>
> "(c) using a chattel in the actor's possession without authority so to use it,
>
> "(d) receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,
>
> "(e) disposing of a chattel by sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,
>
> "(f) misdelivering a chattel, or
>
> "(g) refusing to surrender a chattel on demand."[43]

These examples crystallize the common law's development over the centuries to encompass many different ways in which property may be converted, beyond the original meaning of finding lost property and converting that property to the converter's own use. In addition to the Restatement's example, this Court has held that a sheriff or court officer who unlawfully seizes personal property is, in the absence of governmental

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[41] *Nelson & Witt*, 256 Mich at 70, quoting *Aylesbury Mercantile Co v Fitch*, 22 Okla 475; 99 p 1089 (1908) (Syllabus).

[42] *Thoma*, 360 Mich at 438, citing *Nelson & Witt*, 256 Mich at 70.

[43] *Thoma*, 360 Mich at 438, quoting 1 Restatement, Torts, § 223.

immunity, liable for conversion, even if he or she does so in the execution of a court order.[44]

To summarize: While the tort of conversion originally required a separate showing that the converter made some use of the property that amounted to a total deprivation of that property to its owner, by the twentieth century common-law conversion more broadly encompassed any conduct inconsistent with the owner's property rights. In this context, the Legislature enacted MCL 600.2919a, to which we now turn.

B. STATUTORY CONVERSION

For most of Michigan's history, conversion was a tort for which the only redress was an action at common law. Indeed, when the Legislature first enacted what we now refer to as the statutory conversion remedy, in 1976, its terms did not provide a separate remedy against a converter. As originally enacted, MCL 600.2919a stated:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.[45]

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[44] *Kenney v Ranney*, 96 Mich 617, 618; 55 NW 982 (1893) ("We understand it to be the settled law that when one, by a trespass, takes the property of another, and sells it, he is liable for the conversion, and that no demand is necessary, and the question of good or bad faith is not necessarily involved. This doctrine is applied daily in cases against sheriffs and constables, where property is unlawfully seized and sold upon execution.").

[45] Former MCL 600.2919a as added by 1976 PA 200.

In interpreting this now-defunct provision, the Court of Appeals has explained that, initially, MCL 600.2919a was not "designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property."[46] Rather, it proscribed conduct that "occur[s] after the property has been stolen, embezzled, or converted by the principal . . . ."[47]

In 2005, the Legislature amended MCL 600.2919a to its present language.[48] In particular, Subsection (1)(a) created a remedy against a person who "steal[s] or embezzl[es] property or convert[s] property to the other person's own use." The interpretive issue before us is whether this language in Subsection (1)(a) allows a plaintiff to recover treble damages in all instances of common-law conversion or, instead, whether a plaintiff seeking damages for conversion under Subsection (1)(a) must allege additional conduct to show that the defendant converted the plaintiff's property "to the [defendant's] own use."

The historical analysis of the common-law tort of conversion discussed earlier shows that Michigan law's understanding of conversion shifted away from requiring an additional showing that the conversion occurred for the other person's "own use" and toward allowing a property owner to recover for any act of dominion inconsistent with that person's rights in that property. This shift in the common law occurred long before the Legislature's 2005 amendments of MCL 600.2919a. As

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[46] *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002).

[47] *Id*.

[48] 2005 PA 44 took immediate effect on June 16, 2005. See *Appletree*, 485 Mich at 9 n 16 ("Before its amendment, MCL 600.2919a applied only to third parties who aided another's act of conversion or embezzlement, and did not apply to the person who directly converted or embezzled, as it does now.").

a result, the Legislature's inclusion of the phrase "to the other person's own use" in § 2919a(1)(a) indicates its intent to limit § 2919a(1)(a) to a subset of common-law conversions in which the common-law conversion was to the other person's "own use."[49]

The Court of Appeals did not specifically address whether an additional element is required to transform

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[49] Aroma claims that the House legislative analysis shows that the Legislature intended to extend liability under MCL 600.2919a to *all* converters simply because it identified "the apparent problem" of the former MCL 600.2919a as failing to allow "a victim [to] sue the person who actually commits the theft," embezzlement, or conversion. House Legislative Analysis, HB 4356 (March 16, 2005). As a matter of logic, this assertion is faulty because MCL 600.2919a, as initially enacted, did not apply to every instance of theft, embezzlement, or conversion, and only provided a cause of action against a third party who had knowledge of the status of stolen, embezzled, or converted property. See former MCL 600.2919a. As a result, the Legislature had a range of options open to it when it decided to enact policy that expanded § 2919a to encompass additional conduct, and it chose one of those options by requiring a victim of conversion to show that the conversion was to the other person's "own use."

Moreover, as a matter of statutory interpretation, Aroma's reading of the statute in light of the House legislative analysis is faulty on two levels. First, the language of the amended MCL 600.2919a is unambiguous and, as a result, the examination of legislative history "of any form" is not proper. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Second, even if legislative history were relevant to the interpretation of MCL 600.2919a, legislative analyses

> are entitled to little judicial consideration in resolving ambiguous statutory provisions because: (1) such analyses are not an official form of legislative record in Michigan, (2) such analyses do not purport to represent the views of legislators, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) such analyses are produced outside the boundaries of the legislative process as defined in the Michigan Constitution, and which is a prerequisite for the enactment of a law. [*Id*., citing Const 1963, art 4, §§ 26 and 33.]

common-law conversion into conversion to the other person's "own use" pursuant to MCL 600.2919a(1)(a). However, implicit in its analysis is that a plaintiff seeking treble damages pursuant to § 2919a(1)(a) must "present[] evidence that the conversion was to defendant's 'own use' as required by MCL 600.2919a(1)(a)."[50]

[50] *Aroma Wines*, 303 Mich App at 447. Although the Court of Appeals' opinion in this case is the first published decision to interpret the amended version of MCL 600.2919a, Aroma claims that several unpublished decisions of the Court of Appeals support its assertion that common-law conversion and conversion to the other person's "own use" are synonymous. We address these cases for the sake of completeness and to observe that none of these cases withstands scrutiny even as merely persuasive authority. See MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis.").

Three of Aroma's cited cases concluded that no common-law conversion occurred, so they can only stand for the uncontroversial principle that common-law conversion is a threshold to conversion to the other person's own use. See *Victory Estates LLC v NPB Mortgage LLC*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 307457); *Paul v Paul*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2013 (Docket No. 311609); *Armstrong v O'Hare*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 308635). A fourth case, *JP Morgan Chase Bank v Jackson GR, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2014 (Docket No. 311650), simply held that treble damages are unavailable when no damages occurred in the first place or would not have even been contested. Other cases did not discuss the "own use" language of § 2919a(1)(a), presumably because the issue was not raised. See *J Franklin Interests, LLC v Meng*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2011 (Docket No. 296525); *Stockbridge Capital, LLC v Watcke*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2014 (Docket No. 313241).

Finally, Aroma cites *J & W Transp, LLC v Frazier*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2010 (Docket No. 289711), which bears examining in slightly more detail. There, the panel suggested a two-step process for determining whether a plaintiff could properly assert a statutory conversion claim because it observed that "defendants failed to return plaintiffs' property after demand had been made *and used property in their possession without the authority to do so*." *Id.* at 15 (emphasis added). As a result, this decision, far from supporting Aroma's theory of

Similarly, Aroma's counsel in opposition to the motion for directed verdict also presumed that common-law conversion "has a slightly different standard" than § 2919a(1)(a). We turn now to the scope of that difference —*what* conduct satisfies the additional statutory requirement that the conversion was to the other person's "own use."[51]

C. DEFINITION OF "OWN USE"

The word "use" is one of the most common words in the English language[52] and conveys different shades of meaning as either a noun (as in, "an object's *use*") or a verb (as in, "to *use* an object"). Within the phrase "converting property to the other person's own use," the word "use" is employed as a noun. *Merriam-Webster's Collegiate Dictionary* identifies many different definitions and senses of the word "use" as a noun, including the following most relevant within the context of MCL 600.2919a(1)(a):

> **1 a :** the act or practice of employing something **:** EMPLOYMENT, APPLICATION <he made good ~ of his spare time> **b :** the fact or state of being used <a dish in daily ~ > . . . **2 a** (1) : habitual or customary usage (2) : an individual habit or group custom[.][53]

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§ 2919a, actually undercuts it. Nevertheless, none of the unpublished Court of Appeals opinions cited for Aroma's theory provides this Court with any meaningful analysis of § 2919a, because the issue has not been squarely presented to any appellate court until this case.

[51] We further emphasize that the Legislature intended MCL 600.2919a to work alongside the common law by creating a nonexclusive statutory cause of action in addition to other remedies available, including that for common-law conversion. See MCL 600.2919a(2); *Appletree*, 485 Mich at 10.

[52] A study by Dictionaries of the Oxford English Corpus found that the word "use" is the 83d most frequently used word in the English language. See Oxford Dictionaries, *The OEC: Facts about the language*, available at <http://www.oxforddictionaries.com/words/the-oec-facts-about-the-language> (accessed June 12, 2015) [http://perma.cc/BDP4-2UB5].

[53] *Merriam-Webster's Collegiate Dictionary* (2014).

Columbian proffered, and the circuit court adopted, a narrow definition of "use" focused on the intended purpose of the converted property, such as the definition of the word as "habitual or customary usage" quoted above. Under this definition, to convert Aroma's wine to Columbian's "own use" means that "one would have to drink it or perhaps sell it."

In reversing the circuit court's decision, the Court of Appeals held that "the definition of 'use' encompasses a much broader meaning" than the circuit court's definition allows.[54] Under the Court of Appeals' preferred definition, "use" "requires only that a person 'employ for some purpose . . . .' "[55] As a result, converting to the other person's "own use" means merely that a defendant "employ[s]" another person's property for any purpose, as long as it is "to [the defendant's] own purposes."[56]

The Court of Appeals thus implicitly acknowledged the placement of the word "use" within MCL 600.2919a(1)(a). In particular, the word "own" modifies "use," suggesting that any use of the converted property must be intentionally geared toward a purpose personal to the person converting the property. When examining the phrase "own use" in this light, it becomes clear that the Legislature did not seek to restrict the application of MCL 600.2919a(1)(a) on the basis of the intended or common purpose of the converted property. Rather, the only restriction to the application of MCL 600.2919a(1)(a) to a common-law conversion offense is that it must be used for a purpose personal to the converter. Therefore, we agree with the Court of Appeals' definition of "use" and hold that conversion

[54] *Aroma Wines*, 303 Mich App at 448.

[55] *Id*.

[56] *Id*.

"to the other person's own use" requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose.

This broad definition of "own use" finds support in our early conversion caselaw. As explained earlier, in *Kreiter*, this Court held that conversion to someone's own use need not be geared toward the intended purpose of the converted property and held that a converter of beer was liable regardless of whether he or she "destroyed [it] from a belief in its deleterious effects, or made way with [it] in carousals or private drinking."[57] Similarly, our precedent also illustrates that not every common-law conversion is to the converter's "own use," and therefore that additional language is not surplusage. For instance, this Court has also held that, leaving aside any potential governmental immunity defenses, a sheriff or court officer is liable for conversion if he or she unlawfully seizes personal property pursuant to a court order.[58] While the sheriff has converted that property, the sheriff has not converted the property to his or her "own use" within the meaning of MCL 600.2919a(1)(a).

Accordingly, we agree with the Court of Appeals that someone alleging conversion to the defendant's "own use" under MCL 600.2919a(1)(a) must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose. We now turn to the specific evidence presented in this case to determine whether Columbian is entitled to a directed verdict on Aroma's statutory conversion claim.

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[57] *Kreiter*, 28 Mich at 498-499.

[58] *Kenney*, 96 Mich at 618.

IV. APPLICATION

In determining whether the circuit court properly granted Columbian's motion for a directed verdict on Aroma's statutory conversion claim, we reiterate that we are not making any factual determinations, only whether sufficient evidence has been presented for the fact-finder—in this case, the jury—to conclude that Columbian converted Aroma's wine to its "own use," that is, for some purpose personal to Columbian.[59]

Under this standard, our application of MCL 600.2919a(1)(a) is straightforward. Whether Columbian committed a *common-law* conversion is not at issue here, for the jury has already decided that question against Columbian. In arguing that it did not commit *statutory* conversion, Columbian claims that it moved the wine from its temperature-controlled storage area to complete a renovation project at its warehouse. Even considering just this admission, we agree with the Court of Appeals that a jury could consider "the act of moving plaintiff's wine contrary to the contract in order to undertake an expansion project to benefit itself" to be "an act of employing the wine to [Columbian's] own purposes constituting 'use' of the wine."[60] Moreover, Aroma proffered various e-mails between its owner and Columbian's employees to support its claim that Columbian limited Aroma's access to its wine during a period when Columbian declared Aroma's account to be delinquent. Furthermore, the Court of Appeals also observed that Aroma proffered evidence that, if believed, would allow a jury to conclude

[59] *Krohn*, 490 Mich at 155, citing *Sniecinski*, 469 Mich at 131.

[60] *Aroma Wines*, 303 Mich App at 448-449.

that Columbian "filled the temperature-controlled storage space . . . with other customers' products."[61] As a result,

> [i]f a jury believed the evidence showing that defendant moved plaintiff's wine for its own purposes—whether it be to sell the space to other customers or complete a construction project—or that it used the wine as leverage against plaintiff, it could have determined that defendant converted the wine to its own use.[62]

Therefore, we affirm the Court of Appeals' conclusion that the circuit court erred when it granted Columbian's motion for a directed verdict on Aroma's statutory conversion claim. Aroma presented evidence during its case-in-chief that would allow a jury to find that Columbian converted Aroma's property to its own use within the meaning of MCL 600.2919a(1)(a). As a result, Columbian is not entitled to a directed verdict on Aroma's statutory conversion claim.

V. CONCLUSION

Although its language is rooted in common-law conversion, the tort established in MCL 600.2919a(1)(a) is not the same as common-law conversion. Rather, the separate statutory cause of action for conversion "to the other person's own use" requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose. Aroma has alleged facts that, if believed by a jury, would indicate Columbian's conversion of Aroma's wine for its own purposes. Therefore, we affirm the Court of Appeals' conclusion that Columbian is not

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[61] *Id*. at 448.

[62] *Id*. at 449.

entitled to a directed verdict on Aroma's statutory conversion claim and remand this case to the Kent Circuit Court for further proceedings consistent with this opinion.

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

BEALS v MICHIGAN

Docket No. 149901. Argued April 29, 2015. Decided June 18, 2015. Rehearing denied 498 Mich ___.

Theresa Beals, as personal representative of the estate of William T. Beals, brought an action in the Barry Circuit Court against the state of Michigan and William J. Harman. William Beals drowned while swimming in a pool at the Michigan Career and Technical Institute, a state residential facility, which provides vocational and technical training to students with disabilities. Harman was the only lifeguard on duty when the drowning occurred. Plaintiff accused the state of violating the Persons with Disabilities Civil Rights Act (PDCRA), MCL 37.1101 *et seq*., and accused Harman of gross negligence. Both defendants moved for summary disposition. The court, Amy L. McDowell, J., denied the motions. Harman appealed, and the state filed a delayed application for leave to appeal. The Court of Appeals granted the state's delayed application for leave to appeal and consolidated the state's appeal with Harman's appeal. In an unpublished opinion per curiam, the Court of Appeals, METER, P.J., and SHAPIRO, J. (O'CONNELL, J., concurring in part and dissenting in part), reversed the trial court's denial of summary disposition with regard to plaintiff's claim under the PDCRA, but affirmed the trial court's denial of summary disposition with regard to plaintiff's claim of gross negligence against Harman. Harman sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant Harman's application for leave to appeal or take other action. 497 Mich 930 (2014).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, MCCORMACK, and VIVIANO, the Supreme Court *held*:

The governmental tort liability act, MCL 691.1401 *et seq*., affords broad immunity from tort liability to governmental agencies and their employees when they are engaged in the exercise or discharge of a governmental function. Exceptions to the act must be narrowly construed. Under MCL 691.1407(2), each employee of a governmental agency is immune from tort liability for an injury to a person caused by the employee while

in the course of employment if (1) the employee is acting or reasonably believes he or she is acting within the scope of his or her authority, (2) the governmental agency is engaged in the exercise or discharge of a governmental function, and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury. For a governmental employee's conduct to be considered the proximate cause of an injury, that conduct must be the one most immediate, efficient, and direct cause of the injury. In this case, the one most immediate, efficient, and direct cause of William Beals's death was that which caused him to remain submerged in the deep end of the pool without resurfacing. Harman's failure to act was not the proximate cause of William Beals's death even though timely action by Harman might have prevented the death. The trial court should have granted summary disposition in favor of Harman because Harman was entitled to governmental immunity.

Judgment of the Court of Appeals reversed with regard to Harman's entitlement to summary disposition.

Justice BERNSTEIN, dissenting, would have denied leave to appeal. It was undisputed that Harman was distracted, not in his designated position, and ignored several calls for help from the student who found William Beals's body. In the absence of other evidence indicating what caused William Beals to remain submerged, Harman's failure to rescue the deceased was the one most immediate, efficient, and direct cause of his death.

Fieger, Fieger, Kenney, Giroux & Harrington, PC (by *Geoffrey N. Fieger* and *Matthew D. Klakulak*), for Theresa Beals.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Mark E. Donnelly*, Assistant Attorney General, for William J. Harman.

Amici Curiae:

Garan Lucow Miller, PC (by *Rosalind Rochkind*), for the Michigan Municipal League, the Michigan Municipal League Liability and Property Pool, and the Michigan Townships Association.

ZAHRA, J. This case requires the Court to consider whether defendant lifeguard's failure to intervene in the deceased's drowning constituted "the proximate cause" of his death. While governmental agencies and their employees are generally immune from tort liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., MCL 691.1407(2)(c) provides an exception to this general rule when a governmental employee's conduct is both (1) grossly negligent and (2) "the proximate cause" of an injury, which this Court interpreted to mean the "most immediate, efficient, and direct cause" of that injury in *Robinson v Detroit*.[1]

Plaintiff brought the instant suit against defendant, a governmental employee, and pleaded avoidance of governmental immunity by alleging that defendant's grossly negligent behavior while lifeguarding and resulting failure to rescue plaintiff's drowning son constituted the proximate cause of his death. Subsequently, defendant filed a motion for summary disposition on the ground of governmental immunity, but the trial court denied defendant's motion. The Court of Appeals, in a split opinion, affirmed, concluding that a jury could reasonably find that defendant's failure to intervene constituted the proximate cause of the deceased's death. The Court of Appeals dissent instead concluded that defendant is immune from liability, because his actions were not the proximate cause, i.e., "the one most immediate, efficient, direct cause" of the deceased's death, as is required to impose tort liability under MCL 691.1407(2) and *Robinson*.

But for the applicable immunity statute, a question of fact may remain as to defendant's liability for the

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

deceased's death. However, in light of the well-established principles of governmental immunity set forth by the Legislature and this Court, we agree with the Court of Appeals dissent that defendant is immune from tort liability. Applying this Court's rationale in *Robinson* to the instant case, defendant's failure to intervene in the deceased's drowning cannot logically constitute the "most immediate, efficient, and direct cause" of his death. The causal connection between defendant's failure to intervene and the deceased's drowning is simply too tenuous for it to constitute the proximate cause of his death. In our view, it is readily apparent that the far more "immediate, efficient, and direct cause" of the deceased's death was that which caused him to remain submerged in the deep end of the pool without resurfacing. That the reason for the deceased's prolonged submersion in the water is unknown does not make that unidentified reason any less the proximate cause of his death.

Accordingly, we hold that the trial court erred by denying summary disposition to defendant, because the exception to governmental immunity articulated in MCL 691.1407(2) is inapplicable in the instant matter. We therefore reverse in part the judgment of the Court of Appeals, and remand this case to the Barry Circuit Court for entry of an order granting summary disposition in favor of defendant.

I. FACTS AND PROCEEDINGS

The deceased, William Beals, a 19-year-old diagnosed with a learning disability and an unspecified level of autism, drowned on May 19, 2009, while swimming in a pool at the Michigan Career and Technical Institute (MCTI), a state residential facility providing vocational and technical training to students with disabilities.

Beals and approximately 24 other disabled students were using the MCTI indoor swimming pool for a recreational swim. According to his mother, Beals was an "accomplished swimmer" who had been swimming independently for years. The only lifeguard on duty that evening was defendant William Harman, a certified lifeguard who was both an employee and student of MCTI. The record indicates that Harman suffers from attention deficit disorder.

At some point during the recreational swim, Beals waded into the shallow end of the pool where he "surface dove" into the deep end and continued to swim underwater. He never resurfaced under his own power. There is no evidence in the record that Beals visibly struggled in the water or that Harman or any of the 24 other students in the pool area witnessed Beals in distress. Indeed, it was not until Beals had been underwater for approximately eight minutes that another student wearing goggles put his head underwater and noticed Beals's body in the deep end of the pool next to the wall. This student pulled Beals from the bottom of the pool after making as many as three unsuccessful attempts to call for Harman's attention. When Harman heard other students yelling for help, he raced to the deep end of the pool, removed Beals from the water, and attempted cardiopulmonary resuscitation (CPR) until other staff members arrived. Beals was then transported to a hospital where he was declared deceased. A subsequent autopsy revealed that the cause of Beals's death was "drowning" and the manner of death was "accidental." The underlying reason for Beals's accidental drowning is unknown.

On January 26, 2011, Beals's mother, Theresa Beals, filed suit in Barry Circuit Court as the personal representative of Beals's estate. Plaintiff sued both Harman

and the State of Michigan, seeking economic and non-economic damages for the alleged wrongful death of her son. She accused the state (MCTI) of violating the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*.,[2] and Harman of gross negligence. In proofs developed by plaintiff, students at MCTI criticized Harman's attention to swimmers, describing him as "distracted" and indicating that he was talking to girls and playing with a football during the period in which Beals drowned. According to MCTI video surveillance footage of the events preceding the discovery of Beals's body, Harman did not once sit in the lifeguard observation stand, which, according to a report penned by plaintiff's expert, would have given Harman the best view of the pool, nor did Harman notice or observe that Beals had slipped under the water until the students called for his attention about eight minutes after Beals submerged in the deep end. Plaintiff does not allege, nor does the video indicate, that Harman caused Beals to enter the pool or that he took any action to influence Beals's behavior while Beals was in the water.

Harman moved for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity, asserting that his conduct was not "the proximate cause" of Beals's death, as is required to impose tort liability on a governmental employee under MCL 691.1407(2). The trial court issued an order denying summary disposition, finding that "reasonable minds could differ as to the question of gross negligence and if the proximate cause of death was the gross negligence of William Harman and/or the State of Michigan."

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[2] The trial court denied the state's motion for summary disposition as to this claim, but the Court of Appeals unanimously reversed the trial court on this issue. Plaintiff did not appeal that ruling in this Court.

Harman appealed the trial court's decision in the Court of Appeals, which affirmed the trial court in a split opinion.[3] The majority upheld the trial court's denial of Harman's motion for summary disposition, holding that "[g]iven the evidence presented, reasonable minds could conclude that Harmon's [sic] failure to intervene constituted the one most immediate, efficient, and direct cause of Beals's death."[4] Judge O'CONNELL dissented in part, instead concluding that the undisputed facts establish that defendant's conduct cannot be deemed "the proximate cause" of Beals's death, and that the trial court should have granted summary disposition in favor of Harman under MCR 2.116(C)(7).[5]

Harman sought leave to appeal in this Court. We directed the Clerk to schedule oral argument on whether to grant the application or take other action.[6] We specifically requested that the parties address "whether defendant William J. Harmon's [sic] alleged failure to act was *the* proximate cause of the decedent's death. MCL 691.1407(2)(c)."[7]

II. STANDARD OF REVIEW

The applicability of governmental immunity is a question of law that this Court reviews de novo on appeal.[8] This Court also reviews de novo a trial court's determination regarding a motion for summary dispo-

[3] *Estate of Beals v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2014 (Docket Nos. 310231 and 310565).

[4] *Id*. at 3-4.

[5] *Id*. at 2 (O'CONNELL, J., dissenting in part).

[6] See MCR 7.302(H)(1).

[7] *Beals v Michigan*, 497 Mich 930 (2014).

[8] *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

sition.[9] "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. [The reviewing court] consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them."[10] "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law."[11]

III. BACKGROUND

The GTLA, MCL 691.1401 *et seq*., affords broad immunity from tort liability to governmental agencies and their employees whenever they are engaged in the exercise or discharge of a governmental function.[12] The GTLA provides several exceptions to this general rule, all of which must be narrowly construed.[13] One such exception that governs the tort liability of governmen-

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[9] *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012), citing *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[10] *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001) (citations omitted).

[11] *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003) (citation omitted).

[12] MCL 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.").

[13] *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (stating "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed.") (citations omitted).

tal employees like Harman is contained in MCL 691.1407(2), which states in pertinent part:

> [E]ach . . . employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

There is no dispute regarding whether defendant Harman acted within the scope of his authority as an employee of a governmental agency engaged in the exercise of a governmental function. Moreover, Harman does not challenge whether his conduct amounted to gross negligence.[14] Accordingly, the sole issue presented in the instant appeal is whether Harman's conduct constituted "the proximate cause" of Beals's death for purposes of MCL 691.1407(2)(c).

This Court explained the proper interpretation of the term "the proximate cause" for purposes of MCL 691.1407(2)(c) in *Robinson v Detroit*, and held that in order for a governmental employee's grossly negligent conduct to be considered the proximate cause of an injury, that conduct must be "the one most immediate, efficient, and direct cause of the injury or dam-

[14] We do not opine as to whether Harman's conduct was grossly negligent. Harman does not explicitly concede that his conduct was grossly negligent, nor does he argue that it was not. Harman's position instead rests solely on his argument that his conduct was not "the proximate cause" of Beals's death as a matter of law.

age . . . ."[15] In *Robinson*, this Court considered "whether the city of Detroit or individual police officers face civil liability for injuries sustained by passengers in vehicles fleeing from the police when the fleeing car caused an accident."[16] The plaintiff passengers alleged that the police officers were not immune from liability, because their gross negligence in chasing the fleeing vehicles was the proximate cause of the collisions. This Court disagreed. First, the Court articulated that because " 'the' is a definite article, and 'cause' is a singular noun, it is clear that the phrase 'the proximate cause' contemplates one cause."[17] The *Robinson* Court then concluded that "the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause."[18] Applying this construction, this Court held that

> the officers in question are immune from suit in tort because their pursuit of the fleeing vehicles was not, as a matter of law, "the proximate cause" of the injuries sustained by the plaintiffs. The one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles.[19]

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[15] *Robinson*, 462 Mich at 462.

[16] *Id*. at 444.

[17] *Id*. at 462.

[18] *Id*. Before *Robinson*, this Court had effectively interpreted the phrase "the proximate cause" to mean "a proximate cause" in *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). The majority in *Robinson* overruled *Dedes*, noting that "a proximate cause" and "the proximate cause" have distinct legal meanings, and "the Legislature has shown an awareness that it actually knows that the two phrases are different." *Robinson*, 462 Mich at 460.

[19] *Id*. at 462.

Accordingly, "summary disposition for the defendant officers was proper because reasonable jurors could not find that the officers were 'the proximate cause' of the injuries."[20]

IV. ANALYSIS AND APPLICATION

Applying this Court's rationale in *Robinson* to the instant case, Harman's failure to intervene in Beals's drowning cannot reasonably be found to be "the one most immediate, efficient, and direct cause" of Beals's death. While it is unknown what specifically caused Beals to remain submerged under the water, the record indicates that Beals voluntarily entered the pool and voluntarily dove under the surface of the shallow end into the deep end without reemerging. Although plaintiff alleges that Harman's inattentiveness prevented him from attempting a timely rescue of Beals, in our view, it is readily apparent that the far more "immediate, efficient, and direct cause" of Beals's death was that which caused him to remain submerged in the deep end of the pool without resurfacing.

Under the facts of this case, Harman's inaction does not constitute the "most immediate, efficient, and direct cause" of Beals's drowning. Harman did not cause Beals to enter the pool and swim to the deep end, an act the accomplished swimmer performed voluntarily, nor did Harman cause Beals to remain submerged in the water, which was undeniably a more direct cause of Beals's death than any inaction on the part of Harman. That we lack the reason for Beals's prolonged submersion in the water does not make that unidentified reason any less the "most immediate, efficient, and

[20] *Id*. at 463, citing *Moll v Abbott Laboratories*, 444 Mich 1, 28, n 36; 506 NW2d 816 (1993).

direct" cause of his death. Consequently, while Harman's failure to intervene may be counted among the myriad reasons that Beals did not survive this occurrence, it certainly was not "the proximate cause" of his death for purposes of MCL 691.1407(2)(c).

In concluding to the contrary, the Court of Appeals majority appears to have conflated Harman's alleged breach of duty with the proximate cause of Beals's death. In holding that "reasonable minds could conclude Harman's failure to intervene constituted the one most immediate, efficient, and direct cause of Beals's death," the majority focused on Harman's obligation to rescue Beals and reasoned that Harman's grossly negligent conduct resulted in his failure to notice Beals's distress and respond appropriately.[21] While the majority pointed to evidence alleging that proper intervention and rescue could have prevented Beals's death,[22] this speculation does not establish a proximate relationship between Harman's breach and Beals's death. Stated simply, that Harman breached his duty does not necessarily entail that his inaction was the most *direct cause* of Beals's drowning. Indeed, Harman did not *cause* Beals's drowning; he merely failed to observe it happening and to attempt a rescue in response. That we can only speculate as to Beals's survival had Harman timely intervened further supports our conclusion that Harman's conduct was not the proximate cause of Beals's death.[23]

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[21] *Beals*, unpub op at 3-4.

[22] *Id*. at 3. As the Court of Appeals noted, plaintiff's expert, professional aquatics safety and water rescue consultant Gerald M. Dworkin, opined in a preliminary report that Beals's death "could have been and should have been easily prevented" and that a timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support."

[23] It is noteworthy that there were 24 other students in the pool at the time of Beals's drowning, none of whom noticed Beals in distress or

Further, we find the present case analogous to *Dean v Childs*,[24] which also involved a claim that a governmental employee's failure to intervene to prevent a death constituted the proximate cause of that death. In *Dean*, the plaintiff's home was allegedly set on fire by an arsonist, resulting in the death of the plaintiff's four children. The plaintiff sued the defendant firefighter, claiming that he was grossly negligent in fighting the fire and that he took " 'affirmative actions that significantly increased the risk of danger' " based on an expert's conclusion that the defendant caused the fire " 'to be pushed' " toward the children and that this prevented a rescue attempt.[25] The defendant moved for summary disposition based on governmental immunity, but the trial court denied his motion. The Court of Appeals majority opinion affirmed, opining that

> [w]hile it is likely that the arsonist was "a proximate cause" of the children's deaths, plaintiff's evidence, if

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attempted to rescue him before he was found at the bottom of the pool. These students had no duty to prevent Beals from drowning, and it is undisputed that their conduct was not the proximate cause of Beals's death. Although Harman did have a duty to intervene in Beals's drowning, he acted no differently than the other 24 students present at the time of Beals's drowning, and was thus no more the *cause* of Beals's death than were the other students. While Harman may have breached a duty that the other students did not possess, that is distinct from the cause of Beals's drowning, which cannot be attributed to the actions or inactions of Harman or the other students.

Moreover, given that there is no evidence that Beals struggled in the water or displayed any signs of distress, it is unclear that even a prudent lifeguard would have been able to observe and prevent Beals's drowning. This further illustrates that, based on the facts presented in this case, the connection between Beals's death and Harman's breach of duty is simply too tenuous for Harman's negligence to constitute the proximate cause of Beals's death.

[24] *Dean v Childs*, 474 Mich 914 (2005), rev'g 262 Mich App 48; 684 NW2d 894 (2004).

[25] *Dean*, 262 Mich App at 51-52, 58.

> proven, would show that the children would have survived the fire if [the defendant] had not acted in a grossly negligent manner. As the factual development of plaintiff's claim may justify recovery, the trial court properly denied [the defendant's] motion for summary disposition on the ground of statutory immunity.[26]

This Court reversed the Court of Appeals for the reasons stated in Judge GRIFFIN's dissent, thereby adopting his conclusion that the defendant was immune from tort liability under MCL 691.1407(2) because " 'the most immediate, efficient and direct cause' " of the children's deaths "was the fire itself, not defendant's alleged gross negligence in fighting it."[27] Although the defendant's alleged gross negligence might have been a " 'substantial factor' " in the deaths, this causal connection was insufficient to meet the governmental immunity threshold standard of "the" proximate cause.[28]

As with the situation of the firefighter in *Dean*, Harman's failure to intervene in Beals's already-initiated drowning does not transform his inaction into the proximate cause of Beals's death, even though plaintiff's expert opined that timely intervention might have prevented Beals's death.[29] When a fire is consuming a house, that a prudent firefighter might have slowed or stopped the fire does not automatically transform his failure to do so into the proximate cause of a death by fire. Similarly, if a swimmer accidently drowns, that a prudent lifeguard might have rescued the swim-

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[26] *Id*. at 58.

[27] *Id*. at 61 (GRIFFIN, J., dissenting in part) (citation omitted). Judge GRIFFIN acknowledged that "[i]f it were proven that an arsonist started the fire, the arsonist may be the proximate cause of the deaths." *Id*. at 61 n 5.

[28] *Id*. at 62 (citation omitted).

[29] See note 23 of this opinion.

mer from drowning does not automatically transform his failure to do so into the proximate cause of a death by drowning.[30]

Accordingly, under *Robinson*, plaintiff cannot, as a matter of law, establish that Harman was "the proximate cause" of Beals's death. Consequently, because no jury could reasonably find that Harman's failure to intervene in Beals's drowning was the proximate cause of his death on the basis of the facts presented in this case, the trial court should have granted summary disposition in favor of Harman under MCR 2.116(C)(7), as Harman is entitled to the protections of governmental immunity.[31] While we need not hypothesize scenarios in which a governmental employee's failure to intervene is so "immediate, direct, and efficient" to the injury that it breaks the existing causal connection, supersedes any other cause, and becomes "the one most immediate, efficient, and direct cause" of the injury, we reject the defendant's suggestion that a governmental employee's failure to intervene can *never* constitute the proximate cause of an injury.[32] Nevertheless, under the

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[30] Moreover, it is more clear in the instant case that the defendant government employee was not the proximate cause of the relevant death than was the case in *Dean*, as Harman did not take any type of affirmative action to increase the danger posed to Beals as the defendant allegedly did in *Dean* by pushing the fire to the back of the home.

[31] While we agree with the dissent's conclusion that Harman is protected by governmental immunity, we do not endorse Judge O'CONNELL's statement that "[a] chain of events . . . cannot logically be *the one most direct and immediate cause* of a death, and as such cannot be the source of tort liability against a governmental employee." *Beals*, unpub op at 2 (O'CONNELL, J., dissenting in part). Because Harman's participation in a chain of events was not the proximate cause of Beals's death in the instant matter, we need not address under what circumstances a chain of events might constitute the proximate cause of an injury or death in a different factual scenario.

[32] See, e.g., *Fuller v Hessler*, 226 Mich 311, 314-315; 197 NW 524 (1924) (holding, outside of the governmental immunity context, that proximate

facts presented in this case, Harman's failure to intervene was not "the one most immediate, efficient, and direct cause" of Beals's death.

It bears repeating that this case arose in the scope of governmental employment. Harman was a governmental employee and the clearly established underlying principle is that he is generally immune from tort liability if he is in performance of a governmental function. The Legislature has carved out a very narrow exception to that immunity for employees whose conduct is (1) grossly negligent and (2) "the proximate cause" of another's person's injury, which this Court has interpreted to mean the most direct cause of that injury.[33] Applying these well-established principles to the instant case, it is evident that Harman is protected from liability by governmental immunity.

V. CONCLUSION

We hold that Harman's conduct did not constitute "the proximate cause" of the deceased's death as a matter of law and that the exception to governmental immunity articulated in MCL 691.1407(2) is inapplicable. Consequently, the trial court should have granted summary disposition in favor of Harman under MCR 2.116(C)(7), because he is entitled to the protections of governmental immunity. Accordingly, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Barry Circuit Court for entry of an order granting summary disposition in favor of defendant Harman.

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

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cause does not exist between an earlier cause and the injury where "independent human agency . . . broke the relation of alleged cause and effect.").

[33] *Robinson*, 462 Mich at 462.

BERNSTEIN, J. (*dissenting*). Under the governmental tort liability act, MCL 691.1401 *et seq*., a governmental employee is immune from tort liability unless his or her conduct amounts "to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). It is only the question of causation that is now before us. This Court has previously interpreted "the proximate cause" to mean the "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

I believe that the lifeguard's failure to rescue the deceased was the one most immediate, efficient, and direct cause of death. Although an autopsy indicated that the deceased died by drowning, there is no evidence as to how this came to pass. Defendant William J. Harman attempts to use the unknown in his favor, arguing that whatever caused the deceased to remain submerged was the proximate cause of his death. However, there is no indication that the deceased intentionally stayed at the bottom of the pool or suffered any sort of cataclysmic health event that would have kept him there.

Contrary to the prevailing image of drowning victims to display obvious signs of distress, drowning can happen both quickly and quietly.[1]

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[1] "Drowning persons usually struggle to keep their mouth above the surface of the water in order to breath. Struggling to stay afloat and possibly suffocating, they are rarely able to call out or wave their arms . . . . These characteristics of drowning . . . emphasize the need for lifeguards as a source for continuous surveillance and immediate action." Christine M. Branche & Steven Stewart (eds), Centers for Disease Control and Prevention, *Lifeguard Effectiveness: A Report of the Working Group* (2001), available at <http://www.cdc.gov/HomeandRecreationalSafety/pubs/LifeguardReport-A.pdf> (accessed June 10, 2015) [http://perma.cc/C9VL-Z4CP].

> Because drowning can occur quickly and quietly, it is not surprising that lifeguards, distracted from keeping an eye on the water by other assigned duties, have failed to spot drowning persons in time to rescue them. . . . It is clear, therefore, that swimming facilities must be staffed adequately to ensure effective and continuous patron surveillance, and that lifeguards should be given no other task that would distract them from this work.[2]

It is undisputed here that Harman, the sole lifeguard on duty, was distracted from his duties; he was not in his designated position, which would have given him the best vantage point of the pool, and he ignored several calls for help from the student who found the deceased. Pointing to an unknown health event as the one most immediate, efficient, and direct cause of death places on plaintiff the unenviable burden of proving a negative, because there is no indication that any such health event occurred.

In the absence of any evidence that would support such a finding, it seems clear that it is the lifeguard's failure to ensure effective and continuous surveillance of the students that was the one most immediate, efficient, and direct cause of death. Because I would hold that the lifeguard's conduct was "the proximate cause" of death, I would find that the exception to governmental immunity articulated in MCL 691.1407(2) is applicable and I would deny leave to appeal.

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[2] *Id*. The United States Lifesaving Association (USLA) also supports this recommendation: " 'Lifeguards assigned to supervise an aquatic area shall not be subject to duties that would distract or intrude their attention from proper observation of persons in the waterfront area, or that prevent immediate assistance to persons in distress in the water.' " *Id*. (citation omitted).

PEOPLE v ACKLEY

Docket No. 149479. Argued March 10, 2015. Decided June 29, 2015.

Leo D. Ackley was convicted by a jury in the Calhoun Circuit Court of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136(b)(2), after his live-in girlfriend's three-year-old daughter died while in his care. At trial, the prosecution called five medical experts who testified that the child had died as the result of a head injury that was caused intentionally, while defense counsel called no experts, despite having been provided court funding for expert assistance and the name of a well-known forensic pathologist who could support the defense theory that the injuries had resulted from an accidental fall. Defendant appealed his convictions as of right, arguing that his lawyer's failure to meaningfully challenge the prosecution's expert testimony violated his Sixth Amendment right to the effective assistance of counsel. The Court of Appeals, BOONSTRA, P.J., and SAWYER and SHAPIRO, JJ., remanded the matter for an evidentiary hearing under *People v Ginther*, 390 Mich 436 (1973), after which the trial court, James C. Kingsley, J., granted defendant's motion for a new trial. The prosecution appealed. The Court of Appeals, OWENS, P.J., and MURRAY and RIORDAN, JJ., reversed in an unpublished opinion per curiam issued April 22, 2014 (Docket No. 318303), holding that the trial court had abused its discretion by granting a new trial because defense counsel's decisions regarding experts were trial strategy and no prejudice had resulted. Defendant appealed. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action, limited to the issue whether defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate the possibility of obtaining expert testimony in support of the defense. 497 Mich 910 (2014).

In a unanimous opinion by Justice MCCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

Defendant was denied the effective assistance of counsel by his trial counsel's failure to investigate adequately and to attempt to secure suitable expert assistance in the preparation and presentation of his defense. Expert testimony was critical in this case to

explain whether the cause of the child's death was intentional or accidental. Defense counsel's failure to attempt to engage a single expert witness to rebut the prosecution's expert testimony, or to attempt to consult an expert with the scientific training to support the defense theory of the case, fell below an objective standard of reasonableness, and there was a reasonable probability that this error affected the outcome of the trial. Accordingly, defendant was entitled to a new trial.

1. The Court of Appeals erred by concluding that defense counsel's decision to consult only Dr. Brian Hunter in preparation for trial was objectively reasonable. There was no objectively reasonable explanation in the record for counsel's decision to confine his pursuit of expert assistance to Hunter, a self-proclaimed opponent of the very defense theory counsel was to employ at trial, despite Hunter's having referred counsel to at least one other expert who could provide qualified and suitable assistance. Counsel's failure to engage expert testimony rebutting the state's expert testimony and failure to become versed in the technical subject matter constituted a constitutional flaw in the representation, not reasonable strategy. Given the centrality of expert testimony to the prosecution's proofs and the highly contested nature of the underlying medical issue, counsel's single error of failing to consult an expert who could meaningfully assist him constituted ineffective assistance.

2. But for counsel's deficient performance, there was a reasonable probability that the outcome of defendant's trial would have been different. Defendant's conviction turned on the jury's assessment of the prosecution's theory that the child's fatal injuries were the result of intentional abuse, which was advanced through the testimony of five experts. Because defendant's own testimony and that of his lay character witnesses were extremely unlikely to counter this formidable expert testimony, expert assistance in defendant's favor was critical to provide the jury with another viable and impartial perspective on the facts of the case while contradicting the prosecution's theory of how the child died. The prosecution's voluminous expert testimony made the need for an effective response by defense counsel particularly apparent and strong, and it rendered counsel's failure to offer expert testimony particularly glaring and harmful to the defendant. This consequence militated in favor of defendant's claim of relief. Further, the prosecution's nonexpert evidence was highly circumstantial, heavily contested, and far from dispositive of the issue of defendant's guilt. While a battle of the experts might not have ensured defendant's acquittal, counsel's failure to prepare or show up for

the battle sufficiently undermined confidence in the outcome of this case to entitle defendant to relief.

Court of Appeals judgment reversed; conviction vacated; case remanded to the trial court for further proceedings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Marc Crotteau*, Assistant Prosecuting Attorney, for the people.

Rodenhouse Kuipers, PC (by *Andrew J. Rodenhouse*), for defendant.

Amicus Curiae:

Michigan Innocence Clinic (by *Caitlin M. Plummer*, *Imran J. Syed*, and *Kimberly A. Thomas*) for the Innocence Network.

MCCORMACK, J. The question before us is whether the defendant was denied the effective assistance of counsel by his trial counsel's failure to investigate adequately and to attempt to secure suitable expert assistance in the preparation and presentation of his defense. In this case involving the unexplained and unwitnessed death of a child, expert testimony was critical to explain whether the cause of death was intentional or accidental. Contrary to the determination of the Court of Appeals, we conclude that defense counsel's failure to attempt to engage a single expert witness to rebut the prosecution's expert testimony, or to attempt to consult an expert with the scientific training to support the defendant's theory of the case, fell below an objective standard of reasonableness, and created a reasonable probability that this error affected the outcome of the defendant's trial. See *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Accord-

ingly, we reverse the judgment of the Court of Appeals, vacate the defendant's convictions, and remand for proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), after his live-in girlfriend's three-year-old daughter died while in his care. According to the defendant, the child had been napping alone in her room before he discovered her lying unresponsive on the floor next to the bed. The prosecution alleged that the defendant killed the child, either by blunt force trauma or shaking. The defendant denied hurting the child, and said that she must have died as the result of an accidental fall.

Given the lack of eyewitness testimony and any other form of direct evidence, expert testimony was the cornerstone of the prosecution's case. The prosecution called five medical experts to testify at trial about the cause of the child's death: two general pediatricians, a pediatric critical care doctor, a trauma surgeon, and a forensic pathologist.[1] Each testified that the child died as a result of abusive head injury caused either by nonaccidental shaking, blunt force trauma, or a combination of both. The defense, in contrast, called no expert in support of its theory that the child's injuries resulted from an accidental fall, although the court had provided funding for expert assistance.

The defendant appealed his convictions as of right, arguing that he was entitled to a new trial because his

[1] The prosecution also called an expert in emergency medicine, who testified regarding the child's initial triage and treatment in the Battle Creek Health Systems Emergency Department.

lawyer's failure to meaningfully challenge the prosecution's expert testimony regarding the cause of the child's death violated his Sixth Amendment right to the effective assistance of counsel. The Court of Appeals remanded for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Ackley*, unpublished order of the Court of Appeals, entered May 24, 2013 (Docket No 310350).

At the *Ginther* hearing, the defendant's trial counsel testified that he contacted only one expert to prepare for trial: forensic pathologist Brian Hunter. Dr. Hunter testified that, after reviewing some of the case materials, he advised counsel "right off the bat" that he was "not the best person" for the defense. He also explained to counsel that there was a marked difference of opinion within the medical community about diagnosing injuries that result from falling short distances, on the one hand, and shaken baby syndrome (SBS) or, as it is sometimes termed, abusive head trauma (AHT), on the other hand. Hunter asserted that this divide is "like a religion" because each expert has deeply held beliefs about when each diagnosis is supported, and the defendant should have the benefit of an expert who, "[i]n his or her religion, believes this could be a short-fall death." Hunter emphasized to counsel that he was on the wrong side of this debate to be able to assist the defendant.

Hunter then referred counsel to at least one well-known forensic pathologist,[2] Dr. Mark Shuman, who had conducted substantial research on short falls.

[2] There was conflicting testimony between Hunter and defense counsel about Hunter's referral(s). According to counsel, Hunter referred him to two experts: Dr. Shuman and Dr. Werner Spitz. According to Hunter, he referred counsel to Dr. Shuman only. In any event, counsel admitted that he never contacted either expert.

Hunter characterized Dr. Shuman as the "best person" to assess the "complex" short-fall mechanism involved in the defendant's theory. Hunter could not promise that Dr. Shuman would "buy into every story the defendant is selling," but he informed counsel that Dr. Shuman was a "man of science . . . he's the guy that's going to give you your best shot."

Counsel testified that he never contacted Shuman, or any other expert in short falls. Nor did he read any medical treatises or other articles about the medical diagnoses at issue. Though recognizing that expert testimony can carry great weight with a jury, he nevertheless stated that while it may have been "prudent" for him to have consulted "the over 400 treatises available" in preparing his cross-examinations of the prosecution's experts "that wasn't the strategy."[3] Instead, he requested a second consultation with Hunter, offering the simple (albeit inexplicable) justification that Dr. Shuman "was not going to work out." Hunter reiterated his concerns with defense counsel's choice to use him, unambiguously warning counsel again that "you don't want me as your defense expert."

Counsel testified that he nevertheless continued to rely on only Hunter in his trial preparation, consulting him at least two more times before trial. Specifically, counsel provided Hunter with additional—but incomplete[4]—portions of the case materials so that

[3] Defense counsel explained that he preferred to attack the experts exclusively through the "gray area" that Hunter supplied—namely, that there had been no studies as to the actual force necessary to achieve fatal blunt-force head injuries in children.

[4] Most notably, counsel failed to provide Hunter with certain critical case materials regarding injuries the child had suffered not long before her death, including: (1) a witness statement that the child had fallen off a trampoline, had struck her head, had briefly gone unconscious, and had been complaining of headaches in the days leading up to her death, and

Hunter could give counsel advice on how to approach the prosecution's experts. Counsel admitted that Hunter's advice was his only method of preparing to cross-examine the prosecution's experts on the viability of their SBS/AHT theory of the child's cause of death.[5]

Finally, the parties stipulated to the admission of an affidavit from Dr. Werner Spitz, another well-known expert in forensic pathology. After reviewing the autopsy report, postmortem photographs, and the trial transcripts, Dr. Spitz opined that the bruises on the child's body were consistent with the intubation and CPR she received on the day of her death. He then averred that he would have testified that the child's head injuries could not be attributed to SBS/AHT but were caused by a likely accidental "mild impact."

Based on this evidence, the trial court granted the defendant a new trial. It found that counsel's original failure even to attempt to contact either Dr. Shuman or Dr. Spitz was objectively unreasonable, and that there was a reasonable probability of a different result at trial had counsel engaged his own medical expert.

The Court of Appeals reversed, concluding that while there was no clear error in the trial court's findings of fact, the trial court had abused its discretion in finding a constitutional violation because counsel's "decision not to consult a second expert constituted trial strategy." *People v Ackley*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 318303), p 4. The court also held that even if counsel

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(2) the police report of the accident, which indicated that the child had been lethargic, had been vomiting, and had lost control of her bowels the day before she died.

[5] Counsel explained at the *Ginther* hearing that he was not paid for pretrial preparation.

should have contacted an expert other than Hunter, no prejudice resulted in light of all the evidence against the defendant.

The defendant sought leave to appeal in this Court. We heard oral argument on the application, limited to the issue of "whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate the possibility of obtaining expert testimony in support of the defense."[6]

II. STANDARD OF REVIEW

Whether the defendant received the effective assistance of counsel guaranteed him under the United States and Michigan Constitutions is a mixed question of fact and law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012), citing *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). This Court reviews for clear error the trial court's findings of fact in this regard, and reviews de novo questions of constitutional law. *Trakhtenberg*, 493 Mich at 47.

III. ANALYSIS

Both the Michigan and United States Constitutions require that a criminal defendant be afforded the assistance of counsel in his or her defense. US Const, Am VI; Const 1963, art 1, § 20. To be constitutionally effective, counsel's performance must meet an "objective standard of reasonableness." *Trakhtenberg*, 493 Mich at 52. To show that this standard has not been met, a defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id.*, citing *Strickland v Washington*, 466 US at 689. But "a court cannot insulate the review of

[6] *People v Ackley*, 497 Mich 910 (2014).

counsel's performance by calling it trial strategy"; counsel's strategy must be sound, and the decisions as to it objectively reasonable. *Trakhtenberg*, 493 Mich at 52. Courts must determine whether the "strategic choices [were] made after less than complete investigation," or if a "reasonable decision [made] particular investigations unnecessary." *Strickland*, 466 US at 690-691.

To obtain relief for the denial of the effective assistance of counsel, the defendant must show that counsel's performance fell short of this "objective standard of reasonableness" and that, but for counsel's deficient performance, "there is a reasonable probability that the outcome of [the defendant's trial] would have been different." *Trakhtenberg*, 493 Mich at 51. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

A. COUNSEL'S PERFORMANCE

Turning first to the performance prong of the *Strickland* analysis, we disagree with the Court of Appeals that counsel's decision to consult only Dr. Hunter in preparation for trial was objectively reasonable. Rather, like the trial court, we conclude that counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant's theory that the child's injuries were caused by an accidental fall and prepare counsel to counter the prosecution's expert medical testimony.

As defense counsel was well aware before trial, the prosecution's theory of the case was that the defendant intentionally caused the child's unwitnessed injuries, a premise that it intended to prove with expert testimony. This testimony would require a response, and indeed,

the court granted counsel funding to seek expert assistance of his own. Yet counsel contacted only Hunter, who repeatedly made clear that he credited the prosecution's SBS/AHT theory and disagreed with the defense's theory. While conceding that the SBS/AHT diagnosis was not universally accepted within the medical community, Hunter explained to counsel that he "really d[id]n't think [he] could help" the defendant because he was on the wrong side of this debate in his field.

As a solution, he advised counsel to consult Dr. Shuman, who not only was on the defendant's side of the SBS/AHT debate generally, but was significantly more likely to agree with the defendant's claim that the child's death in this case must have been accidental. Hunter even suggested that Dr. Shuman was more qualified because he had studied short falls extensively. Whereas Hunter was part of the group of experts who "don't have a good model" to support the accidental fall theory, Dr. Shuman was "someone who has dug into the physics" and the "proposed models" of a short-fall injury. Hunter also characterized Dr. Shuman as a "man of science" and as "the best expert in these types of situations." Yet counsel ignored this advice. He did not contact Dr. Shuman or any other forensic pathologist with expertise in short falls, rendering Hunter his expert by default.

Counsel did not have sufficient information to legitimate this "choice." While an attorney's selection of an expert witness may be a "paradigmatic example" of trial strategy, that is so only when it is made "*after* thorough investigation of [the] law and facts" in a case. *Hinton v Alabama*, ___ US ___; 134 S Ct 1081, 1088; 188 L Ed 2d 1 (2014) (emphasis added). In this case, the record betrays no objectively reasonable explanation for coun-

sel's decision to confine his pursuit of expert assistance to Hunter, a self-proclaimed *opponent* of the very defense theory counsel was to employ at trial, despite Hunter's referral to at least one other expert who could provide qualified and suitable assistance to the defendant. Nor is there any indication that counsel had the requisite familiarity with SBS/AHT or short-fall death theories to justify his settling on consulting only Hunter. To the contrary, counsel admittedly failed to consult any of the readily available journal articles on SBS/AHT and short-fall deaths, and did not otherwise educate himself or conduct any independent investigation of the medical issues at the center of the case, beyond his limited consultations with Hunter. See *Trakhtenberg*, 493 Mich at 54 n 9 (noting that "a defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a *reasonable, informed determination* as to whether an expert should be consulted or called to the stand . . . .") (quotation marks and citation omitted); *Lindstadt v Keane*, 239 F3d 191, 202 (CA 2, 2001) (noting that counsel's lack of familiarity with pertinent sexual abuse studies and failure to conduct any relevant research "hamstrung" his effort to effectively cross-examine the prosecution's expert witness); *Holsomback v White*, 133 F3d 1382, 1387-1389 (CA 11, 1998) (holding that counsel's failure to conduct an adequate investigation into medical evidence of sexual abuse was ineffective).

We fail to see how counsel's sparse efforts satisfied his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Hinton*, 134 S Ct at 1088, quoting *Strickland*, 466 US at 690-691, especially in light of the prominent controversy within the medical community

regarding the reliability of SBS/AHT diagnoses. See *State v Edmunds*, 308 Wis 2d 374, 391-392; 746 NW2d 590 (2008) (holding that the "significant dispute" and "shift in the mainstream medical community" regarding SBS/AHT diagnoses since the defendant's trial established a reasonable probability that a different result would be reached in a new trial, entitling the defendant to relief); Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous J Health L & Policy 209, 212 (2012) (explaining that, in SBS/AHT cases, "it is critical to assess the reliability of the diagnoses under the standards of evidence-based medicine"). In this case involving such "substantial contradiction in a given area of expertise," counsel's failure to engage "expert testimony rebutting the state's expert testimony" and to become "versed in [the] technical subject matter" most critical to the case resulted in two things: a defense theory without objective, expert testimonial support, and a defense counsel insufficiently equipped to challenge the prosecution's experts because he possessed only Dr. Hunter's reluctant and admittedly ill-suited input as his guide. *Knott v Mabry*, 671 F2d 1208, 1212-1213 (CA 8, 1982). This "constitute[d] a constitutional flaw in the representation" of the defendant, not reasonable strategy. *Id*. at 1213.

In concluding otherwise, the Court of Appeals stressed that counsel is not required to shop for experts until finding one who will offer favorable testimony. We do not dispute that general proposition, but we fail to see its relevance here. In this case, counsel did no consultation at all beyond settling on the very first expert he encountered, despite the importance of expert medical testimony in the case and despite that expert's specific recommendation to contact a different and more suitable expert.

Nor can we agree with the Court of Appeals that Dr. Hunter's comments regarding Dr. Shuman's impartiality rendered it "reasonable for [counsel] to conclude that consulting a second expert would not be useful." *Ackley*, unpub op at 4. Hunter's warning that Dr. Shuman "would not buy into every story" or blindly accept the defendant's theory is consistent with scientific integrity, is desirable, and is, indeed, advantageous in the context of expert testimony. But more importantly, Hunter's core message on this very point was that counsel *should* engage Dr. Shuman, a qualified expert better suited to support the defendant's theory. And without having done any research on SBS/AHT or short-fall injuries, or having made any contact with Dr. Shuman, counsel " 'was ill equipped to assess his credibility or persuasiveness as a witness', or to evaluate and weigh the risks of putting him on the stand." *Towns v Smith*, 395 F3d 251, 260 (CA 6, 2005) (citation omitted). "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says." *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011). Finally, as Dr. Spitz's affidavit plainly demonstrates, Dr. Hunter's advice to consult another expert was well founded.

Accordingly, we conclude that counsel's efforts to investigate and attempt to secure suitable expert assistance in preparing and presenting defendant's case fell below an objective standard of reasonableness. While the Court of Appeals may be correct that counsel's deficiencies in this regard did not infect all of his conduct throughout the trial, see *Ackley*, unpub op at 6, the rest of his advocacy could not cure this crucial error. As the Supreme Court has said, "a single, serious error may support a claim of ineffective assistance of counsel." *Kimmelman v Morrison*, 477 US 365, 383; 106 S Ct 2574; 91 L Ed 2d 305 (1986). Given the centrality of

expert testimony to the prosecution's proofs and the highly contested nature of the underlying medical issue, counsel committed exactly that kind of error by failing to consult an expert who could meaningfully assist him in advancing his theory of defense and in countering the prosecution's theory of guilt.

B. PREJUDICE

We further conclude that, but for counsel's deficient performance, "there is a reasonable probability that the outcome of [the defendant's trial] would have been different." *Trakhtenberg*, 493 Mich at 51; *Strickland*, 466 US at 694. As set forth above, the defendant's conviction turned on the jury's assessment of the prosecution's cause-of-death theory, which was advanced through the testimony of five experts, each of whom concluded that the child's injuries were the result of some form of intentional abuse. The defendant's own testimony and that of his lay character witnesses were extremely unlikely to counter this formidable expert testimony. Therefore, the absence of expert assistance in the defendant's favor was critical. It prevented counsel from testing the soundness of the prosecution's experts' conclusions with his own expert testimony and with effective cross-examination. And again, as Dr. Spitz's affidavit shows, such expert assistance *was* available and would have provided the jury with another viable and impartial perspective on the facts of the case while contradicting the prosecution's theory of how the child died.

The Court of Appeals nonetheless found the prejudice from counsel's deficient performance insufficient to warrant relief, given both the strength of the other, nonexpert evidence of the defendant's guilt, and the

sheer multitude of expert testimony the prosecution had marshaled in support of its position. We disagree times two.

First, we fail to see particular strength in the prosecution's nonexpert evidence, which was highly circumstantial, heavily contested, and far from dispositive of the issue of defendant's guilt. There was no explanation for the child's injuries beyond the theories presented by the experts, and the prosecution produced no witnesses who testified that the defendant was ever abusive. In fact, some testimony supported the opposite conclusion; according to the child's mother, the defendant's disciplinary tactics were no different from her own, there was no indication that either of her daughters feared the defendant, there were alternative explanations for some of the child's bruises and physical symptoms,[7] and the child willingly spent time with the defendant and called him "daddy."[8] And while the prosecution claimed that the child began to exhibit health issues around the

[7] The child's mother attributed these bruises to the child's diet and physical activity, and the prosecution's forensic pathologist stated that the child was mildly anemic and that her bruising had no pattern indicating an object or a hand.

[8] The Court of Appeals also cited the "peculiar" nature of the defendant's actions on the day of the incident as an indication of his guilt. Specifically, the panel found significant the defendant's failure to seek help from his neighbors after discovering the child on the floor, his attempt to revive her by pouring cold water over her, his decision to retrieve the family dog before fleeing the family's home, and his decision to first go to his mother's house rather than the hospital. We do not disagree that the defendant's behavior was relevant and, furthermore, that a jury might consider it evidence of guilt. The probability that the jury would do so, however, might be said to make it even more critical that counsel counter the expert-endorsed theory of his client's guilt with an expert-endorsed theory of his client's innocence. Had counsel provided a different lens through which to view his client's behavior, those same "peculiar" actions by the defendant might have instead been perceived as the missteps of a panicked, but nonetheless innocent, caretaker.

time that the defendant entered her life, there was witness testimony to contradict this assertion, and the source and timing of these issues did not coincide with the defendant's move into the family's home or with his assumption of childcare duties.[9] In short, our review of this nonexpert evidence makes plain why the prosecution chose to build its case primarily through the testimony of five experts, but it does little to weaken our conclusion that defense counsel's failure to meaningfully engage and respond to this expert testimony created a reasonable probability of a different outcome at trial.

Nor do we agree with the Court of Appeals that the sheer volume of the prosecution's expert testimony rendered any such efforts by defense counsel futile. This reasoning presumptively prioritizes quantity over quality, and takes no account of the comparative persuasiveness of the "child abuse" and "accidental fall" theories at issue in the case. It also places the defendant in a near-impossible position, whereby the prejudice caused by his counsel's error is effectively used to foreclose his claim of relief based upon that very error. The prosecution's voluminous expert testimony made the need for an effective response

[9] For example, the Court of Appeals cited the child's hair loss as one physical manifestation of abuse, but according to her mother, her hair began thinning before the defendant moved in with the family. In any event, doctors diagnosed it as an infection, not a stress-related issue. The child's regression in toilet training was also emphasized as evidence of abuse. Yet a report from the child's pediatrician attributed her developmental progress, including the fact that she had even *begun* her toilet training, to the defendant's care. Unfortunately, defense counsel never called the child's pediatrician to testify, though these facts could have refuted the prosecution's allegations that the defendant had been physically abusing the child over a sustained period. Counsel's only "explanation" for this omission was that this credible counter-evidence was not needed because it did not fit in with his "trial strategy" of attributing the child's blunt force trauma to a fall from the bed.

by defense counsel particularly apparent and strong, and it rendered counsel's failure to offer expert testimony particularly glaring and harmful to the defendant. Because of counsel's omissions and the resulting absence of suitable expert assistance, the prosecution's expert testimony appeared uncontested and overwhelming. Contrary to the Court of Appeals, we believe this consequence militates in favor of, rather than against, the defendant's claim of relief.

The Court of Appeals' analysis thus vastly underestimated the value of expert assistance to the defense and the impact of its absence, ignoring the fact that in a SBS/AHT case such as this, where there is "no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to kill," the expert "*is* the case . . . ." Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash U L Rev 1, 27 (emphasis added). Here, expert testimony was not only integral to the prosecution's ability to supply a narrative of the defendant's guilt, it was likewise integral to the defendant's ability to counter that narrative and supply his own. Had an impartial, scientifically trained expert corroborated the defendant's theory, the defendant's account of the child's death would not have existed in a vacuum of his own self-interest. While we cannot say that a battle of the experts would have ensured the defendant's acquittal, counsel's failure to prepare or show up for the battle sufficiently "undermine[s our] confidence in the outcome" of this case to entitle the defendant to relief. *Strickland*, 466 US at 694.

IV. CONCLUSION

For the reasons set forth above, we conclude that the defendant is entitled to a new trial because of his

counsel's constitutionally ineffective failure to investigate adequately and to attempt to secure appropriate expert assistance in the preparation and presentation of his defense. Accordingly, we reverse the judgment of the Court of Appeals, vacate the defendant's convictions, and remand to the Calhoun County Circuit Court for further proceedings consistent with this opinion.

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

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition August 22, 2014:

In re IAQUINTA, Nos. 149690 and 149716; Court of Appeals No. 315136. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. The factual findings of the Family Division of the Wayne Circuit Court were inadequate for review. The Court of Appeals should have remanded the case to the trial court to make further factual findings under MCR 3.977(I)(2). Additionally, the Court of Appeals accepted the claim of appeal by the guardian ad litem where no appeal of right existed under MCR 3.993(A). We remand this case to the Family Division of the Wayne Circuit Court to make findings of fact sufficient for appellate review, as required by MCR 3.977(I). We do not retain jurisdiction.

Leave to Appeal Denied August 22, 2014:

In re J, No. 149644; Court of Appeals No. 319359.

In re ARCE/LOGAN, No. 149672; Court of Appeals No. 318471.

In re SMITH, No. 149669 and 149670; Court of Appeals No. 319099 and 319102.

Summary Disposition September 5, 2014:

PEOPLE V IRWIN, No. 148308; Court of Appeals No. 315852. Pursuant to MCR 7.302(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 22, 2013 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 trial court a motion to withdraw the defendant's plea, and failed to 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(F). Counsel acknowledged that the defendant did not contribute to the delay in filing and admitted her sole responsibility for missing the deadline. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 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). Costs are imposed against the attorney, only, in the amount of $250, to be paid to the Clerk of this Court. We do not retain jurisdiction.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v JUNTIKKA, No. 148588; Court of Appeals No. 318300, No. 147860. By order of May 27, 2014, the application for leave to appeal the December 6, 2013 order of the Court of Appeals was held in abeyance pending the decision in *People v Cunningham* (Docket No. 147437). On order of the Court, the case having been decided on June 18, 2014, 496 Mich 145 (2014), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted in light of *Cunningham*.

PEOPLE v LEONARD, No. 148874; Court of Appeals No. 319114. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's November 15, 2013 application for leave to appeal under the standard applicable to direct appeals. The defendant's attorney acknowledged in his motion to reissue judgment of sentence that the delay in filing the defendant's application for leave to appeal was due to the attorney's failure to locate the correctional facility in which the defendant was incarcerated. Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 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). We do not retain jurisdiction.

PEOPLE v ABREGO, No. 149283; Court of Appeals No. 320973. Pursuant to MCR 7.302(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 September 5, 2014:

PEOPLE v TAJUAN WILLIAMS, No. 148419; Court of Appeals No. 301384.

PEOPLE v BENNETT, No. 148453; Court of Appeals No. 315200.

PEOPLE v RIGTERINK, No. 148621; Court of Appeals No. 318323.

PEOPLE v MARK BENNETT, No. 148653; Court of Appeals No. 310850.

PEOPLE v OTHMAN, No. 148685; Court of Appeals No. 310811.

PEOPLE v DONTAYE JONES, Nos. 148688 and 148690; Court of Appeals Nos. 312510 and 319522.

PEOPLE v MUNTAQIM-BEY, No. 148728; Court of Appeals No. 318454.

PEOPLE v HENDON, No. 148735; Court of Appeals No. 319582.

PEOPLE v AUBREY CHRISTIAN, No. 148743; Court of Appeals No. 317051.

PEOPLE v SZABO, No. 148783; Court of Appeals No. 311274; reported below: 303 Mich App 737.

PEOPLE v KIDD, No. 148788; Court of Appeals No. 318080.

GEIGER v GEIGER, No. 148806; Court of Appeals No. 311482.

PEOPLE v DWAYNE JOHNSON, No. 148819; Court of Appeals No. 319737.

PEOPLE v BURCH, No. 148824; Court of Appeals No. 318741.

BARRY A SEIFMAN PC v GUZALL, No. 148834; Court of Appeals No. 317111.

PEOPLE v ROBERT THOMPSON, No. 148843; Court of Appeals No. 318973.

PEOPLE v TYRONE FORD, No. 148846; Court of Appeals No. 318710.

PEOPLE v HAMZA GIBSON, No. 148851; Court of Appeals No. 319683.

PEOPLE v KYLES, No. 148852; Court of Appeals No. 318327.

PEOPLE v HOLMES, No. 148856; Court of Appeals No. 310321.

PEOPLE v BERMUDEZ, No. 148857; Court of Appeals No. 306806.

PEOPLE v DEMETRIUS CLARK, No. 148866; Court of Appeals No. 305681.

PEOPLE v RONEY, No. 148868; Court of Appeals No. 319730.

PEOPLE v DARRYL CLARK, No. 148872; Court of Appeals No. 305552.

PEOPLE v ROBERT COOK, No. 148875; Court of Appeals No. 317010.

PEOPLE v LEE BERRY, No. 148878; Court of Appeals No. 319764.

PEOPLE v COOLEY, No. 148883; Court of Appeals No. 319427.

PEOPLE v KRYSTAL CLARK, No. 148906; Court of Appeals No. 305601.

PEOPLE v FRANK HENDERSON, No. 148918; Court of Appeals No. 318404.

PEOPLE v DESRICK BROWN, No. 148922; Court of Appeals No. 313147.

PEOPLE v REO BRYANT, No. 148923; Court of Appeals No. 319259.

PEOPLE v JIMMIE WALKER, No. 148940; Court of Appeals No. 317438.

CAPITAL ONE BANK USA NA v PONTE, Nos. 148947, 148948, 148949, 148950, and 148951; Court of Appeals Nos. 307664, 308159, 308160, 308161, and 308163.

PEOPLE v WAGLE, No. 148952; Court of Appeals No. 316683.

PEOPLE v DAMON JOHNSON, No. 148959; Court of Appeals No. 318734.

PEOPLE v WILLIAM PARKER, No. 148962; Court of Appeals No. 315559.

PEOPLE v HENRY, No. 148976; Court of Appeals No. 319435.

BROADENAX v ST LOUIS CORRECTIONAL FACILITY WARDEN, No. 148977; Court of Appeals No. 318178.

PAMELA B JOHNSON TRUST v ANDERSON, No. 148978; Court of Appeals No. 309913.

PEOPLE v VINCENT, No. 148983; Court of Appeals No. 312274.

PEOPLE v COBB, No. 148988; Court of Appeals No. 319080.

PEOPLE v COLLIER, No. 148991; Court of Appeals No. 317672.

PEOPLE v BERLANGA, No. 149002; Court of Appeals No. 318651.

PEOPLE v FAULKNER, No. 149009; Court of Appeals No. 315302.

PEOPLE v BELISLE, No. 149016; Court of Appeals No. 319257.

PEOPLE v JEFFREY DYE, No. 149017; Court of Appeals No. 318421.

PEOPLE v DAVON THOMPSON, No. 149018; Court of Appeals No. 319524.

PEOPLE v DAVID CLARK, Nos. 149024 and 149025; Court of Appeals Nos. 310870 and 310872.

PEOPLE v DANTE MOORE, No. 149028; Court of Appeals No. 312909.

PEOPLE v DENNIS HOSKINS, No. 149049; Court of Appeals No. 313639.

In re GENEVIEVE GARCIA TRUST, Nos. 149057 and 149058; Court of Appeals Nos. 309170 and 311123.

PEOPLE v CHISM, No. 149059; Court of Appeals No. 313580.

BURGER v FORD MOTOR CO, Nos. 149064 and 149065; Court of Appeals Nos. 307312 and 308764.

FIA CARD SERVICES, NA v PONTE, No. 149071; Court of Appeals No. 312980.

PEOPLE v AMONTE REID, No. 149080; Court of Appeals No. 312792.

PEOPLE v JOSEPH MCINTYRE, No. 149086; Court of Appeals No. 308394.

PEOPLE v JOYNER, No. 149089; Court of Appeals No. 312108.

BROWN v MICHIGAN REFORMATORY WARDEN, No. 149109; Court of Appeals No. 320050.

BROWN v MICHIGAN REFORMATORY WARDEN, No. 149110; Court of Appeals No. 320042.

PEOPLE v LAVELLE STOKES, No. 149114; Court of Appeals No. 311438.

PEOPLE v LUNDY, No. 149128; Court of Appeals No. 309114.

WRIGHT v HSBC MORTGAGE SERVICES, INC, No. 149136; Court of Appeals No. 320517.

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 149140; Court of Appeals No. 312159.

IRA TWP v TIN FISH II, LLC, INC, No. 149144; Court of Appeals No. 317729.

MURRAY v ITC HOLDINGS CORPORATION, No. 149155; Court of Appeals No. 310776.

PEOPLE v RICHARDS, No. 149159; Court of Appeals No. 320051.

HELDT v DOWNS, No. 149162; Court of Appeals No. 317113.

PEOPLE v KELLY, No. 149164; Court of Appeals No. 314095.

PEOPLE v RUIZ, No. 149170; Court of Appeals No. 320083.

PEOPLE v JONNIE JOHNSON, No. 149171; Court of Appeals No. 313112.

PEOPLE v BRIAN LEE SMITH, No. 149172; Court of Appeals No. 313927.

PEOPLE v JASON CARTER, No. 149174; Court of Appeals No. 311547.

PEOPLE v FLEMING, No. 149175; Court of Appeals No. 320241.

AMMORI v NAFSO, No. 149179; Court of Appeals No. 312498.

FEDERAL DEPOSIT INSURANCE CORPORATION v TORRES, No. 149180; Court of Appeals No. 311277.

VIVIANO, J., not participating due to a familial relationship with one of the presiding circuit court judges in this case.

PEOPLE v BEINVILLE ALEXANDER, No. 149186; Court of Appeals No. 311437.

PEOPLE v CHRISTOPHER JACKSON, No. 149203; Court of Appeals No. 314007.

PEOPLE v DOVE, No. 149209; Court of Appeals No. 320364.

WILSON v MUTUAL BANK, No. 149211; Court of Appeals No. 313224.

BLONDE v LONG, No. 149221; Court of Appeals No. 304653.

PEOPLE v LEBLANC, No. 149223; Court of Appeals No. 320249.

PEOPLE v JOHN WALLACE, No. 149225; Court of Appeals No. 320252.

GLEAVES v DELEON, No. 149239; Court of Appeals No. 312523.

PEOPLE v JOVAN WILSON, No. 149253; Court of Appeals No. 320041.

ZANKE-JODWAY v CAPITAL CONSULTANTS, INC, No. 149257; Court of Appeals No. 306206.

SHEENA v BANK OF AMERICA, No. 149260; Court of Appeals No. 312866.

PEOPLE v BRONTKOWSKI, No. 149274; Court of Appeals No. 313002.

VIVIANO, J., not participating because he presided over this case in the circuit court.

PEOPLE v DAVE HARRIS, No. 149275; Court of Appeals No. 312140.

PEOPLE v BRAND, No. 149281; Court of Appeals No. 314175.

PEOPLE v EMURL DANIELS, No. 149282; Court of Appeals No. 320533.

PEOPLE v VILLNEFF, No. 149294; Court of Appeals No. 313758.

PEOPLE v WILLIAM HALL, No. 149297; Court of Appeals No. 319050.

PEOPLE v RICHARD COOK, No. 149301; Court of Appeals No. 312092.

PEOPLE v KARES, No. 149314; Court of Appeals No. 318974.

PEOPLE v ROBERT LUCAS, No. 149316; Court of Appeals No. 320813.

PEOPLE v PAPPAS, No. 149318; Court of Appeals No. 313751.

PEOPLE v ERIC-JAMAR THOMAS, No. 149324; Court of Appeals No. 313933.

PEOPLE v DEARDUFF, No. 149326; Court of Appeals No. 320921.

COMER v DEPARTMENT OF HUMAN SERVICES, No. 149342; Court of Appeals No. 319378.

MURAD v METRO CAR COMPANY, No. 149346; Court of Appeals No. 318343.

PEOPLE v DASHIELL, No. 149349; Court of Appeals No. 313523.

PEOPLE v CHRISTOPHER WILLIAMS, No. 149365; Court of Appeals No. 314772.

PEOPLE v KENDRICK, No. 149373; Court of Appeals No. 318802.

BAJOR v BANK OF AMERICA, NORTH AMERICA, No. 149377; Court of Appeals No. 314061.

HILL v DEPARTMENT OF CORRECTIONS, No. 149391; Court of Appeals No. 319208.

PEOPLE v MUELLER, No. 149401; Court of Appeals No. 313190.

PEOPLE v ARTHUR JONES, No. 149429; Court of Appeals No. 312250.

ZEHENDER v ZEHENDER, No. 149441; Court of Appeals No. 319196.

HOMER TOWNSHIP v AUSTIN, No. 149528; Court of Appeals No. 319823.

PEOPLE v BELL, No. 149897; Court of Appeals No. 315196.

In re COCHRAN, No. 149937; Court of Appeals No. 319813.

Superintending Control Denied September 5, 2014:

ARORA v ATTORNEY GRIEVANCE COMMISSION, No. 149434.

Reconsideration Granted September 5, 2014:

PEOPLE v WILLIE MOORE, No. 147458; Court of Appeals No. 311987. Leave to appeal denied at 495 Mich 901. We vacate our order dated November 25, 2013. On reconsideration, the application for leave to appeal the May 30, 2013 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).

Reconsideration Denied September 5, 2014:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUTUAL RISK MANAGEMENT AUTHORITY, INC, No. 147752; Court of Appeals No. 306844. Leave to appeal denied at 495 Mich 987.

COSTELLA v TAYLOR POLICE & FIRE RETIREMENT SYSTEM, No. 147810; Court of Appeals No. 310276. Summary disposition at 495 Mich 939.

PEOPLE v GREENE, No. 147948; Court of Appeals No. 317186. Leave to appeal denied at 4995 Mich 948.

PEOPLE v PETERSON, No. 148055; Court of Appeals No. 316697. Leave to appeal denied at 495 Mich 949.

PEOPLE v CHEVIS, No. 148158; Court of Appeals No. 304358. Leave to appeal denied at 495 Mich 992.

PEOPLE v NIEMIEC, No. 148199; Court of Appeals No. 317386. Leave to appeal denied at 495 Mich 993.

PEOPLE v MCGHEE, No. 148270; Court of Appeals No. 316330. Leave to appeal denied at 495 Mich 993.

PEOPLE v KELLEY, No. 148284; Court of Appeals No. 310325. Leave to appeal denied at 495 Mich 950.

PEOPLE v GATES, No. 148309; Court of Appeals No. 316976. Leave to appeal denied at 495 Mich 992.

PEOPLE v ROBERT WHITE, No. 148383; Court of Appeals No. 317530. Leave to appeal denied at 495 Mich 994.

PEOPLE v GATES, No. 148471; Court of Appeals No. 316975. Leave to appeal denied at 495 Mich 995.

LICARI v LICARI, No. 149406; Court of Appeals No. 314025. Leave to appeal denied at 496 Mich 868.

Summary Disposition September 17, 2014:

TALMER BANK & TRUST v PARIKH, Nos. 149061 and 149062; reported below: 304 Mich App 373. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that relies upon the choice-of-law standard for tort actions set forth in *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274 (1997), which does not control the instant contractual dispute. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

PEOPLE v KELLY JACKSON, No. 149173; Court of Appeals No. 320286. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court, and we remand this case to that court for resentencing. OV 2, MCL 777.32, must

be scored at 0 points where the incendiary device was part of the process of manufacturing methamphetamine and was not possessed or used as a weapon. *People v Crabtree*, 493 Mich 878 (2012), citing *People v Ball*, 297 Mich App 121 (2012). In addition, the five-point score for OV 15, MCL 777.45, was proper on the ground that there was evidence of delivery of the drugs. MCL 777.45(1)(h). A proper reading of MCL 777.45(1)(h) reveals two alternative bases for scoring that OV at five points: (1) when the offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or counterfeit controlled substance; and (2) when the offense involved possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Order of Suspension and Public Censure Entered September 17, 2014:

In re HON SHEILA ANN GIBSON, No. 147235. On June 11, 2013, the Judicial Tenure Commission filed a Decision and Recommendation. It was accompanied by a Settlement Agreement with the respondent, Third Circuit Court Judge Sheila Ann Gibson, who consented to the Commission's findings of fact and conclusions of law, and to the Commission's recommendation that she be publicly censured. On September 25, 2013, this Court entered an order remanding the matter to the Commission for further explication, retaining jurisdiction. The Commission issued a Supplemental Decision and Recommendation on November 12, 2013. On March 7, 2014, this Court entered an order rejecting the recommendation of a public censure and remanding the matter to the Commission for a new recommendation or a status report, retaining jurisdiction.

The Commission issued its Second Decision and Recommendation on April 14, 2014. It is accompanied by an amended settlement agreement, in which the respondent stipulated to findings of fact, and consented to a sanction that would be no greater than a public censure and 30-day suspension without pay.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

The JTC should consider these and other appropriate standards that it may develop in its expertise, when it offers its recommendations.

In this case, those standards are being applied to the findings of the Judicial Tenure Commission. The Commission adopted the stipulations of fact agreed to by the respondent and the examiner. We adopt the following findings of the Commission as our own:

1. Judge Gibson is, and at all material times was, a judge of the 3rd Circuit Court in Detroit, Michigan.

2. As a judge, she is subject to all the duties and responsibilities imposed on judges by the Michigan Supreme Court, and she is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. On November 8, 2012, Detroit-area television station WXYZ-TV broadcast a story about Judge Gibson. The story basically stated that they had monitored the times Judge Gibson had arrived at the Lincoln Hall of Justice and had left the Hall of Justice during the week of October 14, 2012.

4. WXYZ-TV reported that on Monday, October 15, 2012, Judge Gibson arrived at the courthouse parking lot at 10:55 a.m. and took the bench at approximately 11:00 a.m.

5. There were 18 matters set for hearing the morning of the 15th: 10 matters at 9 a.m., two matters at 9:30 a.m., and six matters at 10:00 a.m. Litigants, attorneys, and witnesses were present in the courtroom as early as 9 a.m. Therefore, some of the litigants, attorneys and witnesses may not have been able to have their matter addressed in as timely a fashion as they would have had if Judge Gibson had arrived at the courthouse by 9 a.m.

6. WXYZ-TV reported that on Tuesday, October 16, 2012, Judge Gibson arrived at the courthouse parking lot at 10:38 a.m. and took the bench at approximately 11:00 a.m.

7. There were 16 matters set for hearing the morning of the 16th: 11 matters at 9 a.m., two matters at 9:30 a.m., and three matters at 10:00 a.m. Litigants, attorneys, and witnesses were present in the courtroom as early as 9 a.m. Therefore, some of the litigants, attorneys and witnesses may not have been able to have their matter addressed in as timely a fashion as they would have had if Judge Gibson had arrived at the courthouse by 9 a.m.

8. WXYZ-TV reported that on Wednesday, October 17, 2012, Judge Gibson arrived at the courthouse parking lot at 10:58 a.m. and took the bench at approximately 11:00 a.m.

9. There were 22 matters set for hearing the morning of the 17th: eight matters at 9 a.m., eight matters at 9:30 a.m., and six matters at 10:00 a.m. Litigants, attorneys, and witnesses were present in the courtroom as early as 9 a.m. Therefore, some of the litigants, attorneys and witnesses may not have been able to have their matter addressed in as timely a fashion as they would have had if Judge Gibson had arrived at the courthouse by 9 a.m.

10. WXYZ-TV reported that on Thursday, October 18, 2012, Judge Gibson arrived at the courthouse parking lot at 10:30 a.m. and took the bench at approximately 11:00 a.m.

11. There were 15 matters set for hearing the morning of the 18th: six matters at 9 a.m., four matters at 9:30 a.m., and five matters at 10:00 a.m. Litigants, attorneys, and witnesses were present in the courtroom as early as 9 a.m. Therefore, some of the litigants, attorneys and witnesses may not have been able to have their matter addressed in as timely a fashion as they would have had if Judge Gibson had arrived at the courthouse by 9 a.m.

12. WXYZ-TV reported that on Friday, October 19, 2012, Judge Gibson arrived at the courthouse parking lot at 10:05 a.m. and took the bench at approximately 11:00 a.m.

13. There were 15 matters set for hearing the morning of the 19th: three matters at 9 a.m., 10 matters at 9:30 a.m., and two matters at 10:00 a.m. Litigants, attorneys, and witnesses were present in the courtroom as early as 9 a.m. Therefore, some of the litigants, attorneys and witnesses may not have been able to have their matter addressed in as timely a fashion as they would have had if Judge Gibson had arrived at the courthouse by 9 a.m.

14. WXYZ-TV reported that on these five days Judge Gibson left the courthouse between 4:00 p.m. and 4:30 p.m.

We also adopt the Commission's conclusion that these facts demonstrate, by a preponderance of the evidence, that the respondent breached the standards of judicial conduct in the following ways:

The Commission finds that Respondent has committed judicial misconduct, violat[ed] the Code of Judicial Conduct, creat[ed] the appearance of impropriety and breach[ed] the standards of judicial conduct. Respondent is responsible for all of the following:

(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) Conduct which is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

(g) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and

(h) Lack of personal responsibility for her own behavior and for the proper conduct and administration of the court in which she presides, contrary to MCR 9.205(A).

After reviewing the Second Decision and Recommendation of the Judicial Tenure Commission, the settlement agreement, the clarification of the amended settlement agreement, the standards set forth in Brown, and the above findings and conclusions, we accept the recommendation of the Commission and order that the Honorable Sheila Ann Gibson be publicly censured and suspended without pay for 30 days, effective 21 days from the date of this order. This order further stands as our public censure.

KELLY, J., not participating.

Order of Suspension Entered September 17, 2014:

In re ANONYMOUS JUDGE, No. 149517. The supplemental petition for interim suspension is considered, and it is held in abeyance pending further order of the Court. The Honorable Brenda K. Sanders, Judge of the 36th District Court, is suspended without pay until such time as she shows cause why she should not be held in contempt for failing to obey the July 17, 2014 order of this Court to cooperate with the independent medical examiner and provide such information as the independent medical examiner shall reasonably request.

The motion to seal the Supreme Court file is also considered, and it is granted, in order to preserve the confidentiality required by MCR 9.219(A)(2) and MCR 9.221(A). With the exception of this order, the Supreme Court file is suppressed and shall remain confidential until further order of this Court.

Leave to Appeal Granted September 17, 2014:

PEOPLE v CAIN, No. 149259; Court of Appeals No. 314342. The parties shall address whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial.

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.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 17, 2014:

PEOPLE v SMART, No. 149040; reported below: 304 Mich App 244. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the defendant's statement to the police on June 8, 2011 should be suppressed under MRE 410. In briefing this issue, the parties should include in their discussion whether, pursuant to MRE 410(4), "plea discussions" must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting authority and, if so, under what circumstances the agent's discussions constitute "plea discussions." The parties should also address whether this Court's two-part analysis for determining if a statement was made "in connection with" a plea offer, established in *People v Dunn*, 446 Mich 409 (1994), should continue to guide the application of MRE 410, and if not, what test should be applied in its stead. The parties should not submit mere restatements of their application papers.

MICHIGAN ASSOCIATION OF HOME BUILDERS v CITY OF TROY, No. 149150; Court of Appeals No. 313688.

Leave to Appeal Denied September 17, 2014:

CITY OF RIVERVIEW v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 147924, 147925, 147926, 147927, 147928, and 147929; Court of Appeals Nos. 301549, 301551, 301552, 302903, 302904, and 302905.

PEOPLE v KOSIK, No. 148311; reported below: 303 Mich App 146.

PEOPLE v BORDAYO, No. 148863; Court of Appeals No. 318961.

MILLER v STOTHERS, No. 149367; Court of Appeals No. 320305.

In re CURRAN, No. 149461; Court of Appeals No. 317470.

In re CITY OF BENTON HARBOR MAYORAL RECALL ELECTION, No. 150019; Court of Appeals No. 323326.

Superintending Control Denied September 17, 2014:

In re JUDGE OF THE 40TH CIRCUIT COURT, No. 150008.

Order on Motion for Rehearing Entered September 17, 2014:

MAKOWSKI v GOVERNOR, No. 146867: reported at 495 Mich 465. On order of the Court, the motion for clarification or rehearing is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting the motion, we amend the last sentence of the opinion to state as follows:

Accordingly, we reverse the judgment of the Court of Appeals. Consistent with the undisputed language of plaintiff's commutation, we further order the Department of Corrections to reinstate plaintiff's sentence to a minimum term of years — equivalent to the amount of time served as of the date of the Michigan Parole and Commutation Board's decision to recommend that plaintiff's sentence be commuted — to a maximum of life, and remand plaintiff to the jurisdiction of the parole board.[1]

MCCORMACK, J., not participating because of her prior involvement in this case.

Summary Disposition September 19, 2014:

PEOPLE V DYER, No. 148861; Court of Appeals No. 318589. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Lapeer Circuit Court to permit defendant to withdraw his plea. MCR 6.310(A) provides a defendant the unqualified right to withdraw a plea that has not been accepted on the record. At no time prior to sentencing did the trial court accept defendant's plea on the record. Further, we remand this case to the Lapeer Circuit Court for correction of the judgment of sentence. In particular, if defendant chooses not to withdraw his plea of guilty, it appears that there was a $350 overpayment to defendant's trial counsel based on this Court's review of the November 30, 2012 and March 8, 2013 trial court orders authorizing payment of attorney's fees. However, if defendant withdraws his plea, imposition of attorney fees is not appropriate at this time. A court may not impose upon defendant the expenses of providing his legal assistance until defendant is found guilty, enters a plea of guilty, or enters a plea of nolo contendere. MCL 769.1k(1)(b)(iii).

PEOPLE V HOLBROOK, No. 149005; Court of Appeals No. 319565. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of whether the circuit court improperly imposed a fine, in light of our decision in *People v Cunningham*, 496 Mich 145 (2014), and if so, whether the circuit court's imposition of a $750 fine constitutes plain error affecting the defendant's substantial rights. Contrast *People v Franklin*, 491 Mich 916 (2012), with *Johnson v United States*, 520 US 461, 467-468 (1997).

We direct the Court of Appeals' attention to the fact that we have also remanded *People v Konopka* (Docket No. 149047) to the Court of Appeals for consideration of similar issues. 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.

PEOPLE V KONOPKA, No. 149047; Court of Appeals No. 319913. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of whether the circuit court improperly imposed court costs, in light of our decision in *People v*

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[1] While the actual language of the commutation in this case is assumed, defendants affirmatively argued that, if effective, the commutation document would grant plaintiff a term-of-years sentence.

Cunningham, 496 Mich 145 (2014), and if so, whether the circuit court's assessment of $500 in "court costs" constitutes plain error affecting the defendant's substantial rights. Contrast *People v Franklin*, 491 Mich 916 (2012), with *Johnson v United States*, 520 US 461, 467-468 (1997).

We direct the Court of Appeals' attention to the fact that we have also remanded *People v Holbrook* (Docket No. 149005) to the Court of Appeals for consideration of similar issues. 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.

Leave to Appeal Granted September 19, 2014:

In re FARRIS, No. 147636; Court of Appeals No. 311967. By order of October 23, 2013, the application for leave to appeal the August 8, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Sanders* (Docket No. 146680). On order of the Court, the case having been decided on June 2, 2014, 495 Mich 394 (2014), the application is again considered, and it is granted, limited to the issues: (1) whether and to what extent the collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993), extends to the due process issues disposed of by *Sanders*; (2) whether the Court of Appeals properly applied the plain error standard of review in light of *Hatcher*; (3) to the extent a collateral attack is permissible, whether the Court's decision in *Sanders* applies retroactively to this case; and (4) if so, what is the appropriate remedy.

The Legal Services Association of Michigan and Michigan State Planning Body for the Delivery of Legal Services to the Poor, American Civil Liberties Union Fund of Michigan, State Bar of Michigan Family Law and Children's Law Sections, Michigan Coalition to End Domestic and Sexual Violence, National Association of Counsel for Children, UDM Juvenile Appellate Practice 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 for peremptory reversal is denied.

AROMA WINES AND EQUIPMENT, INC v COLUMBIAN DISTRIBUTION SERVICES, INC, Nos. 148907 and 148909; reported below: 303 Mich App 441. The applications for leave to appeal are granted, limited to the issue of the proper interpretation of "converting property to the other person's own use," as used in MCL 600.2919a. The application for leave to appeal as cross-appellant remains pending.

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. Motions for permission to file briefs amicus curiae should be filed in Docket No. 148907 only.

Leave to Appeal Denied September 19, 2014:

PEOPLE v PINKNEY, No. 149966; Court of Appeals No. 322640.

Summary Disposition September 24, 2014:

PEOPLE v MCCHESTER, No. 148531; Court of Appeals No. 318145. Pursuant to MCR 7.302(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 whether the defendant is entitled to resentencing based on a misscoring of Offense Variable (OV) 4 (psychological injury to victim), MCL 777.34. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We further direct the Court of Appeals to remand this case first to the Genesee 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.

PEOPLE v JOHNNY MARTIN, No. 148652; Court of Appeals No. 318328. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for correction of the defendant's presentence report to reflect that he was not on bond at the time of his arrest. 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.

PEOPLE v NATHAN REID, No. 148678; Court of Appeals No. 316576. On order of the Court, the application for leave to appeal the December 17, 2013 order of the Court of Appeals is considered. In the Court of Appeals, the defendant sought leave to appeal two orders of the Genesee Circuit Court, both dated December 21, 2012. The Court of Appeals docketed the defendant's delayed application for leave to appeal as an appeal only from the December 21, 2012 order denying the defendant's motion for the production of documents, and then denied leave to appeal for lack of merit in the grounds presented. With regard to this ruling, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. It does not appear that the Court of Appeals reviewed the defendant's challenge to the other circuit court order. Accordingly, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of that part of the defendant's delayed application for leave to appeal that sought leave to appeal the December 21, 2012 order of the Genesee Circuit Court denying, under MCR 6.502(G), the defendant's motion to rescind or revoke or vacate his plea. We do not retain jurisdiction.

Leave to Appeal Granted September 24, 2014:

HELTON v BEAMAN, No. 148927; reported below: 304 Mich App 97. The parties shall include among the issues to be briefed: (1) whether the plaintiff's affidavit challenging the defendants' affidavit of parentage was sufficient under MCL 722.1437(2), and specifically, whether the DNA testing results were sufficient to support the allegation that the affidavit

of parentage was based on a mistake of fact; (2) whether "paternity determination" in MCL 722.1443(4) includes an acknowledgment of parentage; (3) whether, assuming the sufficiency of the plaintiff's MCL 722.1437(2) affidavit, the circuit court is always required to consider the best-interest factors of MCL 722.1443(4); (4) whether, if MCL 722.1443(4) does apply, the plaintiff in a revocation of parentage acknowledgment case must bear the burden of proving, by clear and convincing evidence, that revocation is in the best interests of the subject child; and (5) alternatively, whether the equitable doctrine of laches applies here in support of the circuit court's decision to deny the plaintiff's request for revocation of the acknowledgment of parentage.

The Children's Law and Family Law Sections of the State Bar of Michigan and the University of Michigan Law School Child Welfare Appellate Clinic 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 September 24, 2014:

PEOPLE v CARROLL, No. 148526; Court of Appeals No. 308229.

PEOPLE v LAMAR CLEMONS, No. 148739; Court of Appeals No. 306463. CAVANAGH, J., would grant leave to appeal.

PEOPLE v BURKEEN, No. 148741; Court of Appeals No. 317110.

PEOPLE v NULL, No. 148802; Court of Appeals No. 319006.

PEOPLE v HOARD, No. 148803; Court of Appeals No. 309458.

PEOPLE v MEGAEL CLEMONS, No. 148855; Court of Appeals No. 312474.

PEOPLE v WYSINGER, No. 149195; Court of Appeals No. 320242.

Leave to Appeal Granted September 26, 2014:

MOODY v HOME OWNERS INSURANCE COMPANY, Nos. 149041 and 149046; reported below: 307 Mich App 415. On order of the Court, the applications for leave to appeal the February 25, 2014 judgment of the Court of Appeals are considered, and they are granted, limited to the issues: (1) whether a district court is divested of subject-matter jurisdiction when a plaintiff alleges less than $25,000 in damages in his or her complaint, but seeks more than $25,000 in damages at trial, i.e., whether the "amount in controversy" exceeds $25,000 under such circumstances, see MCL 600.8301(1); and, if not, (2) whether such conduct nevertheless divests the district court of subject-matter jurisdiction on the basis that the amount alleged in the complaint was made fraudulently or in bad faith. See, e.g., *Fix v Sissung*, 83 Mich 561, 563 (1890).

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. Motions for permission to file briefs amicus curiae should be filed in Docket No. 149041 only.

Leave to Appeal Denied September 26, 2014:

In re ASC, No. 150030; Court of Appeals No. 320521.

Application for Leave to Appeal Dismissed on Stipulation September 26, 2014:

NORTHLINE EXCAVATING, INC v LIVINGSTON COUNTY PUBLIC WORKS, Nos. 148524 and 148525; Court of Appeals Nos. 304964 and 305689; reported below: 302 Mich App 621.

Summary Disposition September 29, 2014:

PEOPLE v GRONDIN, No. 146354; Court of Appeals No. 311295. By order of May 22, 2013, the application for leave to appeal the October 25, 2012 order of the Court of Appeals was held in abeyance pending the decision in *People v Tanner* (Docket No. 146211). On order of the Court, the case having been decided on June 23, 2014, 496 Mich 199 (2014), the application is again considered and, pursuant to MCR 7.302(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 September 29, 2014:

PEOPLE v PILTON, No. 147030; Court of Appeals No. 306212.

PEOPLE v MACK, No. 147246; Court of Appeals No. 315168.

PEOPLE v GOOD, No. 148570; Court of Appeals No. 295538.

PEOPLE v DEMETRIUS JACKSON, No. 148633; Court of Appeals No. 318413.

PEOPLE v ARCHEY, No. 148720; Court of Appeals No. 317538.

PEOPLE v TERRENCE MOORE, No. 148721; Court of Appeals No. 318658.

PEOPLE v HATHORN, No. 148736; Court of Appeals No. 319264.

PEOPLE v TREVIS JOHNSON, No. 148820; Court of Appeals No. 318831.

PEOPLE v ROBERT CURTIS NELSON, No. 148873; Court of Appeals No. 313389.

PEOPLE v GLADDEN, No. 148877; Court of Appeals No. 309717.

DIGIAMBERARDINO v DIGIAMBERARDINO, No. 148881; Court of Appeals Nos. 307848 and 308349.

PEOPLE v VOL PARKER, No. 148894; Court of Appeals No. 319131.

PEOPLE v GOWENS, No. 148895; Court of Appeals No. 311725.

PEOPLE v ROCKY SCHROEDER, No. 148897; Court of Appeals No. 311227.

PEOPLE v BLANCH, No. 148903; Court of Appeals No. 319189.

CITY OF WESTLAND v DOWNING, No. 148910; Court of Appeals No. 317817.

PEOPLE v GARY, No. 148912; Court of Appeals No. 313561.

PEOPLE v SWINTON, No. 148914; Court of Appeals No. 318377.

PEOPLE v MAURICE WILLIAMS, No. 148916; Court of Appeals No. 313022.

PEOPLE v DANIEL JOHNSON, No. 148924; Court of Appeals No. 319756.

In re THEODORA NICKELS HERBERT TRUST, No. 148925; reported below: 303 Mich App 456.

PEOPLE v WINCHELL, No. 148936; Court of Appeals No. 308315.

PEOPLE v DODSON, No. 148979; Court of Appeals No. 309222.

DATAM MANUFACTURING LLC v MAGNA POWERTRAIN USA, INC, No. 148980; Court of Appeals No. 306202.

PEOPLE v RUFUS WILLIAMS, No. 148986; Court of Appeals No. 318157.

PEOPLE v EMORY, No. 148987; Court of Appeals No. 320122.

PEOPLE v JAMES MOORE, No. 148990; Court of Appeals No. 319815.

PEOPLE v SHAUN DAWSON, No. 148992; Court of Appeals No. 318757.

PARLOVECCHIO BUILDING, INC v CHARTER COUNTY OF WAYNE BUILDING AUTHORITY, No. 148998; Court of Appeals No. 313257.

PEOPLE v PRITCHELL, No. 149004; Court of Appeals No. 311052.

PEOPLE v MARK WHITE, No. 149038; Court of Appeals No. 318484.

PEOPLE v TERRY ADAMS, No. 149039; Court of Appeals No. 318111.

PEOPLE v WILLIAM JONES, Nos. 149044 and 149045; Court of Appeals Nos. 306331 and 306334.

PEOPLE v TERRANCE WILLIAMS, No. 149052; Court of Appeals No. 319908.

PEOPLE v SUSALLA, No. 149076; Court of Appeals No. 317721.

PEOPLE v DENISON, No. 149085; Court of Appeals No. 317832.

PEOPLE v STRANG, No. 149115; Court of Appeals No. 309313.

PEOPLE v DYCARIOUS ROBINSON, No. 149139; Court of Appeals No. 312794.

PEOPLE v KENNETH WEST, No. 149143; Court of Appeals No. 320529.

PEOPLE v TREADWELL, No. 149148; Court of Appeals No. 312549.

PEOPLE v KUZMA, No. 149151; Court of Appeals No. 311204.

NAGLER v HUNT, No. 149152; Court of Appeals No. 314014.

KEMP v LITTLE CAESAR ENTERPRISES, INC, No. 149153; Court of Appeals No. 319605.

NOLEN v WILLIAM BEAUMONT HOSPITAL, No. 149156; Court of Appeals No. 307627.

PEOPLE v ANTONIO JACKSON, No. 149165; Court of Appeals No. 311557.

WILLIAMSON v G & K MANAGEMENT SERVICES, INC, No. 149166; Court of Appeals No. 308200.

PEOPLE v COGO, No. 149176; Court of Appeals No. 320116.

PEOPLE v MARVIN HUGHES, No. 149197; Court of Appeals No. 313773.

PEOPLE v LANG, No. 149210; Court of Appeals No. 312543.

HUNTINGTON NATIONAL BANK v DANIEL J ARONOFF LIVING TRUST, No. 149228; reported below; 305 Mich App 496.

PEOPLE v GILL, No. 149234; Court of Appeals No. 313761.

PEOPLE v SHUMAKER, No. 149238; Court of Appeals No. 320311.

MOTYKA v BUREAU OF HEALTH CARE SERVICES BOARD OF NURSING DISCIPLINARY SUBCOMMITTEE, No. 149240; Court of Appeals No. 319884.

PEOPLE v FARREN, No. 149245; Court of Appeals No. 312951.

CAVANAGH, J., would grant the applications for leave to appeal.

PEOPLE v GORDON, Nos. 149252 and 149254; Court of Appeals Nos. 320394 and 320295.

PEOPLE v BRIAN ROY SMITH, No. 149262; Court of Appeals No. 320497.

PEOPLE v PRYOR, No. 149269; Court of Appeals No. 313118.

PEOPLE v THATCHER, No. 149271; Court of Appeals No. 318035.

CROSS v PERFECTION ASSOCIATES, LLC, No. 149277; Court of Appeals No. 319031.

DEUTSCHE BANK TRUST COMPANY AMERICAS v KAJY, No. 149279; Court of Appeals No. 317887.

PEOPLE v KULFAN, No. 149292; Court of Appeals No. 319336.

PEOPLE v SHERWOOD, No. 149302; Court of Appeals No. 321100.

JONES v NUTTALL AFC COMPANY, No. 149322; Court of Appeals No. 318001.

PEOPLE v JAMISON, No. 149323; Court of Appeals No. 312460.

BRYAN v JP MORGAN CHASE BANK, No. 149343; reported below: 304 Mich App 708.

PEOPLE v NWOKE (PEOPLE v DIVINE MEDICAL SERVICES), Nos. 149350 and 149351; Court of Appeals Nos. 311242 and 311462.

PEOPLE v JACKWAY, No. 149353; Court of Appeals No. 313703.

MATHIS v E C BROOKS CORRECTIONAL FACILITY WARDEN, No. 149354; Court of Appeals No. 320403.

CARSON v HOME OWNERS INSURANCE COMPANY, No. 149356; Court of Appeals No. 308291.

PEOPLE v PRUITT, No. 149358; Court of Appeals No. 313065.

PEOPLE v BUYCK, No. 149371; Court of Appeals No. 314008.

OOSTDYK v CALEDONIA COMMUNITY SCHOOLS, No. 149383; Court of Appeals No. 312607.

PEOPLE v RAINES, No. 149387; Court of Appeals No. 320513.

PEOPLE v MATSEY, No. 149396; Court of Appeals No. 314180.

PEOPLE v ARNOLD, No. 149405; Court of Appeals No. 313450.

PEOPLE v BROOMFIELD, No. 149412; Court of Appeals No. 314353.

PEOPLE v JARRUD PAYNE, No. 149413; reported below 304 Mich App 667.

PEOPLE v PUGH, No. 149414; Court of Appeals No. 314481.

PEOPLE v HAZELY, No. 149436; Court of Appeals No. 311454.

PEOPLE v BLOTSKE, No. 149437; Court of Appeals No. 320605.

PEOPLE v LEE, No. 149444; Court of Appeals No. 320893.

PEOPLE v BARFIELD, No. 149445; Court of Appeals No. 320179.

In re WASHINGTON, No. 149448; Court of Appeals No. 321106.

JONES v MICHIGAN, No. 149449; Court of Appeals No. 320299.

PEOPLE v ALDER, No. 149451; Court of Appeals No. 320727.

PEOPLE v DENBRAVEN, Nos. 149454 and 149456; Court of Appeals Nos. 321208 and 321316.

KINNEY v FICANO, No. 149468; Court of Appeals No. 311358.

PEOPLE v VOSTRIRANCKY, No. 149483; Court of Appeals No. 313402.

PEOPLE v CHEYENNE INGRAM, No. 149496; Court of Appeals No. 312656.

PEOPLE v DAVIE JONES, No. 149500; Court of Appeals No. 319383.

PEOPLE v HARVEY, No. 149501; Court of Appeals No. 314555.

PEOPLE v BERNETTE, No. 149505; Court of Appeals No. 313917.

In re PETITION FOR FORECLOSURE OF CERTAIN PARCELS OF PROPERTY, No. 149506; Court of Appeals No. 309229.

MIDLAND FUNDING, LLC v VELIVELLI, No. 149508; Court of Appeals No. 319757.

In re OLIVARES, No. 149514; Court of Appeals No. 321393.

PUGH v CROWLEY, No. 149521; Court of Appeals No. 313471.

PEOPLE v VANPELT, No. 149526; Court of Appeals No. 321202.

PEOPLE v KEITH WALKER, No. 149547; Court of Appeals No. 319496.

ANDREWS UNIVERSITY v BARNABY, No. 149550; Court of Appeals No. 310358.

PEOPLE v BRIDGEFORTH, No. 149559; Court of Appeals No. 321319.

PEOPLE v CHRISTOPHER JONES, No. 149563; Court of Appeals No. 312113.

PEOPLE v POINDEXTER, No. 149565; Court of Appeals No. 321554.

LANTAGNE v SABIN (KARBER v SABIN), Nos. 149572, 149573, 149574, and 149575; Court of Appeals Nos. 312269, 312270, 315532, and 315533.

BRENNAN v MCLAREN REGIONAL MEDICAL CENTER, No. 149598; Court of Appeals No. 320840.

CITIGROUP GLOBAL MARKETS REALTY CORPORATION v SCHMITZ, No. 149610; Court of Appeals No. 309019.

PEOPLE v MCKEEVER, No. 149695; Court of Appeals No. 315771.

PEOPLE v WAHMHOFF, No. 149774; Court of Appeals No. 320752.

TARRATT-HILL v SHAPE CORPORATION, No. 149781; Court of Appeals No. 320279.

PEOPLE v NOTORIANO, No. 149829; Court of Appeals No. 322178.

PEOPLE v CARL MORRIS, No. 149864; Court of Appeals No. 322383.

LINDEN v HUTZEL WOMEN'S HOSPITAL, No. 149997; Court of Appeals No. 321857.

Reconsideration Denied September 29, 2014:

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY, No. 147910; Court of Appeals No. 311036. Leave to appeal denied at 495 Mich 963.

GORDON FOOD SERVICE, INC v STATE TAX COMMISSION, No. 147972; Court of Appeals No. 312204. Leave to appeal denied at 495 Mich 948.

PEOPLE v ABELA, No. 148277; Court of Appeals No. 307768. Leave to appeal denied at 496 Mich 863.

PEOPLE v MASON, No. 148390; Court of Appeals No. 318615. Leave to appeal denied at 496 Mich 857.

PEOPLE v ANTOINE BAILEY, No. 148404; Court of Appeals No. 317517. Leave to appeal denied at 496 Mich 857.

BROWN v WACHOVIA MORTGAGE, No. 148408; Court of Appeals No. 307344. Leave to appel denied at 496 Mich 1006.

PEOPLE v CAMPBELL, No. 148449; Court of Appeals No. 314976. Leave to appel denied at 496 Mich 857.

PEOPLE v KARES, No. 148566; Court of Appeals No. 312680. Leave to appeal denied at 495 Mich 1007.

PEOPLE v KEVIN BROWN, No. 148609; Court of Appeals No. 317159. Leave to appeal denied at 496 Mich 864.

DE FILIPPIS v ATTORNEY GRIEVANCE COMMISSION, No. 148752; Superintending control denied at 496 Mich 861.

PEOPLE v GATISS, No. 148755; Court of Appeals No. 316130. Leave to appeal denied at 496 Mich 864.

PEOPLE v MARK ANDERSON, No. 148789; Court of Appeals No. 318895. Leave to appeal denied at 496 Mich 864.

PEOPLE v MARK YANCEY, No. 148805; Court of Appeals No. 319355. Leave to appeal denied at 496 Mich 864.

Order Directing Taxation of Costs Entered September 29, 2014:

REEVES v ATTORNEY GRIEVANCE COMMISSION, No. 147997. On order of the Court, the motion for review of taxation of costs is granted pursuant to MCL 600.2445(2), MCR 7.219, and MCR 7.318. In light of the unusual circumstances of this case, in which the defendant Attorney Grievance Commission decided to reopen its file and proceed with a full investigation in response to the plaintiff's complaint and to this Court's April 23, 2014 order directing the AGC to provide a supplemental answer to the complaint, we conclude that the plaintiff improved his position by filing the complaint for superintending control. The Clerk is thus directed to issue a letter taxing costs of $375 in favor of the plaintiff.

Summary Disposition October 1, 2014:

PEOPLE v HORACEK, No. 147981; Court of Appeals No. 317527. Pursuant to MCR 7.302(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 whether the defendant's warrantless arrest violated his Fourth Amendment rights. If it did, then the Court of Appeals should consider: (1) whether the Oakland Circuit Court and the prosecutor consented, tacitly or otherwise, to entry of the defendant's nolo contendere plea to

unarmed robbery, conditioned on the defendant's ability to challenge on appeal the trial court's denial of his motions to suppress the evidence and to quash the bindover, see MCR 6.301(C)(2); (2) whether the defendant is entitled to withdraw his plea pursuant to MCR 6.301(C)(2); and (3) whether the defendant's entitlement to relief is impacted by the prosecutor's statement at the plea hearing that any Fourth Amendment violation would be harmless beyond a reasonable doubt because there was sufficient untainted evidence to prosecute the defendant, see *People v Reid*, 420 Mich 326, 337 (1984). 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.

PEOPLE v KISSNER, No. 148645; Court of Appeals No. 315188. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee Circuit Court for further proceedings. The circuit court failed to provide the defendant with advice concerning his appellate rights at his original sentencing or at the sentencing following probation violation, as required under the court rules in effect at the time of his sentencing, MCR 6.425(E)(2) and MCR 6.445(H)(2), respectively. Upon remand, the court shall properly advise the defendant that he is entitled to file an application for leave to appeal to the Court of Appeals, and/or any appropriate postconviction motions in the trial court, pursuant to the versions of MCR 7.205(F)(3), MCR 6.311, and MCR 6.429 in effect at the time of the defendant's sentencing. We further note that because the defendant's minimum sentence exceeded the upper limit of the sentencing guidelines range, he is entitled to an attorney under MCL 770.3a(2)(b), which was in effect at the time that the defendant was sentenced. In his application for leave to appeal or postconviction motion, the defendant may include among the issues raised those issues presented in his application for leave to appeal to this Court, but is not required to do so. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. The motion to join dockets for hearing is denied. In light of this Court's order, the motions for remand, appointment of counsel, and oral arguments are denied as moot. We do not retain jurisdiction.

Leave to Appeal Granted October 1, 2014:

DETROIT EDISON COMPANY v DEPARTMENT OF TREASURY, No. 148753; Court of Appeals No. 309732; reported below: 303 Mich App 612.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 1, 2014:

FRASER TREBILCOCK DAVIS & DUNLAP PC v BOYCE TRUST 2350, Nos. 148931, 148932, and 148933; Court of Appeals Nos. 302835, 305149, and 307002; reported below: 304 Mich App 174.

Leave to Appeal Denied October 1, 2014:

PEOPLE v ROBERT LOVE, No. 148149; Court of Appeals No. 313803.

PEOPLE v MATZKE, No. 148156; Court of Appeals No. 312889; reported below: 303 Mich App 281.

HICKS v AUTO CLUB GROUP INSURANCE COMPANY, No. 149056; Court of Appeals No. 312365.

ALI v LOLOEE, No. 149177; Court of Appeals No. 313939.

Orders Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 3, 2014:

LATHAM v BARTON MALOW COMPANY, Nos. 148928 and 148929; Court of Appeals Nos. 312141 and 313606. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether a significant number of workers were exposed to the high degree of risk identified by this Court in *Latham v Barton Malow Co,* 480 Mich 105, 114 (2008) ("the danger of *working at heights without fall-protection equipment*"). The parties should not submit mere restatements of their application papers.

RODRIGUEZ v FEDEX FREIGHT EAST, INC, No. 149222; Court of Appeals No. 312187. The parties shall submit supplemental briefs within 42 days of the date of this order addressing the relevance to this case, if any, of this Court's decision in *Daoud v De Leau*, 455 Mich 181 (1997). The parties should not submit mere restatements of their application papers.

PEOPLE v ASHLY SMITH, No. 149357; Court of Appeals No. 312721. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the defendant was deprived of his right to the effective assistance of trial counsel. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied October 3, 2014:

PEOPLE v DHONDT, No. 149123; Court of Appeals No. 321026.

ZAHRA, J. (*concurring*). I concur with the Court's decision to deny leave to appeal because the issue is moot. I write separately to address the trial court's erroneous interpretation of MCL 780.761. At trial, the victim testified and was cross-examined in the prosecution's case-in-chief. Following that testimony, the trial court ordered that he still be subject to sequestration. This was an error, however, because MCL 780.761 provides, in relevant part: "If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim *first testifies*. The victim *shall not* be sequestered after he or she *first testifies*." (Emphasis added.) Under the plain language of this statute, a victim can no longer be sequestered, regardless of whether the victim might potentially be called to testify a *second* time, once the victim

first testifies. In this case, the victim first testified in the prosecution's case-in-chief, at which point his sequestration should have ended. Accordingly, the trial court's order to continue the victim's sequestration was contrary to MCL 780.761.

In re PANKEY, No. 149991; Court of Appeals No. 319501.

Leave to Appeal Denied October 9, 2014:

PEOPLE v BASHARA, No. 150189; Court of Appeals No. 323810.

Summary Disposition October 10, 2014:

WILLIAMS v PIONEER STATE MUTUAL INSURANCE COMPANY, No. 148784; Court of Appeals No. 311008. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the June 7, 2012 order of the Genesee Circuit Court granting defendant summary disposition under MCR 2.116(C)(10).

Plaintiff in this case was getting into her car when a tree branch fell from above, hitting her on the head. The litigation that has ensued over plaintiff's entitlement to personal protection insurance benefits from her no-fault automobile insurer centers on whether plaintiff's injuries had "a causal relationship to the motor vehicle that is more than incidental, fortuitous, or but for." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635 (1997). In *Putkamer*, this Court held that a plaintiff seeking coverage for injuries relating to a parked vehicle under MCL 500.3106(1) (as plaintiff is in this case) must establish three elements:

> [The plaintiff] must demonstrate that (1) his [or her] conduct fits one of the three exceptions of [MCL 500.3106(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. [Id. at 635-636.]

We hold that the Court of Appeals clearly erred by holding that defendant was not entitled to judgment as a matter of law under the third *Putkamer* element. Unlike the undisputed facts of *Putkamer*, in which "[t]he act of shifting the weight onto one leg created the precarious condition that precipitated the slip and fall on the ice," *id.* at 636, there is no evidence in this case that plaintiff's act of opening her car door caused the tree branch to fall—it would have fallen whether plaintiff was entering her car or not. Therefore, as the dissenting judge below stated, "If there is any causal relationship between plaintiff's injury and the parked car, the relationship is surely incidental. An incidental or unfortunate causal relationship does not create a question of fact within the *Putkamer* requirements." *Williams v Pioneer State Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 2014 (Docket No. 311008), p 2 (O'CONNELL, J., dissenting). Without

evidence of a sufficient causal connection between plaintiff's injury and her use of the parked motor vehicle as a motor vehicle, defendant is entitled to judgment as a matter of law.

CAVANAGH, J., would deny leave to appeal.

Leave to Appeal Denied October 10, 2014:

PEOPLE v JEFFERSON, No. 148654; Court of Appeals No. 309755.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal.

In this case arising from defendant's convictions of being a felon in possession of a firearm and felony-firearm, the trial court ruled that the prosecution was permitted to impeach defendant with limited questions about his 16-year-old prior conviction for armed robbery. The Court of Appeals majority affirmed that decision. But I agree with the Court of Appeals dissent that evidence of defendant's prior conviction was not properly admitted for impeachment purposes under MRE 609.

This Court has recognized the "danger . . . that a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truthtelling."[1] For this reason, MRE 609 provides a general rule that excludes evidence of prior convictions.[2] There are, however, two exceptions: (1) when "the crime contained an element of dishonesty or false statement"[3] or (2) when "the crime contained an element of theft" and was "punishable by imprisonment in excess of one year or death . . . ."[4]

Under the first exception, evidence of a crime that contained an element of dishonesty or false statement is admissible "without further consideration."[5] There is no need for further inquiry because, for the purpose of assessing truthfulness, such crimes are deemed "directly probative of a witness' truthfulness and can be understood as reflecting upon veracity by jurors without the mediation of their deciding that the defendant has a bad general character."[6]

The second exception, for theft crimes, does however require the court to engage in further consideration. Unlike crimes for which false statement or dishonesty is an element, theft crimes are not "inherently more

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[1] *People v Allen*, 429 Mich 558, 569 (1988).

[2] MRE 609(a) (stating that "evidence that the witness has been convicted of a crime *shall not be admitted* unless" the conditions of Subrules (a)(1) or (a)(2) are met) (emphasis added); see *Allen*, 429 Mich at 605 (explaining that unless a prior conviction falls within one of the two exceptions, "it is to be excluded from evidence without further consideration").

[3] MRE 609(a)(1).

[4] MRE 609(a)(2)(A).

[5] *Allen*, 429 Mich at 605.

[6] *Id.* at 593-594.

probative than prejudicial" on the issue of credibility.[7] But because they " 'are universally regarded as conduct which reflects adversely on a man's honesty and integrity,' " theft crimes are considered to be "more probative of veracity than other crimes."[8] Thus, a trial court must exercise its discretion and assess each theft crime on a case-by-case basis.[9]

Under the exception for theft crimes, the court is first required to determine whether the evidence "has *significant* probative value on the issue of credibility . . . ."[10] In determining probative value, "the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity," and the court must articulate its analysis for each factor on the record.[11] If the court determines that the prior conviction is not significantly probative of credibility, then the analysis should cease and the evidence should be found inadmissible.[12]

If the prior conviction is significantly probative of credibility and "the witness is the defendant in a criminal trial," a further step is required.[13] The trial court must then engage in a balancing test, and the conviction may only be admitted if "the probative value of the evidence outweighs its prejudicial effect."[14] In determining the prejudicial effect, "the court

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[7] *Id.* at 594 n 16.

[8] *Id.* at 595, quoting *Gordon v United States*, 127 US App DC 343, 347 (1967).

[9] *Allen*, 429 Mich at 596, 606 n 33.

[10] MRE 609(a)(2)(B) (emphasis added).

[11] MRE 609(b).

[12] *People v Snyder* (*After Remand*), 301 Mich App 99, 109-111 (2013).

[13] MRE 609(a)(2)(B); see *Snyder*, 301 Mich App at 106.

[14] MRE 609(a)(2)(B); see *Allen*, 429 Mich at 606-608 (clarifying the balancing test for theft crimes under the amended version of MRE 609 promulgated in *Allen*). I note that this balancing test shifts the burden and creates a higher bar to admissibility than the generally applicable balancing test of MRE 403, under which relevant evidence "may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice . . . ." (Emphasis added.) MRE 403 has been interpreted as placing the burden on the party opposing the admission of otherwise relevant evidence to convince the court that the evidence must be excluded because its prejudicial danger outweighs its probative worth " 'by a wide margin.' " *People v Crawford*, 458 Mich 376, 410 n 13 (1998) (BOYLE, J., dissenting), quoting Imwinkelried & Margolin, *The Case for the Admissibility of Defense Testimony About Customary Political Practices in Official Corruption Prosecutions*, 29 Am Crim L Rev 1, 29-30 (1991). Conversely, under MRE 609(a)(2)(B), the burden is on the proponent of impeachment evidence to convince the court that the evidence must be admitted because it has significant probative value that is not outweighed by its prejudicial effect—

shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify," again articulating its analysis for each factor on the record.[15]

After reciting the requirements of MRE 609, the trial court ruled from the bench that the evidence was admissible, stating as follows:

> In this case we have a crime that is one that contains the element of theft, armed robbery. We have an issue before this court that turns solely upon the credibility of witnesses [who] are testifying here. This is his claim both not only an alibi witness by his direct testimony that he did not deliver this weapon to Ms. Jackson [sic], it has significant probative value. While it may have some prejudicial effect, that effect cannot measure up to the importance of testing his veracity in determining whether or not he's testifying truthfully or not.
>
> It is in that sense what this defense is about. He chose to testify knowing that this is an offense for which he could be impeached. I believe that it's appropriate to impeach him on it.

Although the trial court mentioned "significant probative value," "veracity," "prejudicial effect," and the fact that defendant chose to testify, like the Court of Appeals partial dissent, I believe that the trial court failed to analyze the appropriate factors as required by MRE 609(b).[16]

Regarding probative value, notably lacking from the trial court's analysis is consideration of the age of the conviction or why evidence of defendant's 16-year-old armed robbery conviction was so "indicative of veracity"[17] as to rise to the level of "*significant* probative value."[18] Instead, the trial court found that the conviction was admissible because this case "turn[ed] solely upon the credibility of [the] witnesses . . . ." But the fact that credibility is of crucial importance in a case does not compel a finding that the particular theft conviction at issue was indicative of veracity. Indeed, in adopting the current version of MRE

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not even by a narrow margin. See *Crawford*, 458 Mich at 411-412; see also *People v Taylor*, 422 Mich 407, 419 n 5 (1985).

[15] MRE 609(b).

[16] *People v Jefferson*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2013 (Docket No. 309755) (SHAPIRO, J., concurring in part and dissenting in part), pp 2-3.

[17] MRE 609(b).

[18] MRE 609(a)(2)(B) (emphasis added); see *Snyder*, 301 Mich App at 106 ("[O]ur courts have held that, in general, '[t]heft crimes are minimally probative on the issue of credibility,' or, at most, are 'moderately probative of veracity . . . .' ") (citations omitted) (second alteration in original). Indeed, this Court has stated that although robbery contains an element of theft, it is primarily an assaultive crime and has an even "lower probative value on the issue of credibility than . . . other theft crimes." *Allen*, 429 Mich at 611.

609, this Court specifically rejected reliance "on the *need* or lack thereof for evaluating the defendants' credibility" as a factor when evaluating the admissibility of evidence under MRE 609.[19] The trial court erred not only by failing to properly address the required probative value factors, but also by relying on a factor that this Court has eliminated from consideration. Further, given the prosecution's failure to provide any grounds on which to conclude otherwise, I would hold that the armed robbery conviction lacked significant probative value and was inadmissible.[20] Absent a showing of significant probative value, there was no need to determine the prejudicial effect.[21]

Regardless, even assuming that there were grounds on which to determine that the armed robbery conviction had the requisite probative value, the trial court further erred by failing to properly assess the crime's prejudicial effect. As the Court Appeals partial dissent correctly pointed out, " 'the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify' " was not at issue because defendant had already testified.[22] But the trial court failed to even mention, let alone articulate, its analysis of "the conviction's similarity to the charged offense," as MRE 609(b) requires.

Finally, I agree with the Court of Appeals partial dissent that the error in admitting the evidence was not harmless.[23] Because "whether defendant possessed a firearm was purely a question of witness credibility,"[24] I believe that "the danger that [the] evidence admitted to impeach the defendant-as-witness was used by the jury in evaluating defendant-as-defendant"[25] was too high and that it is more probable than not that the reliability of the verdict was undermined.[26]

For these reasons, I would reverse and remand for a new trial.

CAVANAGH and MCCORMACK, JJ., join the statement of VIVIANO, J.

Leave to Appeal Denied October 10, 2014:

WALBRIDGE INDUSTRIAL PROCESS, LLC v SEAGRAM, No. 149645; Court of Appeals No. 321818.

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[19] *Allen*, 429 Mich at 602; see *id.* ("It is our view that it is the effect on the decisional process if the defendant does not testify which must predominate and so the contradicting 'credibility contest' factor must therefore be eliminated.").

[20] See note 14 of this dissenting statement; see also *Snyder*, 301 Mich App at 109.

[21] See *Snyder*, 301 Mich App at 109-111.

[22] *Jefferson*, unpub op at 3 (SHAPIRO, J., concurring in part and dissenting in part), quoting MRE 609(b).

[23] *Id.* at 3-4, citing *Snyder*, 301 Mich App at 112-113.

[24] *Jefferson*, unpub op at 4.

[25] *Allen*, 429 Mich at 567.

[26] See *People v Lukity*, 460 Mich 484, 495 (1999).

In re EDWARDS, No. 150102; Court of Appeals No. 320313.

Reconsideration Denied October 10, 2014:

In re IAQUINTA, Nos. 149690 and 149716; Court of Appeals No. 315136. Summary disposition at 497 Mich 851.

Summary Disposition October17, 2014:

In re JOHNSON, No. 150083; Court of Appeals No. 320222. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for further proceedings. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court, Family Division, to conduct a continued best-interests hearing based on updated information regarding the respondent and the minor child. At the conclusion of the hearing, the circuit court shall forward the record and its finding as to the child's best interests to the Court of Appeals, which shall then resolve the issues presented by the respondent. In the event that the respondent is not aggrieved by the circuit court's decision, the respondent shall file a motion or signed stipulation to dismiss the appeal. See MCR 7.218. We do not retain jurisdiction.

Leave to Appeal Denied October 17, 2014:

PEOPLE V ROBERT RICHARD-HOWARD NELSON, No. 147743; Court of Appeals No. 308244. On October 8, 2014, the Court heard oral argument on the application for leave to appeal the July 30, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Summary Disposition October 22, 2014:

MINDYKOWSKI V OLSEN, No. 148545; Court of Appeals No. 315753. Pursuant to MCR 7.302(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 RANDY STEVENS, No. 149224; Court of Appeals No. 320489. Pursuant to MCR 7.302(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 to withdraw guilty plea, the motion in request for evidence hearing, the motion to remand to the district court, and the motion for a *Franks* hearing are denied.

WIEDYK V POISSON, No. 149431; Court of Appeals No. 308141. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Midland Circuit

Court's December 27, 2011 judgment for the defendants. The trial court was not required to expressly rule on whether the plaintiff's attempt to expand the record on remand with his affidavit was proper, and even if the affidavit was considered by the trial court, it did not err in determining that summary disposition for the defendants was warranted. When considered in light of the record developed in this case, the affidavit's conclusory allegations regarding the extent of the plaintiff's injuries and impairments, nearly all of which the plaintiff suffered prior to the accident in question, were insufficient to create a genuine issue of material fact as to whether the plaintiff's ability to lead his pre-accident lifestyle was impacted by the 2005 accident. *Quinto v Cross & Peters Co*, 451 Mich 358, 362, 371-372 (1996); *McCormick v Carrier*, 487 Mich 180, 202 (2010); see also *Bergen v Baker*, 264 Mich App 376, 389 (2004).

COLE V HENRY FORD HEALTH SYSTEM, No. 149580; Court of Appeals No. 313824. Pursuant to MCR 7.302(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 Macomb Circuit Court for entry of an order granting summary disposition to the defendant. The Court of Appeals erred by affirming the circuit court's determination that the hazard that caused the plaintiff's slip and fall was not an open and obvious danger that an average user of ordinary intelligence would discover on casual inspection. *Hoffner v Lanctoe*, 492 Mich 450, 461 (2012). Here, the so-called "black ice" was detected by four other witnesses who viewed the premises after the plaintiff's accident. There were several patches of ice evident in the area where the plaintiff fell. In addition, there were numerous indicia of a potentially hazardous condition being present, *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934 (2010), including seven inches of snow on the ground, some precipitation the previous day, and a recent thaw followed by consistent temperatures below freezing. A reasonably prudent person would foresee the danger of icy conditions on the mid-winter night the plaintiff's accident occurred. In light of the open and obvious nature of the hazard in this case, we do not consider the defendant's arguments regarding the applicability of MCL 600.2955a.

DOE V DEPARTMENT OF CORRECTIONS, Nos. 149592 and 149593; Court of Appeals Nos. 321013 and 321756. Pursuant to MCR 7.302(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 stay is denied.

Leave to Appeal Granted October 22, 2014:

PEOPLE V JOSEPH MILLER, No. 149502; Court of Appeals No. 314375. The parties shall include among the issues to be briefed whether the state and federal Double Jeopardy Clauses, US Const, Am V, and Const 1963, art 1, § 15, prohibit punishment for both the compound offense of Operating While Intoxicated (OWI) causing serious injury, MCL 257.625(5), and its predicate offense of OWI, MCL 257.625(1) and (9)(a), where both the compound and predicate offenses have alternative elements. Compare *People v Ream*, 481 Mich 223 (2008), with *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993), and

People v Wilder, 485 Mich 35 (2010). The parties shall also include among the issues to be briefed: (1) whether the existence of prior convictions under MCL 257.625(9)(c) amounts to an element of OWI causing serious injury for purposes of the state and federal Double Jeopardy Clauses and, accordingly, (2) whether punishment for both third-offense OWI, MCL 257.625(9)(c), and OWI causing serious injury amounts to impermissible multiple punishment under the Double Jeopardy Clauses, or whether each offense has an element that the other does not.

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.

Leave to Appeal Denied October 22, 2014:

PAUL V GLENDALE NEUROLOGICAL ASSOCIATES, PC, No. 149035; reported below: 304 Mich App 357.

CAVANAGH, J., would grant leave to appeal.

PEOPLE V THIBODEAU, No. 149108; Court of Appeals No. 320115.

PEOPLE V LIPTROT, No. 149214; Court of Appeals No. 319949.

MILLER V CENTRAL MICHIGAN COMMUNITY HOSPITAL, No. 149218; Court of Appeals No. 317953.

PEOPLE V ANDREW KEITH, No. 149258; Court of Appeals No. 320370.

CAVANAGH, KELLY, and MCCORMACK, JJ., would grant leave to appeal.

CHERNICH V KROGER COMPANY, No. 149291; Court of Appeals No. 314514.

PEOPLE V LARRY STEWART, No. 149293; Court of Appeals No. 313097.

PEOPLE V RENYATTA HAMILTON, No. 149317; Court of Appeals No. 312910.

PEOPLE V JEROME LEWIS, No. 149512; Court of Appeals No. 312288.

PEOPLE V RAMOS, No. 149535; Court of Appeals No. 321643.

DOE V DEPARTMENT OF CORRECTIONS, No. 149853; Court of Appeals No. 321850.

CHRISTENSEN V PLEATMAN, No. 150231; Court of Appeals No. 323404.

Rehearing Denied October 22, 2014:

PEOPLE V CARP, No. 146478; opinion at 496 Mich 440.

PEOPLE V CORTEZ DAVIS, No. 146819; opinion at 496 Mich 440.

PEOPLE v ELIASON, No. 147428; opinion at 496 Mich 440. On November 6, 2013, this Court granted the defendant's application for leave to appeal limited to "(1) whether the Court of Appeals correctly applied *Miller v Alabama*, 567 US ___ (2012), to Michigan's sentencing scheme for first-degree murder; (2) whether that sentencing scheme amounts to cruel or unusual punishment under Const 1963, art 1, § 16 as applied to defendants under the age of 18; and (3) what remedy is required for defendants whose sentences have been found invalid under *Miller* or Const 1963, art 1, § 16." *People v Eliason*, 495 Mich 891 (2013). With regard to the other issues that were raised in the defendant's application for leave to appeal but not addressed in this Court's prior opinion, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. In all other respects, the motion for rehearing and/or clarification is denied.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 23, 2014:

PEOPLE v MAZUR, No. 149290; Court of Appeals No. 317447. The parties shall submit supplemental briefs within 28 days of the date of this order addressing whether the defendant is entitled to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., specifically MCL 333.26424(g) and/or MCL 333.26424(i), where her spouse was a registered qualifying patient and primary caregiver under the act, but his marijuana-related activities inside the family home were not in full compliance with the act. 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 this Court when it will hear oral argument in *People v Hartwick* (Docket No. 148444), and *People v Tuttle* (Docket No. 148971).

Summary Disposition October 24, 2014:

PEOPLE v OTTO, No. 148777; Court of Appeals No. 319602. Pursuant to MCR 7.302(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 specifically address whether the Jackson Circuit Court had the authority to sentence the defendant to a minimum term of less than 25 years. See MCL 750.520b(2)(b); MCL 769.34(2)(a).

PEOPLE v GOODMAN, No. 148956; Court of Appeals No. 318736. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vaccate the sentence of the Saginaw Circuit Court and we remand this case to the trial court for resentencing. The trial court erred in scoring Offense Variable (OV) 13 at 10 points for three or more crimes against a person or property to the extent that it relied on the defendant's conspiracy conviction to score the variable. Conspiracy does not constitute a crime against a person or property. See *People v Pearson*, 490 Mich 984, 984-985 (2011); *People v Bonilla-Machado*, 489 Mich 412 (2011). We further

clarify that the Court of Appeals opinion in *People v Jackson*, 291 Mich App 644, 649 (2011), has been abrogated in part by *Pearson* and *Bonilla-Machado* to the extent that it held that a conspiracy conviction may be counted as a crime against a person if "the underlying nature of the conspiracy involved a crime against a person." On remand, the trial court may score OV 13 at 10 points should there be three or more offenses that meet the requirements for such a score. 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.

YOUNG, C.J. (*concurring*). Given the current state of the law, I concur in the result. I write separately, however, to reiterate my disagreement with this Court's construction of the sentencing guidelines in *People v Bonilla-Machado*, 489 Mich 412 (2011), and *People v Pearson*, 490 Mich 984 (2012).

In those cases, I dissented from the portions of both decisions holding that the scoring of the relevant provisions of Offense Variable (OV) 13, MCL 777.43, is limited to only offenses categorized as offenses "against a person" or "against property." *Bonilla-Machado*, 489 Mich at 442 (YOUNG, C.J., dissenting). Properly construed, the relevant provisions of OV 13 should be scored for charged crimes "involving" criminal activity against a person or property, regardless of the offense *category*. *Id.* at 449-450. Because *Bonilla-Machado* and *Pearson* are settled law, however, and because the trial court misapplied that law in this case, I concur in this Court's order remanding this case to the trial court.

Leave to Appeal Granted October 24, 2014:

NASH V DUNCAN PARK COMMISSION, Nos. 149168 and 149169; reported below: 304 Mich App 599. On order of the Court, the application for leave to appeal the March 20, 2014 judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the Duncan Park Commission constitutes "a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision." MCL 691.1401(e).

Leave to Appeal Denied October 24, 2014:

PEOPLE V MILBOURN, No. 149014; Court of Appeals No. 312280. Although the Court of Appeals erred in determining that the law enforcement officer's testimony regarding the complainant's prior consistent statement was properly admitted because it was not hearsay, the erroneous admission of this testimony does not warrant relief in this case because it did not affect the defendant's substantial rights, as required by *People v Carines*, 460 Mich 750, 774 (1999).

Summary Disposition October 28, 2014:

PEOPLE V MELODY JONES, No. 147291; Court of Appeals No. 309303. By order of May 27, 2014, the application for leave to appeal the April 25,

2013 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Cunningham* (Docket No. 147437). On order of the Court, the case having been decided on June 18, 2014, 496 Mich 145 (2014), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion regarding the Berrien Circuit Court's assessment of court costs, and we remand this case to the Court of Appeals for reconsideration of that issue. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE V SANCHEZ, No. 147490; Court of Appeals No. 316115. By order of January 31, 2014, the application for leave to appeal the June 4, 2013 order of the Court of Appeals was held in abeyance pending the decision in *People v Cunningham* (Docket No. 147437). On order of the Court, the case having been decided on June 18, 2014, 496 Mich 145 (2014), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Kent Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7).

PEOPLE V HARPER, Nos. 147921 and 147922; Court of Appeals Nos. 308639 and 309330. By order of February 28, 2014, the application for leave to appeal the September 5, 2013 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Earl* (Docket No. 145677) and *People v Cunningham* (Docket No. 147437). On order of the Court, *Earl* having been decided on March 26, 2014, 495 Mich 33 (2014), and *Cunningham* having been decided on June 18, 2014, 496 Mich 145 (2014), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion regarding the Wayne Circuit Court's assessment of court costs. We remand this case to the Court of Appeals for reconsideration of that issue and the related issue whether the defendant was denied the effective assistance of counsel because his trial counsel failed to object at sentencing to the imposition of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issues in light of *People v Cunningham*, 496 Mich 145 (2014), and

Konopka. 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.

PEOPLE v HODGES, No. 148541; Court of Appeals No. 317862. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Kent Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7). 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.

PEOPLE v ALSTON, No. 148869; Court of Appeals No. 319205. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to reconsider the defendant's issue regarding the Wayne Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v WOODEN, No. 148891; Court of Appeals No. 319844. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Kent Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7).

PEOPLE v CROSS, No. 149303; Court of Appeals No. 320672. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Wayne Circuit Court order imposing court costs, and we remand this case to the trial court for further proceedings consistent with *People v Cunningham*, 496 Mich 145 (2014).

PEOPLE v CORBIN, No. 149455; Court of Appeals No. 319122. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

BAZZI v SENTINEL INSURANCE COMPANY, No. 149584; Court of Appeals No.

320518. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

CAVANAGH, J., would grant leave to appeal.

HENRY FORD HEALTH SYSTEM v THE HARTFORD, No. 149586; Court of Appeals No. 320520. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

CAVANAGH, J., would grant leave to appeal.

HOSKINS v MILLER, No. 149606; Court of Appeals No. 320150. Pursuant to MCR 7.302(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 28, 2014:

SCHOLMA v OTTAWA COUNTY ROAD COMMISSION, No. 148184; reported below: 303 Mich App 12.

CONA v AVONDALE SCHOOL DISTRICT, No. 148346; reported below 303 Mich App 123.

GARCIA v GOVE, Nos. 148348, 148349, and 148350; Court of Appeals Nos. 308302, 308756, and 308757.

PEOPLE v TERRENCE CARTER, No. 148607; Court of Appeals No. 311596.

PEOPLE v RONALD THOMAS, No. 148660; Court of Appeals No. 316217.

PEOPLE v GERALD MCDONALD, No. 148709; reported below: 303 Mich App 424.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v KEYS, No. 148830; Court of Appeals No. 312801.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v DONALD WATKINS, No. 148845; Court of Appeals No. 318836.

PEOPLE v ARMOUR, No. 148880; Court of Appeals No. 315470.

ROGENSUES v WELDMATION, INC, Nos. 148954 and 148955; Court of Appeals Nos. 310389 and 311211.

PEOPLE v WYRICK, No. 149008; Court of Appeals No. 320059.

WELLS FARGO BANK, NA v NORMAN-HARE, No. 149029; Court of Appeals No. 317168.

PEOPLE v SAMUELS, No. 149031; Court of Appeals No. 319693.

PEOPLE v RAY, No. 149050; Court of Appeals No. 319461.

PEOPLE v EASTERLE, No. 149072; Court of Appeals No. 310328.

PEOPLE v TERRANCE RICHARDSON, No. 149074; Court of Appeals No. 319776.

PEOPLE v DAVON MARTIN, No. 149079; Court of Appeals No. 318901.

PEOPLE v RODRIGUEZ-ARANGO, No. 149087; Court of Appeals No. 317961.

PEOPLE v MARCAEL DIXON, No. 149090; Court of Appeals No. 320165.

PEOPLE v SAMPSON SMITH, No. 149092; Court of Appeals No. 319829.

PEOPLE v HINTON, No. 149094; Court of Appeals No. 320097.

PEOPLE v MONK, No. 149098; Court of Appeals No. 319074.

PEOPLE v KENNETH SMITH, No. 149107; Court of Appeals No. 319925.

PEOPLE v OETTING, No. 149122; Court of Appeals No. 319201.

PEOPLE v HANSEN, No. 149125; Court of Appeals No. 319314.

PRESLEY v KIRK, No. 149129; Court of Appeals No. 315641.

PEOPLE v TERON DANIELS, No. 149130; Court of Appeals No. 319350.

PEOPLE v CHRISTMANN, No. 149133; Court of Appeals No. 320031.

GRIEVANCE ADMINISTRATOR v MERCIER, No. 149205.

DUDLEY v DEPARTMENT OF HUMAN SERVICES, No. 149220; Court of Appeals No. 317882.

DIRECTOR, WORKERS' COMPENSATION AGENCY v MACDONALD'S INDUSTRIAL PRODUCTS, INC, No. 149243; reported below: 305 Mich App 460.

PEOPLE v RUSH, No. 149295; Court of Appeals No. 312055.

PEOPLE v JASON DAVIS, No. 149309; Court of Appeals No. 313617.

PEOPLE v REUBEN CRAWFORD, No. 149312; Court of Appeals No. 313963.

PEOPLE v JAMIEL MUHAMMAD, No. 149315; Court of Appeals No. 313984.

PEOPLE v THOMAS LENDSEY CARTER, No. 149319; Court of Appeals No. 314076.

MACON v SAGINAW CIRCUIT COURT JUDGE, No. 149337; Court of Appeals No. 319387.

PEOPLE v GARCIA, No. 149340; Court of Appeals No. 309081.

BROWN v CITY OF ADRIAN, No. 149341; Court of Appeals No. 314213.

PEOPLE v ANTHONY ANDERSON, No. 149392; Court of Appeals No. 311448.

PEOPLE v ROSHAUN SMITH, No. 149404; Court of Appeals No. 320280.

WEST MICHIGAN FILM, LLC v MICHIGAN FILM OFFICE, No. 149410; Court of Appeals No. 313243.

PEOPLE v MARK JOHNSON, Nos. 149418 and 149419; Court of Appeals Nos. 314166 and 314170.

PEOPLE v ADANK, No. 149428; Court of Appeals No. 320596.

PEOPLE v DANDRE SANDERS, No. 149430; Court of Appeals No. 313564.

PEOPLE v BOBBY WILLIAMS, No. 149435; Court of Appeals No. 319912.

PEOPLE v LORIAUX, No. 149439; Court of Appeals No. 312402.

PEOPLE v BURNSIDE, No. 149464; Court of Appeals No. 309807. CAVANAGH, J., would grant leave to appeal.

PEOPLE v FREDDIE YOUNG, No. 149465; Court of Appeals No. 312237.

PEOPLE v ANDREW SCOTT, No. 149466; Court of Appeals No. 311955.

PEOPLE v JUMEKE JONES, No. 149469; Court of Appeals No. 319836.

PEOPLE v ANTWINE, Nos. 149470 and 149471; Court of Appeals Nos. 309028 and 313826.

PEOPLE v OMELAY, No. 149474; Court of Appeals No. 314032.

MOX v SAGINAW CORRECTIONAL FACILITY WARDEN, No. 149475; Court of Appeals No. 319785.

PEOPLE v DEVONTE REID, No. 149477; Court of Appeals No. 312091.

PEOPLE v DARIUS DENNIS, No. 149480; Court of Appeals No. 310178.

PEOPLE v FRANKLIN, No. 149489; Court of Appeals No. 314425.

SHARP v MOHLER, No. 149491; Court of Appeals No. 320368.

PEOPLE v WINDOM, No. 149492; Court of Appeals No. 312496.

PEOPLE v GREEN, No. 149493; Court of Appeals No. 312492.

PEOPLE v WOODYARD, No. 149499; Court of Appeals No. 319159.

WELLS FARGO BANK v COUNTRY PLACE CONDOMINIUM ASSOCIATION, No. 149504; reported below: 304 Mich App 582.

PEOPLE v TERPENING, No. 149510; Court of Appeals No. 314050.

PEOPLE v BENTON, No. 149513; Court of Appeals No. 310249.

LANGFAN v GOODYEAR TIRE & RUBBER COMPANY, No. 149519; Court of Appeals No. 318424.

PEOPLE v GERALD HUGHES, No. 149524; Court of Appeals No. 314764.

PEOPLE v MANIZAK, No. 149527; Court of Appeals No. 314541.

PEOPLE v DONALD CUMMINGS, No. 149540; Court of Appeals No. 311215.

PEOPLE v VERCRUYSSE, No. 149556; Court of Appeals No. 311884.

PEOPLE v LEWIS THOMPSON, No. 149564; Court of Appeals No. 314565.

PEOPLE v SAMPSON, No. 149566; Court of Appeals No. 315252.

FELLOWS v MICHIGAN COMMISSION FOR THE BLIND, No. 149568; reported below: 305 Mich App 289.

DUDLEY v BANK OF AMERICA, No. 149583; Court of Appeals No. 312771.

PEOPLE v RACE, No. 149600; Court of Appeals No. 321623.

PEOPLE v POMEROY, No. 149603; Court of Appeals No. 314219.

CITY OF FLUSHING v WUNDERLICH, No. 149611; Court of Appeals No. 321427.

PEOPLE v LONE, No. 149613; Court of Appeals No. 319589.

PEOPLE v MARIO WILLIAMS, No. 149616; Court of Appeals No. 320810.

AUTODIE, LLC v CITY OF GRAND RAPIDS, DEPARTMENT OF TREASURY, No. 149619; reported below: 305 Mich App 423.

NIGHTINGALE v TOWNSHIP OF SHELBY, No. 149620; Court of Appeals No. 311491.

PEOPLE v LEONARDO TURNER, No. 149623; Court of Appeals No. 320036.

PEOPLE v DALE, No. 149634; Court of Appeals No. 313411.

PEOPLE v MACON, No. 149643; Court of Appeals No. 319390.

PEOPLE v MALONE, No. 149646; Court of Appeals No. 312649.

PEOPLE v JESSE COLLINS, No. 149648; Court of Appeals No. 314679.

PEOPLE v MCKINNON, No. 149652; Court of Appeals No. 314347.

PEOPLE v MARLO BROWN, No. 149653; Court of Appeals No. 304407.

PEOPLE v LAPHAM, No. 149656; Court of Appeals No. 321305.

PEOPLE v MATHES, No. 149660; Court of Appeals No. 314675.

CRAIG v CHRYSLER GROUP, LLC No. 149661; Court of Appeals No. 321611.

PEOPLE v MOGYOROS, No. 149664; Court of Appeals No. 320892.

PEOPLE v HATFIELD, No. 149696; Court of Appeals No. 315086.

PEOPLE v MONTRICE MARTIN, No. 149701; Court of Appeals No. 314903.

PEOPLE v KREISER, No. 149703; Court of Appeals No. 311560.

PEOPLE v KENT, No. 149705; Court of Appeals No. 313049.

PEOPLE v MOQUIN, No. 149725; Court of Appeals No. 321482.

PEOPLE v WARNER, No. 149733; Court of Appeals No. 311034.

MILTON v COMERICA BANK, No. 149745; Court of Appeals No. 313304.

RAMANATHAN v WAYNE STATE UNIVERSITY, No. 149785; Court of Appeals No. 303171.

RAMANATHAN v WAYNE STATE UNIVERSITY, No. 149787; Court of Appeals No. 304643.

In re ROW, No. 149819; Court of Appeals No. 319389.

HASKELL v TUROWSKI, No. 149854; Court of Appeals No. 314043.

DUBIN v FINCHER, Nos. 149975 and 149976; Court of Appeals Nos. 318076 and 319177.

Superintending Control Denied October 28, 2014:

PENN v ATTORNEY GRIEVANCE COMMISSION, No. 149683.

REDD v ATTORNEY GRIEVANCE COMMISSION No. 149839.

Reconsideration Denied October 28, 2014:

THURSFIELD v THURSFIELD, No. 148041; Court of Appeals No. 302186. Leave to appeal denied at 496 Mich 855.

US BANK NATIONAL ASSOCIATION v BAJWA, No. 148387; Court of Appeals No. 313516. Leave to appeal denied at 496 Mich 857.

PEOPLE v ANTHONY WEST, No. 148594; Court of Appeals No. 309821. Leave to appeal denied at 496 Mich 585.

REID v CITY OF FLINT, No. 148630; Court of Appeals No. 315345. Leave to appeal denied at 495 Mich 1007.

PEOPLE v KENNETH WRIGHT, No. 148659; Court of Appeals No. 308765. Leave to appeal denied at 495 Mich 1008.

Leave to Appeal Denied October 31, 2014:

PEOPLE v DELL, No. 149450; Court of Appeals No. 317797.

SHAND LAW PLLC v DONG, No. 149551; Court of Appeals No. 319697.

Statement on Denial of Motion to Disqualify November 4, 2014:

NEWTON v SILVIO, No. 150367; Court of Appeals No. 315556.

VIVIANO, J. On November 4, 2014, appellants filed to a motion to disqualify me from this case. In their motion, appellants state that while I was serving as Chief Judge in Macomb County, "all Macomb County Probate Judges eventually recused and/or deferred from taking action in this matter and the matter was referred to the state court administrator's office for the assignment of an out-county [sic] Judge to act in the Macomb County Probate Court." In their Application for Leave to Appeal and appellate brief to the Court of Appeals, appellants further explain that after Macomb Probate Judges O'Sullivan and George recused

themselves from this case because of prior dealings with one of the witnesses, "both counsel of record were then advised by the then Chief Judge of the Macomb County Probate Court that the State Court Administrator's Office would be reassigning a new judge."

The only document in the record supporting my involvement is limited to my signature, in my capacity as Chief Judge, approving the requested reassignment. This is in keeping with my very vague recollection of this case that I had no involvement beyond operating in my administrative capacity as Chief Judge to facilitate reassignment in light of Judge O'Sullivan's and Judge George's recusals. Further, appellants have failed to articulate any grounds under MCR 2.003(C) on which to justify my recusal.

Accordingly, I see no reason to recuse myself from this case and would deny the motion.

Leave to Appeal Denied November 7, 2014:

PERKINS V AUTO-OWNERS INSURANCE COMPANY, Nos. 147640 and 147641; reported below: 301 Mich App 658.

MARKMAN, J. (*dissenting*). I respectfully dissent. Defendant Auto-Owners Insurance Company argued that because plaintiff, an out-of-state driver, was injured while operating a vehicle that was not insured by an insurer authorized to issue automobile liability insurance in Michigan, he was not entitled to personal protection insurance benefits under Michigan law. MCL 500.3113(c). Despite defendant's argument ultimately having been rejected by the trial court, defendant bore the obligation to pay plaintiff's attorney fees only if its argument was "unreasonable." MCL 500.3148(1). Thus, the dispute here does not pertain to whether defendant's argument should have *prevailed*, but only to whether it was "unreasonable." In my judgment, it was not in the slightest.

PEOPLE V O'NEAL, No. 148921; Court of Appeals No. 311760.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal.

This case arises from defendant's conviction of attempted first-degree home invasion. Before trial, the trial court granted the prosecution's motion to admit three prior breaking and entering convictions and one prior conviction of receiving and concealing stolen property. The prosecution offered the convictions to rebut defendant's claim that he did not intend to break into the house when he kicked the front door but rather was in need of assistance and became frustrated when the occupants refused to open the door.

As I explained in my dissenting statement in *People v Reynolds*,[1] I believe that a decision to admit other-acts evidence to show intent merits more than cursory review. And I continue to believe that this Court should intervene in appropriate cases to ensure that lower courts

[1] *People v Reynolds*, 495 Mich 940 (2014) (VIVIANO, J., dissenting).

"vigilantly weed out character evidence" to avoid the "common pitfall" of admitting "poorly disguised" propensity evidence.[2] Otherwise, there is little incentive for courts to take seriously their duty to serve as the gatekeepers of evidence.

Indeed, here it appears that the trial court abdicated its gatekeeping role by admitting the prior convictions merely because they were offered to show intent.[3] The trial court made no effort to assess the prior convictions to determine their logical relevance and failed to weigh the probative value of the convictions against their prejudicial effect.[4] Although the trial court stated on the record that it would make those determinations at a later date, it did not do so. This raises an especially significant concern in this case in which the trial court repeatedly acknowledged that the sufficiency of the evidence hinged on admission of the prior convictions. The bar for admission of other-acts evidence to prove intent may be relatively low,[5] but the trial court still must conduct the basic analysis required by our evidentiary rules to ensure that the bar is cleared.[6]

CAVANAGH and MCCORMACK, JJ., join the statement of VIVIANO, J.

PEOPLE v BEEMER, No. 149219; Court of Appeals No. 313602.

MARKMAN, J. (*dissenting*). I respectfully dissent and would reverse. Defendant struck another vehicle while intoxicated, and the occupant of the other vehicle suffered a fracture to his wrist. On this basis, defendant was convicted of "operating while intoxicated causing serious impairment of a body function of another person." MCL 257.625(5). The Michigan Vehicle Code provides that " '[s]erious impairment of a body function' includes" the "[l]oss of a limb or loss of use of a limb," the "[l]oss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb," the "[l]oss or substantial impairment of a bodily function," or a "skull fracture or other serious bone fracture." MCL 257.58c(a), (b), (d), and (h). The same term appears, and has been defined, in the no-fault act. MCL 500.3135(5) (" '[S]erious impairment of

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[2] *People v Crawford*, 458 Mich 376, 387, 388, 397 n 14 (1998).

[3] See *id.* at 387; MRE 404(b) (listing intent as one of the purposes for which a prosecutor may seek to admit other-acts evidence).

[4] See *Reynolds*, 495 Mich at 940-942 (VIVIANO, J., dissenting); *People v VanderVliet*, 444 Mich 52, 74-75 (1993).

[5] See *Reynolds*, 495 Mich at 942 (VIVIANO, J., dissenting).

[6] See *VanderVliet*, 444 Mich at 74-75 (directing courts "to employ the evidentiary safeguards already present in the Rules of Evidence" as identified in *Huddleston v United States*, 485 US 681, 691-692 (1988): (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be relevant under MRE 402 as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403; and (4) the trial court may, upon request, provide a limiting instruction to the jury under MRE 105).

body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.").

Although "serious impairment of a body function" has not been defined in the vehicle code in a manner exactly equivalent to the definition in the no-fault act, this Court should nonetheless seek to interpret that term with some degree of consistency in its separate contexts, at least to the point of making clear that the Legislature intended in both places to communicate that an impairment must be of a particularly *serious* character. Here, the victim missed a single day of work and was cleared to resume participating in ice hockey shortly after his cast was removed following three months of intermittently wearing it. Moreover, medical testimony indicated that the victim retained good strength, extension, and flexion in his fingers after the fracture and that the injury was of the sort that heals well. I do not believe that the instant injury can reasonably be characterized as involving the "serious impairment of a body function," particularly in light of interpretations that have been given to this term in the no-fault context. See, e.g., *McCormick v Carrier*, 487 Mich 180 (2010), overruling *Kreiner v Fischer*, 471 Mich 109 (2004). Defendant should be held to full account for his impaired driving and for the injuries he caused, but in my judgment, his criminal conduct was not aggravated by the infliction of a "serious impairment of a body function."

Reconsideration Denied November 7, 2014:

MOODY v HOME OWNERS INSURANCE COMPANY, Nos. 149041 and 149046; Court of Appeals Nos. 301784 and 301783. Leave to appeal granted 497 Mich 866.

Rehearing Denied November 14, 2014:

INTERNATIONAL BUSINESS MACHINES CORPORATION v DEPARTMENT OF TREASURY, No. 146440; opinion at: 496 Mich 642.

Summary Disposition November 19, 2014:

PEOPLE v JUAN WALKER, No. 145433; Court of Appeals No. 307480.

By order of April 29, 2013, the application for leave to appeal the May 21, 2012 order of the Court of Appeals was held in abeyance pending the decision in *Burt v Titlow*, cert gtd 571 US ___; 133 S Ct 1457; 185 L Ed 2d 360 (2013). On order of the Court, the case having been decided on November 5, 2013, 571 US ___; 134 S Ct 10; 187 L Ed 2d 348 (2013), the application is again considered and, pursuant to MCR 7.302(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), as to the defendant's contention that his trial counsel was ineffective for failing to inform him of the prosecutor's September 26,

2001 offer of a plea bargain to second-degree murder and a sentence agreement of 25 to 50 years. See *Missouri v Frye*, 566 US ___; 132 S Ct 1399; 182 L Ed 2d 379 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance. *People v Carbin*, 463 Mich 590, 599-600 (2001). In order to establish the prejudice prong of the inquiry under these circumstances, the defendant must show that: (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the defendant's conviction or sentence under the terms of the plea would have been less severe than the conviction or sentence that was actually imposed. *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1385; 182 L Ed 2d 398 (2012).

If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain as outlined above, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D). If the defendant successfully establishes his entitlement to relief pursuant to MCR 6.508(D), the trial court must determine whether the remedy articulated in *Lafler v Cooper* should be applied retroactively to this case, in which the defendant's conviction became final in October 2005. If available, Judge Thomas Edward Jackson shall preside over the hearing.

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 in this matter. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ROARK, No. 148056; Court of Appeals No. 316467.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the defendant's May 29, 2013 delayed application for leave to appeal as on leave granted. Because the defendant waited more than five months before filing an untimely request for the appointment of appellate counsel, the defendant is not entitled to review under the standard applicable to direct appeals. However, the defendant's previously appointed appellate attorney failed to comply with Administrative Order 2004-6, Minimum Standards for Indigent Criminal Appellate Defense Services, Standard 5. Counsel did not seek to withdraw pursuant to *Anders v California,* 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967). Therefore costs are imposed against the attorney, only, in the amount of $1,000 to be paid to the Clerk of this Court. We do not retain jurisdiction.

WELLS FARGO BANK v CHERRYLAND MALL LIMITED PARTNERSHIP, No. 149167; Court of Appeals No. 319894.

Pursuant to MCR 7.302(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 whether the trial court exceeded its authority when it granted

plaintiff's motion to pursue alternative grounds for relief when the Court of Appeals originally remanded only to determine "whether plaintiff is entitled to costs, expenses, and attorney fees with respect to count IV."

The motion for stay is granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

WHITMAN v CITY OF BURTON, No. 149370; reported below: 305 Mich App 16.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Wurtz v Beecher Metropolitan District*, 495 Mich 242 (2014). We also take this opportunity, as suggested by the Court of Appeals dissent, *Whitman v City of Burton*, 305 Mich App 16, 45 n 2 (2014), to clarify that reports given because the employee is requested to participate in an investigation by a public body are still considered protected activity. See MCL 15.362; *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399 (1998). Any contrary suggestion in our earlier opinion in this case, *Whitman v City of Burton*, 493 Mich 303, 313 (2013), is vacated. We do not retain jurisdiction.

Leave to Appeal Granted November 19, 2014:

BANK OF AMERICA, NA v FIRST AMERICAN TITLE INSURANCE COMPANY, No. 149599; Court of Appeals No. 307756.

The parties shall include among the issues to be briefed: (1) whether a separate contract between the lender and the closing agent existed outside of the closing protection letters; (2) whether there was a genuine issue of material fact regarding the closing agent's violation of the terms of the lender's written closing instructions; and (3) whether the full credit bid rule of *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63 (2008), is a correct rule of law and, if so, whether it applies to this case.

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 November 19, 2014:

PEOPLE v PERSON, No. 147944; Court of Appeals No. 317680.

PEOPLE v ATKINSON, No. 148882; Court of Appeals No. 311626.

PEOPLE v GASHI, No. 149055; Court of Appeals No. 318194.

PEOPLE v DARIUS LEWIS, No. 149363; Court of Appeals No. 314110.

PEOPLE v WILLIE CARTER, No. 149424; Court of Appeals No. 313512.

PEOPLE v SALEH, No. 149604; Court of Appeals No. 321152.

PEOPLE v JASON RICHARDSON, No. 149782; Court of Appeals No. 313743.

BL-1 LIMITED PARTNERSHIP v MOTLEY, No. 150377; Court of Appeals No. 322469.

DEMIL v RMD HOLDINGS, LTD, No. 150388; Court of Appeals No. 324182.

Summary Disposition November 21, 2014:

PEOPLE v JUSTLY JOHNSON, No. 147410; Court of Appeals No. 311625.

Pursuant to MCR 7.302(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 the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal; and (4) if the court determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for MCR 6.508(D)(2), and, if so, whether, in the court's judgment, the denial of such relief in that circumstance violates the defendant's constitutional right to due process under either the federal or state constitutions.

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne 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 counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant. We note that similar issues and evidence are presented in *People v Kendrick Scott* (Docket No. 148324), which we remanded to the Court of Appeals for consideration as on leave granted by order dated November 21, 2014. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

PEOPLE v KENDRICK SCOTT, No. 148324; Court of Appeals No. 317915.

Pursuant to MCR 7.302(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 the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call

Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; and (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal.

On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne 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 counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant. We note that similar issues and evidence are presented in *People v Justly Johnson* (Docket No. 147410), which we remanded to the Court of Appeals for consideration as on leave granted by order dated November 21, 2014. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a codefendant.

PEOPLE V WILLIE JACKSON, No. 148889; Court of Appeals No. 318287.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Wayne Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to that court. On remand, the trial court shall order the production and filing of all relevant transcripts and appoint counsel for the purpose of preparing and filing an application for leave to appeal as on direct review.

PEOPLE V RANDAZZO, No. 149352; Court of Appeals No. 314326.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, vacate the sentences of the Antrim Circuit Court, and remand this case to the trial court for resentencing. On remand, the trial court shall impose concurrent sentences or articulate on the record the reason for imposing consecutive sentences. 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.

In re LAROCK, No. 150341; Court of Appeals No. 323347.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for plenary consideration.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 21, 2014:

PEOPLE V ADAM STEVENS, No. 149380; Court of Appeals No. 309481.

The parties shall file supplemental briefs within 35 days following the appointment of counsel, addressing the appropriate standard for determining whether a trial court's questioning of witnesses requires a new trial, and whether that standard was met in this case. The parties should not submit mere restatements of their application papers.

Summary Disposition November 25, 2014:

PEOPLE v HUBBARD, No. 148361; Court of Appeals No. 318271.

By order of April 28, 2014, the application for leave to appeal the December 5, 2013 order of the Court of Appeals was held in abeyance pending the decision in *People v Cunningham* (Docket No. 147437). On order of the Court, the case having been decided on June 18, 2014, 496 Mich 145 (2014), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Wayne Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7). 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.

CITIZENS BANK v BLACK, No. 149244; Court of Appeals No. 318107.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We direct the Court of Appeals' attention to the fact that the related and consolidated cases of *Citizens Bank v Black* (Docket No. 318981) and *Black v Citizens Bank* (Docket No. 318982) are currently pending in the Court of Appeals.

PEOPLE v KEITH WATKINS, No. 149273; Court of Appeals No. 318060.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the March 17, 2014 order of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of the fact that that court's March 17, 2014 order denying the defendant's motion of relief from judgment stated that "the defendant alleges grounds for relief that were decided against him previously and the defendant has failed to establish that a retroactive change in the law undermines the prior decision," when none of the issues that the defendant raised in his motion for relief from judgment was raised on direct appeal. We do not retain jurisdiction.

PEOPLE v HARD, No. 149495; Court of Appeals No. 320449.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Manistee Circuit Court and direct that court to determine whether the amended copy of the defendant's presentence

report, which the circuit judge corrected at the sentencing hearing on November 15, 2013, has been forwarded to the Department of Corrections. If the amended report has not been forwarded, the court is ordered to do so. See MCL 771.14(6). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

WILLIAMSON v GENERAL MOTORS, LLC, No. 149850; Court of Appeals No. 319789.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Michigan Compensation Appellate Commission for additional analysis. The Appellate Commission failed to address all of the issues raised by the defendant. On remand, the Commission shall address the defendant's argument that the plaintiff's loss of wages at the level she had been earning them with the defendant prior to the onset of her disability was, at least following her recovery from hand surgery, attributable to her voluntary participation in the special attrition program, which severed her right to employment by defendant as of January 1, 2007. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Order of Public Censure and Suspension Entered November 25, 2014:

In re TABBEY, No. 150405.

The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, Hon. Kirk W. Tabbey, 14-A District Court Judge, consents. It is accompanied by a settlement agreement, in which the respondent waived his rights and consented to a sanction no greater than a public censure and a 90-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1293 (2000):

Everything else being equal:

(1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;

(2) misconduct on the bench is usually more serious than the same misconduct off the bench;

(3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;

(4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

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. The respondent is, and at all material times was, a judge of the 14-A District Court in Ypsilanti, Michigan.

2. As a judge, he is subject to all the duties and responsibilities imposed on judges by this Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. On September 17, 2014, the respondent operated a motor vehicle by towing a boat and trailer out of the water at a public launch and parking on the shoulder of a public road in Antrim County, Michigan, while having an alcohol content of 0.17 grams or more per 210 liters of breath.

4. On October 1, 2014, a criminal complaint was issued against the respondent, charging him with operating a motor vehicle with a high blood alcohol content, contrary to MCL 257.625(1)(c).

5. On October 16, 2014, the respondent pleaded guilty to a reduced charge of operating a motor vehicle under the influence of alcohol, contrary to MCL 257.625(1)(a), in 86th District Court case no. 2014-9791-SD, before the Hon. Michael Haley.

6. On the same date, Judge Haley sentenced the respondent to pay a fine, and the case was closed.

The standards set forth in *Brown* are also being applied to the Judicial Tenure Commission legal conclusions to which respondent stipulated and which we adopt as our own:

A. The respondent has pled guilty to the commission of a misdemeanor designed to promote public safety.

B. The commission of a crime by a judge erodes public confidence in the judiciary, which is prejudicial to the administration of justice.

The Commission also concludes, and we agree, that the respondent's conduct constitutes:

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, in violation of Canon 1 of the Michigan Code of Judicial Conduct (MCJC);

B. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

C. Conduct involving the appearance of impropriety, in violation of MCJC, Canon 2A;

D. Failure to conduct oneself at all times in a manner that would enhance the public's confidence in the integrity of the judiciary, contrary to MCJC, Canon 2B; and

E. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2).

After review of the Judicial Tenure Commission's decision and recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Kirk W. Tabbey be publicly censured and suspended without pay for 90 days. This order stands as our public censure. The respondent's unpaid 90-day suspension shall be concurrent to his scheduled sick leave.

Leave to Appeal Denied November 25, 2014:

PEOPLE v LAPINE, No. 148274; Court of Appeals No. 313548.

CLERC v CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL, No. 148367; Court of Appeals No. 307915.

PEOPLE v RODRIGUEZ, No. 148400; Court of Appeals No. 317595.

PEOPLE v BOYKINS, No. 148565; Court of Appeals No. 316469.

PEOPLE v JOSHUA JOHNSON, No. 148631; Court of Appeals No. 318494.

PEOPLE v THOMAS RICHARDSON, No. 148647; Court of Appeals No. 316802.

PEOPLE v CHAD COOK, No. 148864; Court of Appeals No. 319447.

PEOPLE v NEYONEE CUMMINGS, No. 148943; Court of Appeals No. 318908.

MANGRAY v GMAC MORTGAGE, LLC, Nos. 148944 and 148945; Court of Appeals Nos. 311321 and 311332.

PEOPLE v SEDRICK MITCHELL, No. 148963; Court of Appeals No. 311605.

PEOPLE v ZELDA TAYLOR, No. 148970; Court of Appeals No. 319492.

PEOPLE v STEPHAN HARDY, No. 149077; Court of Appeals No. 309405.

PEOPLE v SPICER, No. 149146; Court of Appeals No. 320192.

PEOPLE v TRAVIS OWENS, No. 149147; Court of Appeals No. 318067.

PEOPLE v PAUL CARTER, No. 149158; Court of Appeals No. 319140.

PEOPLE v STEGALL, No. 149202; Court of Appeals No. 318249.

PEOPLE v OSTRANDER, No. 149207; Court of Appeals No. 318631.

PEOPLE v BRANION, No. 149208; Court of Appeals No. 318864.

PEOPLE v CZESNOWSKI, No. 149212; Court of Appeals No. 318997.

WHELAN v WHELAN, No. 149233; Court of Appeals No. 311743.

PEOPLE v TYRONE SMITH, No. 149235; Court of Appeals No. 319499.

In re BYRNE ESTATE, No. 149236; Court of Appeals No. 307641.

PEOPLE v NEAL, No. 149249; Court of Appeals No. 320229.

PEOPLE v MICHAEL JACKSON, No. 149265; Court of Appeals No. 318547.

DUSKIN v DEPARTMENT OF HUMAN SERVICES, No. 149267; reported below: 304 Mich App 645.

PEOPLE v KAIRI SANDERS, No. 149272; Court of Appeals No. 319537.

HARRIS v MOTT COMMUNITY COLLEGE, No. 149280; Court of Appeals No. 313403.

PEOPLE v HARRISON, No. 149284; Court of Appeals No. 319403.

PEOPLE v BARDO, No. 149285; Court of Appeals No. 320337.

PEOPLE v MATTHEW PARKER, No. 149286; Court of Appeals No. 319635.

PEOPLE v JAMES ALFRED JONES, No. 149287; Court of Appeals No. 320777.

PEOPLE v BALDWIN, No. 149288; Court of Appeals No. 318236.

PEOPLE v SIMPKINS, No. 149300; Court of Appeals No. 318133.

PEOPLE v TRAVIS, No. 149304; Court of Appeals No. 320104.

PEOPLE v FUSON, No. 149305; Court of Appeals No. 319265.

PEOPLE v DOCKETT, No. 149325; Court of Appeals No. 320486.

JORDAN v NATIONAL CITY BANK, No. 149327; Court of Appeals No. 309428.

PEOPLE v VALENTIN, No. 149328; Court of Appeals No. 318913.

CLARK v NATIONAL CITY BANK, No. 149329; Court of Appeals No. 309438.

PEOPLE v ESSEX, No. 149334; Court of Appeals No. 317960.

PEOPLE v REINER, No. 149335; Court of Appeals No. 313854.

PEOPLE v LINCOLN WATKINS, No. 149336; Court of Appeals No. 316010.

PEOPLE v KING, No. 149345; Court of Appeals No. 309974.

PEOPLE v BRINSON, No. 149360; Court of Appeals No. 321153.

PEOPLE v KYLE, No. 149361; Court of Appeals No. 320660.

PEOPLE v HOPKINS, No. 149362; Court of Appeals No. 319732.

PEOPLE v CHOICE, No. 149364; Court of Appeals No. 313415.

CITY OF EAST LANSING v HILL, No. 149368; Court of Appeals No. 319130.

DISCOVER BANK v PONTE, Nos. 149379 and 149381; Court of Appeals Nos. 318942 and 318979.

PEOPLE v FRENCH, No. 149385; Court of Appeals No. 320923.

PEOPLE v CEDILLO, No. 149386; Court of Appeals No. 319094.

PEOPLE v HAYNES, Nos. 149397 and 149398; Court of Appeals Nos. 320155 and 320578.

PEOPLE v RANDALL, No. 149400; Court of Appeals No. 314309.

NEWMEYER v FRANTZ-HAGER, No. 149416; Court of Appeals No. 313847.

PEOPLE v STANLEY PRICE, No. 149417; Court of Appeals No. 320198.

PEOPLE v MURINE, No. 149420; Court of Appeals No. 310962.

PEOPLE v ANDRE COLLINS, No. 149422; Court of Appeals No. 313769.

PEOPLE v SHON BERRY, No. 149427; Court of Appeals No. 320769.

FORNER v CONSUMERS ENERGY COMPANY, No. 149433; Court of Appeals No. 307626.

In re WALTHALL, No. 149459; Court of Appeals No. 319793.

PEOPLE v DONALD WRIGHT, No. 149481; Court of Appeals No. 321226.

PEOPLE v HOLLIE, No. 149482; Court of Appeals No. 320966.

PEOPLE v GASPER, No. 149484; Court of Appeals No. 320961.

PEOPLE v KOOS, No. 149485; Court of Appeals No. 321209.

PEOPLE v HOOSIER, No. 149487; Court of Appeals No. 320282.

PEOPLE v JEREMY YANCEY, No. 149515; Court of Appeals No. 320753.

PEOPLE v MENDO LOVE, No. 149529; Court of Appeals No. 314439.

PEOPLE v WILBURN, No. 149538; Court of Appeals No. 320276.

PEOPLE v KEVIN ANDERSON, No. 149541; Court of Appeals No. 321365.

PEOPLE v GARY JACKSON, No. 149549; Court of Appeals No. 320829.

COPELAND v MIDMICHIGAN REGIONAL MEDICAL CENTER, No. 149552; Court of Appeals No. 314880.

JARRETT-COOPER v ROSETT, No. 149579; Court of Appeals No. 312958.

MANNONE v CHASE BANK NA, No. 149589; Court of Appeals No. 310492.

PEOPLE v JAYQUAN ROBINSON, No. 149594; Court of Appeals No. 321242.

PEOPLE v DANA MILLER, No. 149607; Court of Appeals No. 314659.

PEOPLE v AKIELL MCGEE, No. 149615; Court of Appeals No. 320531.

PEOPLE v BREWSTER, No. 149624; Court of Appeals No. 321768.

PEOPLE v CRUZ, No. 149627; Court of Appeals No. 314440.

PEOPLE v LUSTER, No. 149637; Court of Appeals No. 314624.

PEOPLE v STEVEN CLEMENS, No. 149639; Court of Appeals No. 321618.

PEOPLE v LOPEZ, No. 149641; reported below: 305 Mich App 686.

PEOPLE v BERG, No. 149650; Court of Appeals No. 321428.

PEOPLE v RONALD OWENS, No. 149654; Court of Appeals No. 307117.

PEOPLE v HOWE, No. 149655; Court of Appeals No. 313143.

PEOPLE v CANN, No. 149675; Court of Appeals No. 320334.

CHASTAIN v DEPARTMENT OF CORRECTIONS, No. 149684; Court of Appeals No. 320340.

PEOPLE v BULLARD, No. 149698; Court of Appeals No. 321266.

PEOPLE v CLAY, No. 149730; Court of Appeals No. 314681.

PEOPLE v ABUELAZAM, No. 149737; Court of Appeals No. 311936.

PEOPLE v KRAMMES, No. 149747; Court of Appeals No. 314386. CAVANAGH, J., would grant leave to appeal.

PEOPLE v RAYMOND, No. 149752; Court of Appeals No. 320296.

PEOPLE v COOPER-RIVETTE, No. 149758; Court of Appeals No. 321342.

PEOPLE v JAQUAN HENDERSON, No. 149770; reported below: 306 Mich App 1.

KETCHMARK v HAYMAN, No. 149775; Court of Appeals No. 313839.

PEOPLE v WYNN, No. 149784; Court of Appeals No. 315329.

HAYES v ATMANDEE ENTERPRISES, LLC, No. 149786; Court of Appeals No. 314276.

PEOPLE v KARL SMITH, No. 149792; Court of Appeals No. 321494.

MATTIC v RAY LAETHEM PONTIAC-BUICK GMC TRUCK, INC, No. 149794; Court of Appeals No. 320588.

DANOU TECHNICAL PARK, LLC v FIFTH THIRD BANK, No. 149812; Court of Appeals No. 309905.

US BANK NATIONAL ASSOCIATION v CONLIN, No. 149831; Court of Appeals No. 320309.

PEOPLE v GUNTHER, No. 149835; Court of Appeals No. 322050.

PEOPLE v KISSNER, No. 149836; Court of Appeals No. 322052.

PEOPLE v RICH, No. 149841; Court of Appeals No. 321713.

PEOPLE v COLEMAN, No. 149844; Court of Appeals No. 315099.

PEOPLE v BRADLEY, No. 149845; Court of Appeals No. 322417.

PEOPLE v MCMURRAY, No. 149857; Court of Appeals No. 320713.

KNAPP'S VILLAGE, LLC v KNAPP CROSSING, LLC, No. 149861; Court of Appeals No. 314464.

In re WOODS, No. 149870; Court of Appeals No. 321794.

PEOPLE v GREER, No. 149874; Court of Appeals No. 321416.

PEOPLE v MEEKS, No. 149884; Court of Appeals No. 321869.

LIPSCOMB v MORAN, No. 149894; Court of Appeals No. 314520.

FEDERAL HOME LOAN MORTGAGE CORPORATION v FERREBEE, No. 149895; Court of Appeals No. 320182.

MELCHING, INC v CITY OF MUSKEGON, No. 149898; Court of Appeals No. 315177.

PEOPLE v STEVEN OWENS, No. 149911; Court of Appeals No. 307090.

BASKIN v MUSKEGON CORRECTIONAL FACILITY WARDEN, No. 149921; Court of Appeals No. 320493.

PEOPLE v HOLT, No. 149938; Court of Appeals No. 302017.

PIETRZYK v MORTON HOUSE APARTMENTS, No. 149953; Court of Appeals No. 312627.

PEOPLE v DAVID SCOTT, No. 149960; Court of Appeals No. 322155.

KIMBALL v KIMBALL, No. 150052; Court of Appeals No. 319862.

PEOPLE v BROOKS, No. 150076; Court of Appeals No. 322136.

PEOPLE v KIRBY, No. 150108; Court of Appeals No. 322331.

CREHAN v FLAGSTAR BANK, FSB, No. 150110; Court of Appeals No. 321685.

CREHAN v FLAGSTAR BANK, FSB, No. 150112; Court of Appeals No. 321686.

CHAKKOUR v CHAKKOUR, No. 150198; Court of Appeals No. 322306.

Superintending Control Denied November 25, 2014:

FALK v ATTORNEY GRIEVANCE COMMISSION, No. 149308.

Reconsideration Denied November 25, 2014:

PEOPLE v RICKY SCOTT, No. 147837; Court of Appeals No. 305972. Leave to appeal denied at 495 Mich 977.

SEXTON-WALKER v DETROIT BOARD OF EDUCATION, No. 148162; Court of Appeals No. 315412. Leave to appeal denied at 496 Mich 857.

PEOPLE v BELTON, No. 148329; Court of Appeals No. 302107. Leave to appeal denied at 495 Mich 1006.

PEOPLE v DOUGLAS JACKSON, No. 148376; Court of Appeals No. 315335. Leave to appeal denied at 496 Mich 857.

PEOPLE v NENROD, No. 148452; Court of Appeals No. 308340. Leave to appeal denied at 495 Mich 981.

PEOPLE v BURNS, No. 148477; Court of Appeals No. 317255. Leave to appeal denied at 495 Mich 995.

PEOPLE v MARK BENNETT, No. 148653; Court of Appeals No. 310850. Leave to appeal denied at 497 Mich 852.

PEOPLE v DWAYNE JOHNSON, No. 148819; Court of Appeals No. 319737. Leave to appeal denied at 497 Mich 853.

PEOPLE v ROBERT THOMPSON, No. 148843; Court of Appeals No. 318973. Leave to appeal denied at 497 Mich 853.

PEOPLE v COOLEY, No. 148883; Court of Appeals No. 319427. Leave to appeal denied at 497 Mich 853.

PEOPLE v WILLIAM PARKER, No. 148962; Court of Appeals No. 315559. Leave to appeal denied at 497 Mich 853.

PAMELA B JOHNSON TRUST v ANDERSON, No. 148978; Court of Appeals No. 309913. Leave to appeal denied at 497 Mich 853.

BANK OF NEW YORK MELLON v BELL, No. 149101; Court of Appeals No. 317635. Leave to appeal denied at 496 Mich 867.

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 149140; Court of Appeals No. 312159. Leave to appeal denied at 497 Mich 854.

FEDERAL DEPOSIT INSURANCE CORPORATION v TORRES, No. 149180; Court of Appeals No. 311277. Leave to appeal denied at 497 Mich 855.

VIVIANO, J., not participating due to a familial relationship with one of the presiding circuit court judges in this case.

ZANKE-JODWAY v CAPITAL CONSULTANTS, INC, No. 149257; Court of Appeals No. 306206. Leave to appeal denied at 497 Mich 855.

PEOPLE v LARRY JONES, No. 149204; Court of Appeals No. 319505. Leave to appeal denied at 496 Mich 867.

Summary Disposition November 26, 2014:

SAL-MAR ROYAL VILLAGE, LLC v MACOMB COUNTY TREASURER, No. 147384; reported below: 304 Mich App 405.

Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse both the May 30, 2013 and the February 25, 2014 judgments of the Court of Appeals. Macomb County and Macomb Township were not in privity with respect to waiving interest and fees lawfully assessed by the county on the delinquent taxes of plaintiff, Sal-Mar Royal Village, LLC.

A subordinate governmental unit cannot bind a superior unit unless the subordinate unit is authorized to represent the superior. See *Baraga v State Tax Comm*, 466 Mich 264, 270 (2002), quoting 50 CJS, Judgments, § 869, p 443. Here there is no indication that the township was ever empowered to represent the county with respect to matters incidental to delinquent tax collection. On the contrary, the statutory tax regime contemplates that the two governmental units had differing obligations, see MCL 211.44(1); MCL 211.78a, and potentially conflicting interests if the county was unable to collect delinquent taxes for which it had previously reimbursed the township from its delinquent tax revolving fund, see MCL 211.87b.

Because the question of privity is dispositive, we decline to address the other issues raised by the parties on appeal.[1]

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v KWASNY, No. 148358; Court of Appeals No. 306784.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment regarding the restitution order in lower court No. 2009-004979-FH and we remand this case to the Court of Appeals for reconsideration in light of *People v McKinley*, 496 Mich 410 (2014). The Court of Appeals evaluated the restitution order in accordance with *People v Gahan,* 456 Mich 264 (1997), which was overruled in *People v McKinley*. 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.

In re ESTATE OF SOLTYS, No. 148740; Court of Appeals No. 311143.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion affirming the ruling of the St. Clair Probate Court that the plaintiffs had sufficiently rebutted the

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[1] Although we do not reach the issue, we question whether the Michigan Tax Tribunal had the authority to compel the county to disobey the explicit statutory obligation requiring the county to assess the interest and fees. "A county property tax administration fee . . . and interest . . . computed from the date that the taxes originally became delinquent, *shall* be added to property returned as delinquent under this section." MCL 211.78a(3) (emphasis added).

statutory presumption of a depositor's intention to vest title to jointly held accounts in the surviving joint owner, MCL 487.703. In this case, the statutory presumption that the decedent intended the joint accounts to become the property of the survivor arose based on evidence that the decedent created and maintained the accounts until her death. *Jacques v Jacques*, 352 Mich 127 (1958). The Court of Appeals stated that "the statutory presumption . . . can be rebutted by competent evidence." However, although a party challenging the statutory presumption certainly must proffer competent evidence, the relevant question is whether the party has met its burden of proof to overcome the statutory presumption by providing reasonably clear and persuasive proof of a contrary intention. *Id.*; *Lau v Lau*, 304 Mich 218 (1943); see also *Kirilloff v Glinisty*, 375 Mich 586 (1965). We remand this case to the Court of Appeals for application of the proper standard. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v KUDLA, No. 149307; Court of Appeals No. 320187.

Pursuant to MCR 7.302(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 PREECE, No. 150292; Court of Appeals No. 322542.

Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Saginaw Circuit Court, and we remand this case to the trial court for resentencing. The trial court's disagreement with the guidelines range for the defendant's offense is not a substantial and compelling reason for an upward departure. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003).

Leave to Appeal Granted November 26, 2014:

PEOPLE v SEEWALD, No. 150146; Court of Appeals No. 314705.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 26, 2014:

TYRA v ORGAN PROCUREMENT AGENCY OF MICHIGAN, No. 148079; reported below: 302 Mich App 208.

At oral argument, the parties shall address whether *Zwiers v Growney,* 286 Mich App 38 (2009), was overruled by this Court's decision

in *Driver v Naini,* 490 Mich 239 (2011), and whether the defendant's affirmative defenses were defective because they did not specifically state the grounds for the defense. 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.

We further order that this case be argued and submitted to the Court together with the case of *Tyra v Organ Procurement Agency of Michigan* (Docket No. 148087). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in Docket No. 148079 only.

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 *Furr v McLeod* (Docket No. 149344).

TYRA V ORGAN PROCUREMENT AGENCY OF MICHIGAN, No. 148087; reported below: 302 Mich App 208.

At oral argument, the parties shall address whether *Zwiers v Growney,* 286 Mich App 38 (2009), was overruled by this Court's decision in *Driver v Naini,* 490 Mich 239 (2011), and whether the defendants' affirmative defenses were defective because they did not specifically state the grounds for the defense. 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.

We further order that this case be argued and submitted to the Court together with the case of *Tyra v Organ Procurement Agency of Michigan* (Docket No. 148079). Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in Docket No. 148079 only.

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 *Furr v McLeod* (Docket No. 149344).

FURR V MCLEOD, No. 149344; reported below: 304 Mich App 677.

At oral argument, the parties shall address whether *Zwiers v Growney*, 286 Mich App 38 (2009), was overruled by this Court's decision in *Driver v Naini*, 490 Mich 239 (2011). 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.

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 *Tyra v Organ Procurement Agency of Michigan* (Docket Nos. 148079, 148087).

The application for leave to appeal as cross-appellants is denied, because we are not persuaded that the question presented should be reviewed by this Court.

PEOPLE V ACKLEY, No. 149479; Court of Appeals No. 318303.

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 the possibility of obtaining expert testimony in support of the defense. The parties should not submit mere restatements of their application papers.

In re ARS, No. 150142; Court of Appeals No. 318638.

The parties shall file supplemental briefs within 42 days of the date of this order, addressing: (1) whether the respondent father demonstrated adequate "good cause" under Section 25 of the Adoption Code, MCL 710.25(2), for the adjournment of the adoption proceeding, see *In re MKK*, 286 Mich App 546 (2009); (2) whether the respondent adequately demonstrated that he had "provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him," MCL 710.39(2); and (3) whether the trial court gave adequate consideration to the legislative mandate that all adoption proceedings "be considered to have the highest priority . . . ." MCL 710.25(1).

Leave to Appeal Denied November 26, 2014:

THE SERVICE SOURCE, INC v DHL EXPRESS (USA), INC, No. 147860; Court of Appeals No. 301013.

Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 23, 2014. The application for leave to appeal the July 11, 2013 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*). Because I believe that the trial court clearly erred when it awarded plaintiff damages for profits that it lost *before* the contract was *breached* on January 31, 2009, as well as profits that it lost *after* the contract was lawfully *terminated* on March 5, 2009, I respectfully dissent from this Court's order denying leave to appeal.

The two corporate parties entered into a contract in which defendant would provide international and domestic shipping services for plaintiff's customers and, in return, plaintiff would promote defendant as a preferred carrier to its customers. Facing difficult economic circumstances, defendant informed plaintiff on November 10, 2008 of its plans to discontinue providing domestic shipping services on January 31, 2009. Plaintiff made its last payment to defendant on December 2, 2009. Although defendant continued to provide domestic services until January 31, 2009, and international services until March 5, 2009, plaintiff never paid defendant for these services. Paragraph 17 of the contract gave defendant the power to terminate the contract for non-payment upon 10 days' notice. In response to plaintiff's non-payment, defendant gave the required notice and terminated the contract effective March 5, 2009. Plaintiff then filed this action for breach of contract on February 10, 2009, after defendant ceased providing domestic services.

The trial court awarded plaintiff damages in the amount of $3,546,789, which represented the amount of profits plaintiff lost be-

tween January 1, 2009, and December 31, 2012, less the money that plaintiff owed defendant. However, given that plaintiff itself concedes that defendant did not actually breach the contract until January 31, 2009, any lost profits plaintiff suffered before this date cannot be said to have been caused by defendant's breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178 (2014) ("A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach."). In addition, given that defendant lawfully terminated the contract on March 5, 2009, defendant's liability under the contract could not extend beyond this date. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51 (2003) ("[T]he bedrock principle of American contract law [is] that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance. . . ."). Therefore, to the extent that the trial court awarded damages for profits lost *before* the contract was breached (assuming for the sake of argument that the contract was breached at all, a matter that I would also review further were this Court to grant leave), and for profits lost *after* the contract was lawfully terminated, the trial court clearly erred, in my judgment. A corrected calculation of plaintiff's lost profits from January 31, 2009, through March 5, 2009, would reduce the award of damages by roughly $3.3 million.

In light of this error, I would vacate the trial court's award of damages to the extent that it includes damages for profits lost before January 31, 2009, and after March 5, 2009. The parties here are sophisticated business entities and freely constructed the agreement that governed their relationship, and when parties enter into such agreements, they do so with the expectation that courts will accurately enforce their terms. At least with respect to the award of damages, I do not believe that this occurred in this case.

ZAHRA, J. (*dissenting*). This case concerns the fallout from the decision of defendant, DHL Express (USA), Inc., to pull out of the United States domestic shipping business. Defendant has long been involved in international shipping. In 2003, defendant entered the domestic shipping market by acquiring Airborne Express, a domestic shipper. As part of the acquisition, defendant assumed Airborne Express's agreements with other companies known as "resellers." Resellers obtain preferential wholesale rates with shipping companies and resell the shipping services to smaller customers at rates in between the wholesale rate and the retail rate that would otherwise be charged by the shipper. One of those resellers, plaintiff The Service Source, Inc. (TSS), was a reseller for Airborne Express and operating under a 5-year "Reseller Agreement for U.S. Origin Domestic and International Service."

After DHL acquired Airborne Express, TSS and defendant, on January 6, 2006, entered into a 5-year "Reseller Agreement for U.S. Origin Domestic and International Service." Except for the dates and parties, this agreement was the same as the 5-year "Reseller Agreement for U.S. Origin Domestic and International Service" between Airborne Express and TSS. TSS and defendant renewed this reseller agreement in November 2006 and December 2007, each time extending the 5-year agreement

an additional year. In 2007, the owners of TSS incorporated plaintiff The Service Source Franchise, LLC (TSSF), to expand and franchise its reseller operations. On July 22, 2007, defendant and TSSF entered into a 5-year "Reseller Agreement for U.S. Domestic Origin and International Service," which except for the dates and parties, had the same terms as the reseller agreement with TSS bearing the same name.[1]

The two reseller agreements, which are in relevant part identical, provide the following pertinent recitals on page 1:

RESELLER AGREEMENT

FOR U.S. ORIGIN DOMESTIC AND INTERNATIONAL SERVICE

* * *

RECITALS:

WHEREAS, RESELLER has requirements for expedited international air express services for documents and/or packages or freight being sent to various locations around the world and for domestic door-to-door air and ground express services for documents and/or packages or freight being sent to various locations throughout the United States ("Services"); and

WHEREAS, DHL regularly provides such Services for its customers and desires to handle substantially all the requirements of customers of RESELLER ("RESELLER customers") for such Services to the locations served by DHL in accordance with the terms and conditions contained herein; and

WHEREAS, RESELLER's agreement to consign a certain amount of its requirements for such service to DHL will result in cost savings and decreased operational expenses to DHL due to the minimum volumes expected; and

WHEREAS, as a result of said cost savings and expense reduction, DHL agrees to provide Services at the rates specified herein.

The reseller agreements then provide:

AGREEMENT:

1. **THE SERVICES.**

RESELLER agrees to promote DHL's Services to RESELLER customers, and DHL agrees to provide Services to RESELLER customers to fulfill RESELLER customers' needs for Services. RESELLER shall promote DHL's Services as a preferred carrier to RESELLER customers for international and domestic shipments of documents and small packages. Shipments will originate at

[1] Plaintiff TSS and plaintiff TSSF will hereafter generally be referred to collectively as "plaintiff."

> RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents. . . .
>
> DHL may, at its discretion, add additional services to this Agreement from time to time, under terms and conditions to be determined.

Paragraph 16 of the reseller agreements provides in part:

> DHL will invoice RESELLER on a weekly basis for the Services provided by DHL to RESELLER customers during the previous week. Invoiced amounts will be remitted by RESELLER to DHL within twenty-one (21) days of invoice date. RESELLER's account will be considered past due twenty-one (21) days after invoice date. A late payment fee of 5% or $5.00, whichever is greater, will be assessed upon past due balances.

Paragraph 17 of the agreements relates to the term of agreement and termination. It provides in part:

> (a) This Agreement shall become effective on the date set forth above and shall remain in full force and effect for five (5) years, unless sooner terminated in accordance with the provisions of this Agreement. By mutual consent, to be embodied in writing no later than December 1 of each calendar year, this Agreement may be extended for an additional one (1) year period(s) so that it will have a rolling five (5) year term. For example, by December 1, 2006, the parties may agree in writing to extend the Agreement for an additional year, i.e., until January 6, 2012. By December 1, 2007, the parties may agree in writing to extend the Agreement for an additional year; i.e., until January 6, 2013.
>
> (b) If either party defaults in any obligation or covenant of this Agreement, and continues in default for a period of thirty (30) days after receiving notice of default from the non-defaulting party, the non-defaulting party may, without prejudice to other rights and remedies, terminate this Agreement upon thirty (30) days written notice.
>
> (c) Notwithstanding sub-sections (a) and (b) above, in the event of RESELLER'S nonpayment of any bill or other charge when past due and not reasonably contested by RESELLER, DHL may terminate this Agreement upon ten (10) days written notice.[2]

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[2] Notably, ¶ 28 of the reseller agreements provides for "**GOVERNING LAW**," stating that "[t]his Agreement shall be governed by and construed in accordance with the laws of Florida without regard to its conflict of law rules." This provision is not pertinent here given the parties agreement that Michigan and Florida law is the same in regard to this case.

As mentioned, defendant decided to withdraw from the domestic shipping market and provide only international shipping service. On November 10, 2008, defendant issued a press release stating that domestic service would end January 30, 2009, and that it could no longer guarantee specific delivery dates for domestic packages as of November 18, 2008. Ninety percent of plaintiff's resale shipping was domestic.

On February 10, 2009, plaintiff filed this suit, alleging that defendant's announcement on November 10, 2008, "breached said Agreements, and [defendant] has since that time refused to honor its obligations under the Agreements." Plaintiff continued to use defendant's domestic shipping services through January 2009, and international shipping services for the next few months. Plaintiff also stopped paying defendant for services still being used, with the last payment made on December 2, 2008. By late February 2009, defendant claimed that plaintiff owed it more than $500,000. As a result, defendant sent a letter to plaintiff informing plaintiff that the reseller agreements were terminated as of March 5, 2009, under ¶ 17(c) of the agreements.

Defendant filed a counterclaim asserting that plaintiff owed it more than $500,000. Plaintiff did not contest the counterclaim and conceded that it owed defendant $673,000 for unpaid shipping services.

Plaintiff moved for partial summary disposition on the question of liability. The circuit court did not address the specific language of the reseller agreements, relying instead on the parties' course of dealing. The court held:

> Counsel, this is a contract case. There's a contract commencing January of '06. I think it was later affirmed sometime maybe in '07, and then maybe again in '08. But it provided for and in fact did include domestic and international delivery service. Commencing sometime in the end of '08 Defendants ceased and altered the terms of the practice and the contract that was in existence at that time.
>
> I think that there are probably all kinds of ways to shade the facts here. Bottom line is there is going to be a litany of damages if they exist or not, but as far as the fact of, both of you agree, that you no longer — the Defendant no longer provides the same services that were provided to the Plaintiff at the time that the contract was entered into and that was in fact the practice between the parties for all that time up until such time as Defendant ceased providing that for Plaintiffs and Plaintiffs' clients received their packages back undelivered contrary to the terms of the contract.
>
> I don't find it that far reaching, I don't find it as complicated as Defendants would like to see it, and I think all the arguments that go to the corpus of Defendant's position here remain in tact [sic] under the issue of damages. I am granting Plaintiffs' motion for partial summary judgment and allowing the matter to go forward on the issue of damages.

In essence, the circuit court held that the reseller agreements required defendant to provide domestic service. Because there was no

dispute that defendant ceased domestic service in January 2009, the court granted plaintiff's motion on the issue of liability.

The Court of Appeals took a different approach and addressed the specific language of the reseller agreements:

> As defendant argues, one sentence of the contract suggests that defendant was free to cease service to any location if it so chose: "Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." This suggests that if DHL ceased regular service in any given area, it would no longer be required to collect or deliver there for plaintiff[]. If one were to consider only this sentence, it would appear that defendant's argument is correct that it was not bound to pick up or deliver packages at any domestic location.

The panel held the following:

> However, a contract must be read as a whole, and "isolated words and phrases are not determinative of the parties' intentions." *City Nat'l Bank of Miami v Citibank, NA*, 373 So 2d 703 (Fla Dist Ct App, 1979); see also *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005) ("This Court is required to read contracts as a whole, giving harmonious effect, if possible, to each word and phrase."). Taken as a whole, the contracts between the parties clearly contemplate that defendant would provide domestic service. The contracts are titled "Reseller Agreement for U.S. Origin Domestic and International Service." The agreements require defendant to provide "services" to plaintiffs' customers, and defines services as "expedited international air express services . . . *and for domestic door-to-door air and ground express services* for documents and/or packages or freight being sent to various locations throughout the United States." (Emphasis added.) Further, every reference to shipping refers to both international and domestic service. There is no indication that the parties intended to allow DHL to completely cease either domestic or international service. Reading the contracts as a whole and giving meaning to all of the words in the contract, defendant could likely cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service.[3]

In my view, the provisions relied on by the Court of Appeals do not address the volume of services defendant must legally provide to plaintiff's customers under the reseller agreements. The complete title of the

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[3] *Service Source, Inc v DHL Express (USA), Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 11, 2013 (Docket No. 301013), p 5.

reseller agreements is not germane to this question, and the definition of "services" under the agreements is simply not in dispute. Rather than addressing the question whether the reseller agreements provide for the volume of services defendant must provide, the panel simply read into the agreements a vague fiat that defendant's cessation of domestic service to a "handful" of locations would be just fine.[4] Of course, this conclusion only raises the question whether it then is permissible for defendant to cease service to "two handfuls" of the locations, or perhaps 20% or even 60% of the locations. In other words, the panel here improperly assumed that closing a "handful" of locations is permissible despite that the language of the reseller agreements it relied on does not provide a sufficient basis for determining whether defendant's cessation of any volume of services constitutes a breach of the agreements.

Rather, the only provision that does address the amount of services defendant must provide is contained in the recitals, which in part state that "DHL regularly provides such Services for its customers and desires to handle substantially all the requirements of customers of RESELLER ("RESELLER customers") for such Services to the locations served by DHL in accordance with the terms and conditions contained herein[.]" While this provision clearly states defendant's intent to "handle substantially all the requirements of [plaintiff's] customers," the provision also makes clear that defendant's obligation is limited to providing services "to the locations served by DHL in accordance with the terms and conditions contained herein[.]" And the only provision in the reseller agreements addressing the locations served by defendant provides that "[s]hipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." Reading this provision and the recital together, I find it rather plain that defendant is obligated to provide services to plaintiff's customers at locations regularly serviced by defendant. As such, defendant owes no legal duty to plaintiff to maintain regular service to all or any of its locations. Rather, I agree with defendant that this language "means that [defendant] agreed that whatever infrastructure it had in place to pick up and deliver packages to any particular location would be available at a discount to [plaintiff's] customers—nothing more and nothing less."

This position is also consistent with other express provisions of the reseller agreements. For instance, the agreements do not require plaintiff to pay for services in advance. Paragraph 16 of the reseller agreements states that defendant would bill plaintiff on a weekly basis for the services provided by defendant to plaintiff's customers during the previous week. Had the services been purchased in advance, that would be an indication that plaintiff was expecting that the delivery services would be available for the length of the reseller agreements. Further, neither party

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[4] Indeed, the uncertainly of the panel's conclusion is reflected in its listless statement that "defendant *could likely* cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service." *Id.* (emphasis added).

to the contract is required to deal exclusively with the other party. That is, defendant may do business with other resellers and plaintiff may do business with other shippers. In my view, these provisions of the reseller agreements reflect that plaintiff could not reasonably rely on future services from defendant. Rather, as defendant posits in reply to plaintiff's brief on appeal, "[i]f [defendant] was not obligated to satisfy [plaintiff's] requirements, and if [plaintiff] had no obligation to ship with [defendant], then it makes no sense to interpret the contract as locking [defendant] into an entire domestic delivery network just for [plaintiff's] benefit."

In its brief to this Court, plaintiff notes that "[t]here is also no argument that the contract is unenforceable due to an indefinite quantity, see *In re Anchor Glass Container Corp*, 297 BR 887, 891 ([Bankr] MD Fla, 2003), because [plaintiff] committed to a $4 million minimum annual volume." I find this assertion to be inaccurate. Paragraph 21 provides only that

> [t]he discounted rates presented are in expectation of minimum monthly payments by [plaintiff] to DHL for Services of three hundred and twenty eight thousand dollars ($328,000). If such expectations are not met, DHL may elect in its discretion to adjust rates under this Agreement accordingly or to terminate this Agreement.

Paragraph 21 does not at all reflect that plaintiff committed to a $4 million minimum annual volume. Indeed, plaintiff could unilaterally decide not to ship with defendant and, according to ¶ 21, defendant could only "elect in its discretion to adjust rates under this Agreement accordingly or to terminate this Agreement."

Last, I find *Anchor Glass* instructive. That case is concisely summarized in 30 Williston, Contracts (4th ed), § 77:2, pp 288-289:

> The agreement was an indefinite quantity supply agreement. Under the parties' arrangement, the buyer was neither obligated to buy glass bottles for use in bottling wine exclusively from the seller, a now bankrupt bottle manufacturer, nor did the agreement mandate that the manufacturer had to satisfy all of the buyer's requirements for bottles. Rather, the buyer was free, when it wanted to purchase bottles, to send the seller a purchase order, which the seller could—and presumably would—fill, promising only that it would provide the buyer with certain discounts and rebates if and when it bought from the seller. However, the buyer conceded that it did not have to buy exclusively from this manufacturer and that it did not do so; and that it was not obligated to buy its requirements, or any specified quantity, from the manufacturer. In short, when the buyer filed its claim against the manufacturer in the latter's bankruptcy, the court determined that this was not an agreement to do anything else than engage in

> some business when a need arose, and to the extent that each party was capable or desirous of doing business with the other at the time."

As in *Anchor Glass*, plaintiff was not obligated to buy shipping services exclusively from defendant, nor did the agreement mandate that defendant had to satisfy all of plaintiff's requirements for shipping. Rather, plaintiff was free, when it wanted to purchase shipping, to send defendant a purchase order, which defendant could—and presumably would—fill, promising only that it would provide plaintiff certain discounts and rebates if and when plaintiff bought from defendant. However, plaintiff conceded that it did not have to buy exclusively from defendant and that it was not obligated to buy its requirements, or any specified quantity, from defendant. Similarly, this was not an agreement to do anything other than engage in some business when a need arose and to the extent that each party was capable or desirous of doing business with the other at the time. Thus, I agree with defendant that the reseller agreements merely provide that defendant "agreed that whatever infrastructure it had in place to pick up and deliver packages to any particular location would be available at a discount to [plaintiff's] customers—nothing more and nothing less." There is simply no language in the agreements imposing a legal duty on defendant to continue domestic shipping service to plaintiff at a certain volume. Accordingly, I conclude that defendant did not breach any provision of the reseller agreements, and would reverse the lower courts' decisions and remand for entry of summary disposition for defendant.

PEOPLE v KWASNY, No. 148360; Court of Appeals No. 309924.

PEOPLE v KEVIN PORTER, No. 149120; Court of Appeals No. 316446.

PEOPLE v PARAVAS, No. 149268; Court of Appeals No. 311291.

PEOPLE v BAKER, No. 149310; Court of Appeals No. 320002.

PEOPLE v BASTUBA, No. 149375; Court of Appeals No. 320250.

PEOPLE v LOPEZ-VELASQUEZ, No. 149453; Court of Appeals No. 320562.

PEOPLE v ACEVEDO, No. 149509; Court of Appeals No. 320360.

PEOPLE v REARDON, No. 149520; Court of Appeals No. 321170.

Leave to Appeal Denied December 5, 2014:

In re ADKINS/WATKINS, No. 150386; Court of Appeals No. 319420.

In re GROVES, No. 150426; Court of Appeals No. 320356.

In re FERGUSON, No. 150427; Court of Appeals No. 321545.

Summary Disposition December10, 2014:

HASTINGS MUTUAL INSURANCE COMPANY v MOSHER DOLAN CATALDO & KELLY, INC, No. 149201; Court of Appeals No. 296791. Pursuant to

MCR 7.302(H)(1), in lieu of granting the application for leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals erred in holding that plaintiff Hastings Mutual Insurance Company ("Hastings Mutual") did not have a duty to defend defendant Mosher Dolan Cataldo & Kelly, Inc. ("Mosher Dolan") in the underlying arbitration case. The duty to defend is broader than the duty to indemnify. *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450 (1996). An insurer has a duty to defend, despite theories of liability asserted against the insured that are not covered under the policy, if there are any theories of recovery that fall within the policy. *Id*. at 451. In this case, the claimants in the underlying arbitration case alleged water damage to personal property that was not excluded from coverage by any of the exclusions in Hastings Mutual's policy. Therefore, although the Fungi Exclusion excluded coverage for some of the claims asserted in the underlying arbitration case, Hastings Mutual had a duty to defend Mosher Dolan. And, because Hastings Mutual had a duty to defend, it is not entitled to restitution. We remand this case to the Oakland Circuit Court for further proceedings consistent with this order and the February 14, 2013 judgment of the Court of Appeals (Court of Appeals Docket No. 296791). The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

SMITH V CITY OF FLINT, No. 149390; Court of Appeals No. 320437. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, we direct the Court of Appeals to specifically address whether the plaintiff has stated a claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment.

Leave to Appeal Granted December 10, 2014:

GREER V ADVANTAGE HEALTH, No. 149494; reported below: 305 Mich App 192.

ASSOCIATED BUILDERS AND CONTRACTORS V CITY OF LANSING, No. 149622; reported below: 305 Mich App 395. The parties shall include among the issues to be briefed: (1) whether *Attorney General, ex rel. Lennane v City of Detroit*, 225 Mich 631 (1923), should be overruled; and (2) what authority, if any, enabled defendant to enact its prevailing wage ordinance.

The Michigan Building and Construction Trades Council and the Michigan State AFL-CIO are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 10, 2014:

PEOPLE v GROSS, No. 149426; Court of Appeals No. 320971.

PEOPLE v SALERNO, No. 149432; Court of Appeals No. 313115.

LAFONTSEE v HOME-OWNERS INSURANCE COMPANY, No. 149503; Court of Appeals No. 313613.

CAVANAGH, J., would grant leave to appeal.

QUINTO v WOODWARD DETROIT CVS, LLC, No. 149582; reported below: 305 Mich App 73.

BRUGGER v CITY OF HOLLAND, No. 149630; Court of Appeals No. 313925.

PEOPLE v DONNER, No. 149919; Court of Appeals No. 314665.

PEOPLE v LATEEF, No. 150043; Court of Appeals No. 315157.

Summary Disposition December 12, 2014:

ROBERTS v SAFFELL, No. 149609; Court of Appeals No. 312354. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we direct the Leelanau Circuit Court to assign a different judge to preside over any further proceedings in this case. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

ZAHRA, J. (*concurring*). I concur in the denial of plaintiffs' application for leave to appeal. I write separately to admonish the trial court for its repeated failure to follow the decisions of the appellate court.

In 2003, plaintiffs Richard and Stacey Roberts purchased a summer home in Leland, Michigan, from defendants Robert and Joanne Saffell. Some two years later, plaintiffs filed suit against defendants after discovering that their entire house had become structurally unsound because of a termite infestation. The suit pleaded claims for breach of contract, fraudulent misrepresentation, silent fraud, and innocent misrepresentation, all of which were based on defendants' negative response to the seller disclosure statement query about whether there was any history of infestation. Because plaintiffs felt that they might not be able to prove actual knowledge of the termite infestation on defendants' part, they made the strategic decision to solely pursue the claim for innocent misrepresentation. This was not a sound strategy.

Defendants have continually maintained that innocent misrepresentation does not constitute a viable cause of action under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*. Defendants twice moved for summary disposition on this basis. The trial court first denied the motion, and the second time the trial court reserved a ruling until after plaintiffs had presented their proofs. Trial then proceeded on the assumption that plaintiffs had a cognizable cause of action. Defendants moved for a directed verdict after plaintiffs had presented their

proofs, but the trial court denied the motion. The jury rendered its verdict in favor of plaintiffs, and the trial court entered judgment.

Defendants appealed. The Court of Appeals, in a published decision, reversed the trial court's judgment and held "that innocent misrepresentation is not a viable theory of liability under the [SDA]." *Roberts v Saffell*, 280 Mich App 397, 399 (2008) (*Roberts I*). Plaintiffs sought leave to appeal in this Court. This Court considered the application and heard oral argument in regard to whether to accept the application or take other peremptory action. *Roberts v Saffell*, 483 Mich 943 (2009). Following the parties' arguments, this Court affirmed the Court of Appeals' conclusion that "a claim for innocent misrepresentation requires that a defendant make a false statement *without knowledge* of its falsity . . . " *Roberts v Saffell*, 483 Mich 1089, 1090 (2009).[1] From this rather unremarkable proposition, this Court stated that the panel had properly concluded that plaintiffs' claim for innocent misrepresentation did not constitute a viable cause of action under the SDA, *id*., which requires a statement regarding "the condition and information concerning the property, *known* by the seller," MCL 565.957(1).

On first remand, the trial court conducted a hearing on defendants' motion for entry of a judgment and attorney fees. The trial court openly provided its unsolicited view on its "concept of justice and the meanings of justice and where does justice come from." The trial court concluded that

> it is essentially the notion that at the conclusion of a dispute that the right result has been reached. That people feel comfortable with the result. There are winners, there are losers, but they feel comfortable about the result.

Apparently applying its subjective view of justice in this case, the trial court denied defendants' motion for attorney fees, believing it would be a "manifest injustice, it's wrong, it's a bad result, it would be a terrible thing to do." The trial court then openly stated that it would not grant the motion unless "I'm directly told to do so by the court of appeals."

Defendants again appealed. *Roberts v Saffell*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 295500) (*Roberts II*). The Court of Appeals issued an opinion that was rather sympathetic to plaintiffs' position, but the panel "reluctantly conclude[d] that the contract requires the trial court to hold further proceedings regarding defendants' attorney fee request." *Id*. at 2. The panel expressly "remand[ed] this case to the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*. The panel also entertained "defendants' request that we order the case be heard by a different judge upon remand," but rejected this request because the "trial court indicated it would award the attorney fees if so ordered by this Court, albeit reluctantly." *Id*. at 2-3. In sum, despite the conciliatory language in the opinion, the panel clearly

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[1] See *Roberts I*, 280 Mich App at 414-415 (2008).

stated that "the trial court was required to enforce the contract as written" and ordered "the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*. at 2. This Court denied leave to appeal. *Roberts v Saffell*, 490 Mich 895 (2011).

On second remand, the trial court conducted a second hearing on defendants' motion for entry of a judgment and attorney fees. The trial court again injected its subjective sense of justice into the proceedings. The following colloquy occurred:

> *The Court*: I guess, you know, I feel better about it if somewhere along the way you discover who put in those pristine 2x4's next to the termite riddled 2x4's, did you really win or just get lucky?"
>
> [*Defense counsel*]: We prevailed.
>
> *The Court*: [Plaintiffs' counsel's] clients get cheated?
>
> [Defense counsel]: No.
>
> *The Court*: Really?
>
> [*Defense counsel*]: They voluntarily dismissed a cause of action going forward on innocent misrepresentation, not withstanding the law doesn't allow recovery, that's not being cheated, that's the legal process.
>
> *The Court*: My question is, were there in fact pristine white 2x4's sistered next to termite riddled 2x4's, and who did that, you ever figure that out? They sue the wrong people?
>
> Never mind, it's rhetorical.

At the end of the hearing, the trial court stated:

> I'm going to provide a written opinion.
>
> I'm going to look at the legal issue regarding damages from the defendant's point of view, whether they need to be pled, whether they need to be proven and regardless of how I resolve that issue — regardless of how I resolve that issue I will then make findings with regard to attorney fees in this particular case.
>
> So, one way or the other you can go back to the Court of Appeals, you either get the fees or you won't get the fees, but you won't have to come back here and argue them again.

In its written decision and order, the trial court concluded that "Defendants cheated the Plaintiffs" and that it remained "this Court's opinion that those six citizens who listened to this trial understood the case, understood their obligation to base a verdict on the Defendants' actual knowledge and failure to disclose and that the jury's verdict should be reinstated."[2] The trial court concluded that defendants

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[2] Of course, the trial court did not explain in its written opinion how "the case nonetheless proceeded to trial as if on an intentional misrepresentation theory, which, unlike an innocent misrepresentation theory, required proof of defendants' knowledge of the infestation and of their

"should not be paid for their deception." Turning to the question of attorney fees, the trial court stated that "[i]f this case continues to be a vehicle for injustice, . . . then attorney's fees will have to be awarded." Yet the trial court concluded that because "the source of the fee award arises in a contract, the fees are considered damages, not costs." The trial court reasoned "that the failure to make a claim for fees and offer proofs at trial now precludes [Defendants] from an award." The trial court found that defendants should have brought a counterclaim, but did not, and thus because defendants "failed to claim fees as damages at trial, this Court declines to award them here."

Defendants appealed for the third time. *Roberts v Saffell*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2014 (Docket No. 312354) (*Roberts III*). The Court of Appeals first rejected the trial court's conclusion that defendants were required to file a counterclaim to obtain attorney fees under the contract. The panel then held that

> [i]n any event, the trial court in this case was bound by the law of the case to award defendants' [sic] their reasonable attorney fees under the contract. We are similarly bound. Under the law of the case doctrine, "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies to explicit or implicit issues actually decided. *Id*. However, the doctrine "does not apply to an issue that was raised but not decided by an appellate court." *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 697; 513 NW2d 230 (1994). [*Id*. at 7.]

The panel explained that

> [i]n *Roberts II*, this Court found defendants to be the prevailing party and held that the contractual attorney fee provision applied. *Roberts II*, unpub [op] at 2. After determining that the trial court erred in failing to grant defendants' attorney fee request, this Court "remand[ed] this case to the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract." *Id*. . . .
>
> * * *
>
> The contract does not specify that the attorney fees must be established at trial. But rather than give the defendants the

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failure to disclose it to plaintiffs." *Roberts v Saffell*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2014 (Docket No. 312354), p 2 n 2 (*Roberts III*). More confounding is that "the record suggests that the trial court instructed the jury on those elements, notwithstanding the fact that the remaining innocent misrepresentation claim did not require them to be proven." *Id*.

> opportunity ordered by this Court, the trial court again denied their fee request. This Court determined that defendants were the prevailing party and that they thus were contractually entitled to an award of reasonable attorney fees. The trial court was bound by that decision and was directed to establish those fees. [*Id*. at 7-8.]

Twice, the trial court, which has openly and vehemently expressed its unhappiness with defendants' appellate victories in this case, declined to award the contract-required fees. During these proceedings, the trial court repeatedly called defendants deceptive and even, at times, called them cheats. The trial court also demeaned the defense attorneys' efforts as "creating the opportunity for this miscarriage of justice to unfold" and belittled defense appellate counsel's success by comparing him to a blind squirrel that occasionally finds a nut.

Twice, the Court of Appeals has had to overturn the trial court's recalcitrance. Despite an order from this Court and the Court of Appeals, the trial court declined to enter an award for attorney fees because "[t]o characterize an award of fees to the Defendants in the circumstances presented by this case as a manifest injustice is to demean the word manifest." Yet "the trial court in this case was bound by the law of the case to award defendants' [sic] their reasonable attorney fees under the contract." *Roberts III*, unpub op at 7. Indeed the *Roberts III* panel recognized that it was similarly bound. *Id*. I write this statement to espouse my view that the trial court improperly invoked its own personal and subjective views of justice to decide this case. The trial court was required to follow the law of the case and, for this reason alone, I admonish the trial court for its repeated failure to follow the decisions of the appellate court. I agree with defense counsel's assertion before the Court of Appeals that the trial court's grandstanding and utter failure to follow the law has "increased the litigation costs which [defendants] must initially bear and [plaintiffs] are obligated for under the contract." Simply put, the trial court's bias has resulted in additional costs imposed on plaintiffs.

YOUNG, C.J., joins the statement of ZAHRA, J.

Leave to Appeal Granted December 12, 2014:

BERNSTEIN v SEYBURN, KAHN, GINN, BESS, & SERLIN, PC, No. 149032; Court of Appeals No. 313894.

On order of the Court, the application for leave to appeal the February 20, 2014 judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the plaintiff's claim for legal malpractice accrued at the time the defendants discontinued the provision of generalized legal services to the plaintiff and whether those services were "the matters out of which the claim for malpractice arose" under MCL 600.5838, see *Levy v Martin*, 463 Mich 478 (2001).

The State Bar of Michigan Professional Ethics Committee is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 12, 2014:

PEOPLE v MCNUTT, No. 149423; Court of Appeals No. 313621. We note that, contrary to the Court of Appeals holding, trial counsel did not affirmatively waive the defendant's request for specific instructions by making a record that the judge had declined to give the instructions as requested and concluding his remarks with, "Thank you, Your Honor." Contrast *People v Kowalski*, 489 Mich 488, 504-505 (2011). However, we conclude that, regardless of whether the defendant waived review of the jury instructions, the instructions did not result in outcome-determinative error.

Leave to Appeal Denied December 16, 2014:

PEOPLE v ALBERS, No. 149443; Court of Appeals No. 319947.

Leave to Appeal Granted December 19, 2014:

LEGO v LISS, Nos. 149246 and 149247; Court of Appeals Nos. 312392 and 312406. The parties shall address: (1) whether, and if so to what degree, a defendant governmental actor's mental state or level of culpability is relevant to determining what constitutes normal, inherent, and foreseeable risks of the firefighter's or police officer's profession, under MCL 600.2966; and (2) whether the defendant's alleged violation of numerous departmental safety procedures is relevant to determining whether the shooting in this case was one of the normal, inherent and foreseeable risks of plaintiff Michael Lego's profession. In addressing the first issue, the parties shall also address whether, and if so to what extent, MCL 600.2967 informs the interpretation of MCL 600.2966.

BLACK v SHAFER, No. 149516; Court of Appeals No. 312379. The parties shall address: (1) whether this action sounds in ordinary negligence or in premises liability; (2) the role, if any, of licensor-licensee relationships in this action; (3) the specific nature of the duty, if any, owed by defendant Anthony Shafer to the plaintiff's next friend, Jessica Bitner, with respect to Bitner's injury, including whether the parties had a legally significant "special relationship," see generally, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988); (4) whether a reasonable juror could determine that a duty was breached; (5) the import of a third party's criminal act in negligently discharging a firearm; and (6) causation generally.

Summary Disposition December 23, 2014:

PEOPLE v GOREE, No. 149213; Court of Appeals No. 319974. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Based on our review of the record, the circuit court

granted original appointed appellate counsel's motion to withdraw, but denied the defendant's request for the appointment of substitute appellate counsel. On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, the issues raised by the defendant in his motion for relief from judgment that was filed in 2013. We do not retain jurisdiction.

PEOPLE v KENTREZE WHITE, No. 149250; Court of Appeals No. 320151. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Based on our review of the record, the circuit court granted original appointed appellate counsel's motion to withdraw, but denied the defendant's request for the appointment of substitute appellate counsel. On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, the issues raised by the defendant in his motion for relief from judgment that was filed in 2013. We do not retain jurisdiction.

BAILEY v SCHAAF, No. 149311; reported below: 304 Mich App 324. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals February 20, 2014 opinion setting forth a hypothetical scenario in which defendant Hi-Tech Protection and its employees were not in the business of providing security, because the panel's conclusion in that regard is contrary to law. See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 214 (1991) ("The knowledge possessed by a corporation *about a particular thing* is the sum total of all the knowledge which its officers and agents, *who are authorized and charged with the doing of the particular thing* acquire, while acting under and within the scope of their authority.") (emphasis added; internal quotations omitted). In all other respects, leave to appeal and leave to appeal as cross-appellant are denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v MABEN, No. 149843; Court of Appeals No. 321732. Pursuant to MCR 7.302(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 Issue III in the principal delayed application prepared by appellate defense counsel at the Court of Appeals, alongside Issues I and II, where leave to appeal was previously granted. On remand, the Court of Appeals shall hold this case in abeyance pending this Court's decision in *People v Lockridge* (Docket No. 149073). After *Lockridge* is decided, the Court of

Appeals shall consider the defendant's Issue III in light of *Lockridge*. With respect to all other issues not being addressed by the Court of Appeals, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE V BELT, No. 149914; Court of Appeals No. 321257. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Kalamazoo Circuit Court, which shall allow the defendant the opportunity to withdraw her guilty plea. See *People v Cobbs*, 443 Mich 276 (1993). We note that the defendant's plea proceeding occurred prior to the effective date of MCR 6.310(B)(3).

We further order the Kalamazoo 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 on remand. We do not retain jurisdiction.

PEOPLE V TAYWON WILLIAMS, No. 149949; Court of Appeals No. 311755. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. The court articulated substantial and compelling reasons for departing from the guidelines with respect to the defendant's convictions for armed robbery, assault with intent to murder, and torture, but it failed to articulate any rationale for the particular departures made. *People v Smith*, 482 Mich 292 (2008). On remand, the court shall either issue an order that articulates why the extent of the departures is warranted, or 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.

VARRAN V GRANNEMAN, No. 150274; Court of Appeals No. 321866. Pursuant to MCR 7.302(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 further consideration. On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue of whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Washtenaw Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the defendant-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Washtenaw Circuit Court Family Division's order is not appealable by right, it may then dismiss the defendant-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012).

We direct the Court of Appeals' attention to the fact that we are also remanding the related case of *Varran v Granneman* (Docket No. 150319) and that the related cases, *Varran v Granneman* (Court of Appeals Docket Nos. 324412 and 324763), are currently pending in the Court of Appeals.

VARRAN v GRANNEMAN, No. 150319; Court of Appeals 322437. Pursuant to MCR 7.302(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 further consideration. On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue of whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Washtenaw Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the defendant-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Washtenaw Circuit Court Family Division's order is not appealable by right, it may then dismiss the defendant-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012).

We direct the Court of Appeals' attention to the fact that we are also remanding the related case of *Varran v Granneman* (Docket No. 150274) and that the related cases, *Varran v Granneman* (Court of Appeals Docket Nos. 324412 and 324763), are currently pending in the Court of Appeals.

The motion to consolidate is denied without prejudice to a party filing a motion to consolidate in the Court of Appeals.

Leave to Appeal Granted December 23, 2014:

GLAUBIUS v GLAUBIUS, No. 150206; reported below: 306 Mich App 157. The parties shall include among the issues to be briefed: (1) whether the defendant was merely the "presumed father" of the minor child, see MCL 722.1433(4), or whether he was the "affiliated father," see MCL 722.1433(2), due to certain aspects of the parties' divorce judgment — provisions that "t[ook] as confessed" the complaint allegation that the parties had had one child, that referred to the parties as mother and father, and that provided for child custody and visitation; (2) whether the plaintiff lacked a remedy under the Revocation of Paternity Act, MCL 722.1431 *et seq*., for the reason that the divorce judgment precluded her effort to obtain a determination under MCL 722.1441(1)(a) that the minor child was born out of wedlock; and (3) whether the alleged paternity determination in the judgment of divorce was res judicata as to the question of the identity of the child's legal father.

The Children's Law and Family Law Sections of the State Bar of Michigan and the University of Michigan Law School Child Welfare Appellate Clinic 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.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 23, 2014:

PEOPLE v TROWBRIDGE, No. 146357; Court of Appeals No. 300460. The motion to expand the record is granted. By order of October 3, 2014, the prosecuting attorney was directed to answer the application for leave to appeal the September 25, 2012 judgment of the Court of Appeals. The answer having been received, the application for leave to appeal is again considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the Court of Appeals correctly resolved the defendant's ineffective assistance of counsel claim in light of *People v Douglas*, 496 Mich 557 (2014). 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.

PEOPLE v TIMOTHY JACKSON, No. 149798; Court of Appeals No. 310177. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the challenged testimony of Jacklyn Price regarding the defendant's prior sexual relationships was admissible res gestae evidence; (2) if so, whether the prosecutor was required to provide notice pursuant to MRE 404(b)(2); and (3) whether, if notice was required, any failure in this regard was prejudicial error warranting reversal. The parties should not submit mere restatements of their application papers.

BEALS v STATE OF MICHIGAN, No. 149901; Court of Appeals No. 310231. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether defendant William J. Harmon's alleged failure to act was *the* proximate cause of the decedent's death. MCL 691.1407(2)(c). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied December 23, 2014:

GHANAM v DOES, No. 148726; reported below: 303 Mich App 522.

PEOPLE v LEGION, No. 149241; Court of Appeals No. 318976.

FORNER v ALLENDALE CHARTER TOWNSHIP, No. 149332; Court of Appeals No. 317298.

BUTTON v TIM BILLS TRUCKING, INC, No. 149389; Court of Appeals No. 306724.

LOWE'S HOME CENTERS, INC v MARQUETTE TOWNSHIP (HOME DEPOT USA, INC v BREITUNG TOWNSHIP), Nos. 149407 and 149408; Court of Appeals Nos. 314111 and 314301.

PEOPLE v ERIC YOUNG, No. 149734; Court of Appeals No. 314217.

PEOPLE v ROSCOE OWENS, No. 149890; Court of Appeals No. 321985.

WHITEHEAD v DHRUVAN, No. 150062; Court of Appeals No. 320117.

In re CAMPBELL/METCALF, No. 150519; Court of Appeals No. 319946.

COWAN v FATA, No. 150636; Court of Appeals No. 324493.

Summary Disposition December 29, 2014:

PEOPLE v BOROM, No. 148674; Court of Appeals No. 313750. On October 22, 2014, the Court heard oral argument on the application for leave to appeal the December 19, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In this case, the defendant is charged with two counts of first-degree child abuse, as both a principal and an aider and abettor, and one count of first-degree felony murder, the predicate felony being the second count of first-degree child abuse occurring on July 26, 2011. In lieu of granting leave to appeal, if the prosecutor proceeds to trial on an aiding and abetting theory, we direct the Wayne Circuit Court, pursuant to MCR 7.301(A), to require that, if the jury finds the defendant guilty of the second count of first-degree child abuse or felony murder, the jury return a special verdict form specifying whether any such verdict was premised on a theory that the defendant acted as a principal or that the defendant aided or abetted the commission of either of the offenses. See MCR 2.515(A) and MCR 6.001(D). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should now be reviewed by this Court.

MARKMAN, J. (*concurring*). I concur in this Court's interlocutory denial and write separately only to respond to the dissent, which concludes that there was not probable cause that defendant possessed the necessary intent to sustain a charge of first-degree child abuse.

Defendant, her 17-year-old boyfriend, and her 16-month-old child lived in the home of defendant's mother. In July 2011, the child was injured on three separate occasions while at the home. First, the child suffered an injury to his shoulder on July 9, for which he was treated at a hospital and returned home. Second, on or about July 23, the child suffered second- and third-degree burns to the back of his head and face, for which he was not treated. Third, the child suffered a skull fracture on July 26, for which he was brought again to the hospital, where he died two days later.

Authorities investigated the injuries that led to the child's death, and defendant was eventually charged with three counts of first-degree child abuse and one count of first-degree felony murder.[1]

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[1] In Michigan, murder is divided into two degrees: first and second. First-degree murder is defined in MCL 750.316 and includes "premeditated murder" and "felony murder." *People v Williams*, 475 Mich 101, 103 (2006). "All other murders" that are not first-degree murder "are murders in the second degree." *People v Mendoza*, 468 Mich 527, 534 (2003). "First-degree felony murder is the killing of a human being with

At her preliminary examination, several witnesses testified concerning the circumstances, and likely causes, of the child's injuries, and the district court considered various out-of-court statements of defendant and her boyfriend. The evidence generally indicated that the child suffered the first injury while in the boyfriend's care and that it was not deemed suspicious at the time. However, the facts surrounding the second and third injuries were of greater concern. Concerning the second injury, both defendant and her boyfriend asserted that the child was burned when the child accidentally turned on the hot water during a bath. The boyfriend indicated that *he* was the only person bathing the child at the time the child was burned, while defendant indicated that *she* was the only person bathing the child. The medical examiner opined that it was unlikely that the child had accidentally turned on the hot water and burned himself. Concerning the third and fatal injury, the testimony indicated that the child had been left alone in the boyfriend's care. He stated that he saw the child strike his head when he accidentally fell off the porch stairs. Defendant, on the other hand, stated variously that nothing caused the injury, that she saw the child fall off the porch stairs and injure himself, and that she was not at home when the injury occurred. Defendant, at her mother's urging, eventually called 911 that evening. According to the medical examiner, the fatal injury was most consistent with the child being thrown against a "firm object," and the death was the result of homicide.

The prosecutor moved the district court to dismiss the charge of first-degree child abuse arising out of the first injury and bind defendant over to the circuit court for trial only on the remaining three charges, and the district court did so. Defendant then moved the circuit court to dismiss the charges in their entirety, and the motion was denied. The Court of Appeals affirmed.

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Perkins*, 468 Mich 448, 452 (2003). "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *People v Yost*, 468 Mich 122, 126 (2003), quoting *People*

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malice while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]." *People v Ream*, 481 Mich 223, 241 (2008) (citation, quotation marks, and emphasis omitted). One felony specifically enumerated in MCL 750.316(1)(b) is "child abuse in the first degree." "[M]alice is a term of art." *People v Aaron*, 409 Mich 672, 712 (1980). "A legal term of art is a technical word or phrase that has acquired a particular and appropriate meaning in the law." *People v Law*, 459 Mich 419, 425 n 8 (1999). "[M]alice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of [the] defendant's behavior is to cause death or great bodily harm." *Aaron*, 409 Mich at 728.

v Justice (*After Remand*), 454 Mich 334, 344 (1997). "The prosecutor need not establish beyond a reasonable doubt that a crime was committed." *Perkins*, 468 Mich at 452. "Absent an abuse of discretion, reviewing courts should not disturb a magistrate's decision to bind a criminal defendant over for trial." *People v Plunkett*, 485 Mich 50, 57 (2010). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691 (2003).

At the time relevant to this case, the first-degree child abuse statute, MCL 750.136b(2), read as follows:

> A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years. [As amended by 2008 PA 577.]

To prove first-degree child abuse, the prosecutor must show that the "defendant intended to commit the act" and that the "defendant intended to cause serious physical [or serious mental] harm or knew that serious physical [or serious mental] harm would be caused by" the act. *People v Maynor*, 470 Mich 289, 291 (2004).[2]

According to the dissent, defendant did not possess the necessary intent to sustain the first-degree child abuse charge arising out of the *third* injury. First, the dissent contends that defendant did not possess the necessary intent as a principal because she did not intend to cause serious physical or serious mental harm by leaving the child with her boyfriend, nor did she know that serious physical or serious mental harm would be caused by doing so. Second, the dissent contends that defendant did not possess the necessary intent as an aider and abettor because she did not have knowledge of her boyfriend's intent to commit first-degree child abuse.

Concerning the first contention, I do not believe the district court erred by finding probable cause that defendant had knowledge that serious physical or serious mental harm would be caused by leaving the child with her boyfriend. The evidence indicated that the child had suffered two serious injuries in a two-week period, each time while in the boyfriend's care. The second injury in particular cast the first injury in a suspicious light. In addition, defendant's mother had warned her that bringing the child to the hospital following the second injury could result in Children's Protective Services removing the child from the home. Given the successive injuries, and given the warning about Children's Protective Services intervention, it is not unreasonable to infer that

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[2] According to the dissent, "only acts by which a defendant specifically intended to harm the child are punishable under the first-degree child abuse statute." In the law, "specific intent . . . involve[s] a particular criminal intent beyond the act done . . . ." *People v Beaudin*, 417 Mich 570, 573-574 (1983). "Specific intent" is distinguishable from "general intent," which "involve[s] merely the intent to do the physical act." *Id*.

defendant knew that her boyfriend was abusing the child and causing him serious physical harm. Given defendant's knowledge of the ongoing serious physical harm caused by her boyfriend on two prior and recent occasions on which the child was left alone with him, there was sufficient probable cause to believe that she "knew that serious physical harm would be caused by" leaving the child in her boyfriend's exclusive care on a *third* occasion. *Maynor*, 470 Mich at 291.

Concerning the second contention, I again do not believe the district court erred by finding probable cause that defendant had knowledge of her boyfriend's intent to commit first-degree child abuse. The aiding-and-abetting statute, MCL 767.39, reads as follows:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Aiding and abetting "is simply a theory of prosecution, not a separate substantive offense." *People v Perry*, 460 Mich 55, 63 n 20 (1999). "[A] defendant is liable for the crime the defendant intends to aid or abet . . . ." *People v Robinson*, 475 Mich 1, 14-15 (2006). "This includes both intending to commit the crime and *aiding someone with knowledge that he or she intends to commit the crime*." *Id*. at 15 n 39 (emphasis added).

As already noted, the evidence here indicated that defendant knew that her boyfriend was physically abusing the child and causing him serious physical harm. If so, there was obviously probable cause to believe that defendant knew that her boyfriend harbored an intent to cause the child such harm. By placing the child in his care on the day in question, defendant "aid[ed] someone with knowledge that he or she intend[ed] to commit the crime" of first-degree child abuse. *Id*.

In conclusion, and contrary to the dissent, I do not believe the district court abused its discretion by binding defendant over on the charge of first-degree child abuse arising out of the fatal injury either as a principal or on an aiding-and-abetting theory. Furthermore, because I disagree that the district court abused its discretion by binding defendant over on the predicate felony, I similarly disagree that it abused its discretion by binding defendant over on the charge of first-degree felony murder. Therefore, I concur in this Court's order denying interlocutory leave to appeal.[3]

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[3] I concur in the Court's order for another reason. The prosecutor may present alternative theories to the jury that defendant was guilty of the charges either as a principal or as an aider and abettor. See *People v Gadomski*, 232 Mich App 24, 31 (1998). Ordinarily, "the jury in a criminal prosecution . . . return[s] a general verdict—guilty or not guilty." *People v Ramsey*, 422 Mich 500, 525 (1985) (LEVIN, J., dissenting). Thus, when the prosecutor presents alternative theories of guilt and the jury

CAVANAGH, J. (*dissenting*). I disagree with the majority's interlocutory denial of leave to appeal in this case. Instead, I would hold that the facts alleged are insufficient to bind defendant over on charges of first-degree child abuse and felony murder under an aiding-and-abetting theory. Therefore, I respectfully dissent.

BACKGROUND

Defendant and her 16-month-old son were living in the home of defendant's mother. Defendant's 17-year-old boyfriend also lived with them. In July 2011, defendant's son suffered three injuries over the course of several weeks while under her boyfriend's supervision.

The first injury resulted in a broken arm and shoulder. Defendant's boyfriend claimed that the injury occurred when the child fell off the side of the stairs. Defendant and her boyfriend did not initially take the child to the hospital; however, defendant's mother later discovered the injury and took defendant, defendant's boyfriend, and the child to the hospital where the child was treated for the injury.

The second injury occurred two weeks later. The child suffered third-degree burns on the back of his head and second-degree burns across his face. Defendant's boyfriend claimed that the burn injuries were caused when he put the child in the bathtub and started the water before leaving the room to get a diaper; he returned to discover that the child had turned on the hot water, burning his face and head. Defendant's mother talked to defendant about taking the child to the doctor, but warned defendant that the child would be taken by Child Protective Services for having sustained a second serious injury. Defendant treated the burns with salve and bandages at the advice of her mother, who was a healthcare worker, instead of taking the child to the doctor. The medical examiner later determined that the burn pattern was consistent with a situation in which the child's face was toward the floor and hot water was poured on the back of his head and flowed down both sides of his head.

The third injury occurred a week later where the child suffered a blow to the head and became unresponsive. Defendant's mother received a panicked telephone call from defendant, saying that she could not wake

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returns a general verdict of guilty, the jury does not specify under which theory it found the defendant guilty. See, e.g., *People v Booker* (*After Remand*), 208 Mich App 163, 170 (1994). However, MCR 2.515(A) provides that "[t]he court may require the jury to return a special verdict in the form of a written finding on [an] issue of fact, rather than a general verdict." Under this Court's order, therefore, if the prosecutor presents alternative theories of guilt and the jury finds defendant guilty of one or more of the charges, the lower courts will be able to identify whether the verdicts were based on defendant's being a principal or an aiding-and-abetting theory. Put simply, this Court's order provides guidance for the lower courts in any proceedings that might arise after trial. For this additional reason, I concur.

the child. After speaking with defendant's boyfriend, during two separate phone calls defendant's mother told him and defendant each to call 911. Defendant called 911, and an ambulance arrived and took the child to the hospital, where he died days later. Defendant's boyfriend explained that the third injury had occurred when he and the child were playing with a ball, while defendant's boyfriend was in the yard and the child was on the porch. When defendant's boyfriend went to retrieve the ball after the child threw it past him, the child fell off the porch. During a police interview, defendant's boyfriend wrote a statement explaining that defendant was not present when any of the injuries occurred. Defendant's boyfriend and defendant told police that defendant had initially lied about being present during the injuries because she was afraid that she would lose custody of the child because her boyfriend was not old enough to be watching the child alone.

The medical examiner opined that the child's death was caused by a massive subdural hematoma that occurred as the result of a blunt-force blow to the head powerful enough to fracture the skull. The examiner concluded that the injury did not result from a four- or five-foot fall, as described by defendant and defendant's boyfriend. After reviewing a reenactment by defendant's boyfriend of how the injuries allegedly occurred, the medical examiner concluded that the injuries did not occur as described. The medical examiner opined that it was more likely that the child had been thrown with force against a hard object. The medical examiner determined that the death was a homicide.

Defendant was charged with two counts of first-degree child abuse, premised on the first and third incidents, and one count of felony murder based on the first-degree child abuse charge stemming from the third incident. The district court bound defendant over for trial, but dismissed the count of first-degree child abuse stemming from the first incident. Defendant moved to quash all charges, alleging in part that her failure to act could not constitute first-degree child abuse. The circuit court denied the motion, and the Court of Appeals affirmed.

STANDARD OF REVIEW

Issues of statutory interpretation are reviewed de novo. *People v Tennyson*, 487 Mich 730, 735 (2010). A district court's decision whether to bind over a defendant is reviewed for an abuse of discretion. *People v Perkins*, 468 Mich 448, 452 (2003). A bindover is sufficient if the offense charged has been committed and there is probable cause to believe that the defendant committed it. See *People v Stafford*, 434 Mich 125, 133 (1990).

ANALYSIS

As stated, under the prosecution's theory of the case, first-degree child abuse serves as the predicate felony for the charge of felony murder. The prosecution attempts to establish first-degree child abuse in two alternative ways. First, the prosecution contends that defendant commit-

ted first-degree child abuse as a principal by leaving the child in her boyfriend's care with knowledge that serious injury would likely result. Second, the prosecution attempts to establish first-degree child abuse under an aiding-and-abetting theory. For the reasons stated below, I do not think that the prosecution can establish first-degree child abuse by defendant and, therefore, defendant cannot be bound over for first-degree child abuse or felony murder. I will address both of these theories in turn.

FIRST-DEGREE CHILD ABUSE AS A PRINCIPAL

First-degree child abuse, MCL 750.136b(2), requires that a person "knowingly or intentionally cause serious physical or serious mental harm to a child." In my view, it is helpful in resolving this case to compare the first- and second-degree child abuse provisions. See *G C Timmis & Co v Guardian Alarm Co,* 468 Mich 416, 421 (2003) (explaining that individual statutory provisions "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute") (quotation marks and citation omitted). *People v Maynor*, 470 Mich 289, 291 (2004), examined MCL 750.136b(2), and a majority held that first-degree child abuse "requires the prosecution to establish . . . not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act." Although the *Maynor* majority did not expressly compare first-degree child abuse to second-degree child abuse, I believe that such an approach supports the *Maynor* majority's holding.

Specifically, the second-degree child abuse statute, MCL 750.136b(3), states:

> A person is guilty of child abuse in the second degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

The *Maynor* concurrence analyzed the second-degree child abuse statute and noted that "the words 'knowingly' and 'intentionally' modify the phrase 'commits an act.' " *Maynor*, 470 Mich at 300 (WEAVER, J., concurring). Accordingly, the concurrence explained that in order to establish second-degree child abuse, the prosecution must prove only that a defendant intended to commit an act likely to cause harm, not that a defendant actually intended serious physical or mental harm. *Id*. at 300-301. The concurrence concluded that the Legislature could have included within the first-degree child abuse provision language similar to

that within the second-degree child abuse provision if first-degree child abuse, like second-degree child abuse, *only* required proof that a defendant intended to *commit the act* that caused harm. *Id*. at 301.

As the *Maynor* concurrence demonstrates, when the first- and second-degree provisions of the child abuse statute are read together, it is clear that the first-degree provision is intended to punish conduct by which a defendant actually intended to cause harm, whereas the second-degree provision specifically criminalizes both omissions and reckless acts. Thus, when viewing the first- and second-degree child abuse provisions together, it defies logic to conclude that the Legislature would intend to punish as first-degree child abuse acts of recklessness or omission when the defendant lacks the specific intent that the harm would result as required under the first-degree child abuse provision. Because the Legislature decided to place acts of omission and recklessness in the second-degree provision, and not the first-degree provision, that conduct is only punishable as second-degree child abuse. See *Robinson v City of Lansing*, 486 Mich 1, 15 (2010) (stating that the Court "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute") (quotation marks and citation omitted); see, also, *Jennings v Southwood*, 446 Mich 125, 142 (1994) ("[E]xpress mention in a statute of one thing implies the exclusion of other similar things.") (quotation marks and citation omitted). Accordingly, only acts by which a defendant specifically intended to harm the child are punishable under the first-degree child abuse statute.

In my view, defendant's alleged conduct may be, at most, characterized as reckless. See *Black's Law Dictionary* (8th ed) (defining "reckless" as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk"). While there *may* be sufficient evidence to establish probable cause for a charge of second-degree child abuse based on defendant's decision to leave the child with her boyfriend, in my opinion defendant's potentially reckless conduct does not give rise to the level of intent necessary to bind her over as a principal under the first-degree child abuse statute. Therefore, because I believe defendant's alleged conduct is, at most, reckless, which does not rise to the level of first-degree child abuse, there is not, as a matter of law, probable cause to bind defendant over on a charge of first-degree child abuse as a principal.[4]

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[4] The prosecution also argues that defendant's actions constituted an omission punishable by the child abuse statute. MCL 750.136b(1)(c) defines "omission" for purposes of the child abuse statute as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." The prosecution argues that any omission by a defendant that falls outside the definition of "omission" in MCL 750.136b(1)(c) can constitute first-degree child abuse. However, the inclusion of acts of omission within the second-degree child abuse provision implies the exclusion of those acts from the first-degree child abuse provision because the express mention in a statute of one thing

FIRST-DEGREE CHILD ABUSE AS AN AIDER AND ABETTOR

People v Kelly, 423 Mich 261, 278 (1985), generally explains that there are two forms of requisite intent under an aiding-and-abetting theory. First, a defendant may have the criminal intent necessary to be convicted of the crime as the principal. *Id*. Second, a defendant may also be convicted of a crime under an aiding-and-abetting theory if he or she has knowledge of a principal's intent to commit a crime when performing acts or giving encouragement that assisted the commission of that crime. *Id*. at 278-279. See, also, *People v Burrel*, 253 Mich 321, 322-323 (1931) (explaining that, had the defendant known of the principal's intentions when providing his aid, he could have been charged under an aiding-and-abetting theory); Perkins & Boyce, Criminal Law (3d ed), p 743. However, even if a defendant aids in the principal's resulting crime, the defendant cannot be guilty as an aider and abettor if the defendant provided an "unwitting contribution." Perkins & Boyce, p 740. Thus, in order to bind a defendant over under an aiding-and-abetting theory when the defendant only had *knowledge* of the principal's intent, there must be probable cause that at the time of aiding and abetting the crime, the defendant not only knew or had reason to know of the *principal's intentions* but also shared the principal's purpose. See *id*.

Applying these basic elements, in my view the prosecution has not established probable cause to show that defendant's actions constitute aiding and abetting first-degree child abuse because the prosecution has not shown probable cause that defendant either (1) had the requisite intent to commit first-degree child abuse at the time that she left the child in her boyfriend's care or (2) knew that her boyfriend had the intent to commit first-degree child abuse at the time that defendant left the child in his care. As to the first form of intent, the prosecution does not argue that defendant specifically intended to cause serious physical or mental harm to the child by leaving the child with her boyfriend, and, as explained, defendant's actions do not support the argument that she had the intent required to bind her over under the first-degree child abuse statute as a principal. As to the second form of intent, the prosecution has offered no evidence to show that when defendant left the child with her boyfriend on the day in question, she knew of her boyfriend's intent to commit first-degree child abuse. In fact, there is no evidence that defendant's boyfriend *himself* had the requisite intent to commit first-

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implies the exclusion of other similar things. *Jennings*, 446 at 142. And the prosecution's argument also ignores the rule that when a statute specifically defines a given term, that definition alone controls. *Addison Twp v Barnhart*, 495 Mich 90, 98 (2014), quoting *Tryc v Mich Veterans' Facility,* 451 Mich 129, 136 (1996). Thus, reading the word "omission" into the first-degree child abuse statute and giving it a different meaning than the statutory definition violates the rules of statutory interpretation.

degree child abuse at that time.[5] Although defendant perhaps should have known that her boyfriend posed a potential danger to the child, the knowledge of mere potential danger does not sufficiently inform defendant of her boyfriend's later-to-be-formed specific intent, nor does knowledge of potential danger bring defendant's purpose in line with her boyfriend's alleged purpose to harm the child as required by our aiding-and-abetting jurisprudence. Therefore, the prosecution has not established probable cause to show that defendant committed first-degree child abuse under an aiding-and-abetting theory.

The prosecution, however, cites *People v Robinson*, 475 Mich 1, 6 (2006), to argue that to bind a defendant over on felony murder under an aiding-and-abetting theory, the prosecution only needs to show probable cause of malice. However, that argument is contrary to our caselaw. In *People v Riley (After Remand)*, 468 Mich 135, 140 (2003), we explained that in order to convict a defendant of felony murder under an aiding-and-abetting theory, the prosecution must prove that the defendant

> (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) *while committing, attempting to commit, or assisting in the commission of the predicate felony*. [Emphasis added.]

Thus, to convict defendant under an aiding-and-abetting theory of felony murder, the prosecution must still show that defendant committed, attempted to commit, or assisted in committing the predicate felony: first-degree child abuse. Therefore, while it is true that the prosecution in this case must establish probable cause of at least malice to fulfill the second element under the *Riley* test,[6] this does not relieve the prosecution of the duty to nonetheless establish probable cause of commission of

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[5] Indeed, there is no evidence of defendant's boyfriend's intent and defendant's knowledge of that intent beyond the prosecution's argument that defendant *should have known* that her boyfriend *might* pose a danger to the child, which is not the standard under the aiding-and-abetting theory.

[6] I note that it is questionable whether the prosecution can establish the second element of the *Riley* test. It appears that defendant did not actually intend to kill or do great bodily harm to the child in the instance underlying the charge at issue. Further, I question whether defendant's omission of leaving the child in the care of her boyfriend created a *high risk* of death or great bodily harm with the *knowledge* that death or great bodily harm was the *probable* result. However, because the parties were not directed to, and did not, address this point, I will not address it at this time.

the predicate felony (first-degree child abuse) and its requisite intent in order to fulfill the third *Riley* requirement.[7] Because the prosecution is unable to establish probable cause regarding defendant's specific intent or knowledge of her boyfriend's specific intent to commit first-degree child abuse, it is my view that the trial court erred by binding defendant over on charges of first-degree child abuse and felony murder.

CONCLUSION

For these reasons, I do not believe that there is sufficient evidence to show probable cause that defendant possessed the necessary intent to be bound over as a principle of first-degree child abuse or under an aiding-and-abetting theory. As a result, there is also insufficient evidence to establish probable cause that defendant committed first-degree child abuse as the predicate felony to felony murder. Therefore, I would reverse the judgment of the Court of Appeals and remand to the trial court with the instruction to dismiss the first-degree child abuse and felony-murder charges stemming from the child's death.

PEOPLE V OVERTON, No. 148347; Court of Appeals No. 308999. On October 7, 2014, the Court heard oral argument on the application for leave to appeal the October 31, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*). Call me a "textualist" or a "strict constructionist" if you must, but I agree with Justice MCCORMACK'S conclusion that defendant's conviction for first-degree criminal sexual conduct should be vacated because, on the basis of the plain language of MCL 750.520a(r), there was insufficient evidence to establish that defendant engaged in the "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* . . . ." (Emphasis added.) Specifically, I agree that, under the plain language of the statute, a finger cannot also constitute an "object" because to hold otherwise would render surplusage the phrase "part of a person's body," contrary to the rules of statutory interpretation. *In re MCI Telecom*

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[7] Further, the prosecution misreads the *Robinson* majority's opinion. While I continue to stand by my *Robinson* dissent, the reason that the prosecution in *Robinson* had to prove only malice is because felony murder and the underlying felony, assault with intent to do great bodily harm less than murder, shared the same intent—i.e., malice. Thus, when the prosecution established malice for one crime in *Robinson*, it also necessarily established the intent for the other. However, in this case, the specific intent of first-degree child abuse is a higher standard than the malice required for felony murder, see *Robinson*, 475 Mich at 14, and, as noted within, the prosecution must establish both: the malice related to felony murder and the intent required by the predicate felony.

Complaint, 460 Mich 396, 414 (1999) ("[A] court should avoid a construction that would render any part of the statute surplusage or nugatory."). I also agree that the phrase "a person's body" when juxtaposed against the phrase "another person's body" excludes the intrusion of an alleged victim's finger into his or her own genital or anal openings at a defendant's direction. As Justice MCCORMACK explains, in context the requirement that the intrusion be into "*another* person's body" necessarily refers to the body of someone else.

Our primary goal when interpreting statutes "is to give effect to the intent of the Legislature," and "[t]he first step in that determination is to review the language of the statute itself." *Id*. at 411. I agree with Justice MCCORMACK that the text of the statute unambiguously supports defendant and, as a result, it is up to the Legislature to amend the statutory provision, and thus provide adequate notice, if it wishes to clarify that the statute's plain language is inconsistent with its true intent. See *People v Turmon*, 417 Mich 638, 655 (1983) (explaining the indisputable proposition that due process requires that citizens "be apprised of conduct which a criminal statute prohibits"). Accordingly, I respectfully dissent.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the Court's order. I would reverse the defendant's first-degree criminal sexual conduct (CSC-I) conviction, for which he is serving 25 to 40 years.

The defendant is a Detroit police officer who was convicted by a jury for engaging in inappropriate sexual conduct with his girlfriend's 11-year-old daughter. The defendant's conviction for CSC-I is the result of an incident in which he "instructed" the victim about using a tampon. Specifically, the defendant had the victim insert a finger into her vagina while he held up a mirror in which she was to check her method. The defendant admitted telling the victim how to insert the tampon but denied telling her to digitally penetrate herself.

As charged against the defendant, CSC-I requires "engag[ing] in sexual penetration with another person" under the age of 13. MCL 750.520b(1)(a). "Sexual penetration," in turn, is defined in MCL 750.520a(r) as

> 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 genitalia or anal openings of another person's body, but emission of semen is not required.

The Court of Appeals was satisfied that the defendant "was engaged in the intrusion of a human body part—a finger—into the genital opening of another person's body—the victim's vagina—when the victim obeyed [the defendant's] instruction to digitally penetrate herself under the pretext of teaching her how to use a tampon." *People v Pope*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2013 (Docket Nos. 306372 and 308999), p 4. In other words, the panel found that the defendant had engaged in sexual penetration because he was responsible for the victim's *self*-penetration. The Court of Appeals ignored the plain language of the statute, however, which requires the intrusion of "any part of a person's body" or "any object" into "*another* person's body." MCL 750.520a(r) (emphasis added).

"Another" is not defined in the statute but "[c]ourts are to accord statutory words their ordinary and generally accepted meaning." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995). The ordinary meaning of "another" is, of course, someone else. In addition, the article "a" in the phrase "any body part of a person's body" underscores the statute's distinction between the person performing the penetration, on the one hand, and the person being penetrated, on the other. The Court of Appeals missed this distinction.

Nor can the victim's finger constitute an "object" for the purposes of MCL 750.520a(r). While "object" is not defined within the statute, the ordinary meaning does not include body parts. And it is reasonable to infer that the Legislature did not view body parts as encompassed within the term "object" since MCL 750.520a(r) specifically refers to them as a "part of a person's body" and as separate from an "object." If body parts could be counted as objects, there would have been no need to separately include "any part of a person's body" in the statute; "object" could have done the work. Indeed, there is no authority construing the victim's own finger as an object for the purposes of MCL 750.520a(r).[1]

Finally, the application of the CSC-I statute to the defendant's conduct here is in conflict with the pattern of the activities that are explicitly referred to in MCL 750.520a(r). As examples of "sexual penetration," the statute lists "sexual intercourse, cunnilingus, fellatio, anal intercourse." MCL 750.520a(r). The only acts enumerated are those requiring physical contact between two people. Under the doctrine of *ejusdem generis*, a broad term following a series of specific items "is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated; that is, because the listed items have a commonality, the general term is taken as sharing it." *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 349-350 (2003) (quotation marks and citation omitted). The intrusions targeted by the statute are restricted to those having the same character as the ones enumerated, i.e., acts involving physical contact between two people.

Undoubtedly, the defendant's general pattern of conduct towards the victim makes him entirely unsympathetic, and I see no problem with affirming his second-degree criminal sexual conduct (CSC-II) and gross indecency convictions that were based on other actions involving the

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[1] Although the prosecution argued that the victim's fingers were used as objects, it cited only cases involving penetration by the defendant's finger or an object that was not a body part. See, e.g., *People v Grissom*, 492 Mich 296, 300-301 (2012) (stating that the defendant "slid a ring with several stones on it down one of his fingers to the knuckle and . . . forced that finger into her vagina"); *Simmons v State*, 746 NE2d 81, 86 (Ind App, 2001) ("A finger may be considered an object under the statute."); *State v Grant*, 33 Conn App 133, 141 (1993) (holding that penetration of the child's vagina by the defendant's finger constituted sexual intercourse by an object). But with no allegation of force or any form of physical assistance used, there is a difference between a perpetrator's finger and a victim's.

victim. And it is certainly an understatement to say that the specific act at issue here is suspect; the act is likely even sufficient to sustain another conviction for CSC-II.[2] But the question is whether the defendant's instruction to the victim and her action in response was actually an intrusion "of any part of a person's body or of any object" into "another person's body" so that his 25- to 40-year sentence for CSC-I has support under the statute. The plain language of MCL 750.520b(1)(a) simply does not encompass the defendant's specific conduct here. Accordingly, I would vacate the defendant's CSC-I conviction.

Finally, in addition to the textual weakness I have identified, I believe the Court of Appeals' holding in this case should alert us to the possibility of overbreadth in connection with this statute in future cases. While the facts here do not, in my view, raise an overbreadth concern,[3] I worry that affirmance of the defendant's CSC-I conviction would provide support going forward for prosecuting truly innocuous and even common parenting events, such as a mother instructing her daughter about genital hygiene. Crucially, the statute at issue here has no *mens rea* requirement.

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[2] CSC-II criminalizes instances in which the offender "engages in *sexual contact* with another person" such as when, for example, the other person is under 13 years of age. MCL 750.520c(1)(a) (emphasis added). "Sexual contact" is defined as

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being *for the purpose of sexual arousal or gratification*, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger.

MCL 750.520a(q) (emphasis added). CSC-II does not require the physical interaction of two separate individuals, but merely necessitates that the offender "engage" in the touching, that the "toucher" (be that person the offender or the victim) do it intentionally (e.g., by instruction), and that the offender be acting for the purpose of his own sexual gratification. In this case, the defendant's intentional penetration instruction, the victim's obedience thereto, and the sexual nature of the interaction plainly fit the elements of CSC-II.

[3] "Generally, a defendant may only challenge a statute as vague or overbroad in light of the facts of the case at issue." *People v Douglas*, 295 Mich App 129, 140 (2011).

Therefore, with a victim's self-penetration now encompassed within it, there is no requirement that a defendant's involvement in that self-penetration be for a noninnocent purpose. Innocent conduct could thus be easily swept into the statute's broad reach.

Again, the defendant's conduct in this instance, especially when viewed against the backdrop of the other conduct for which he was separately convicted of CSC-II and gross indecency, permits an inference that his particular conduct was, in fact, for a noninnocent purpose. But because the statute does not require any showing of a noninnocent purpose, innocent parenting conduct could be subject to the same 25- to 40-year sentence. We can address that issue when and if it is put to us.

Summary Disposition December 30, 2014:

PEOPLE v KEY, No. 147679; Court of Appeals No. 306951. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court on the first-degree murder count, and we remand this case to the trial court for resentencing on that count under MCL 769.25. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v JACKIE THOMPSON, No. 148364; Court of Appeals No. 318128. Pursuant to MCR 7.302(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 whether the conduct of the defendant with the victim prior to the commission of the sentencing offense may be considered when scoring Offense Variable 7, and if so, what evidence may support that scoring. MCL 777.37; *People v McGraw,* 484 Mich 120 (2009). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

DEPARTMENT OF LICENSING & REGULATORY AFFAIRS v KHAN, No. 149560; Court of Appeals No. 318799. Pursuant to MCR 7.302(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 CHARLES CARTER, No. 149877; Court of Appeals No. 321801. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Wayne Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), MCL 769.1k (as amended effective October 17, 2014), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7).

Leave to Appeal Denied December 30, 2014:

PEOPLE v PRINCE, No. 144588; Court of Appeals No. 305703.

PEOPLE v COREY WATSON, No. 146734; Court of Appeals No. 306989.

PEOPLE v WINES, No. 147013; Court of Appeals No. 312441.

PEOPLE v STURDIVANT, No. 147080; Court of Appeals No. 314042. CAVANAGH, J., would grant leave to appeal.

PEOPLE v MENDO LOVE, No. 147098; Court of Appeals No. 308868.

PEOPLE v MENDO LOVE, No. 147171; Court of Appeals No. 308868.

PEOPLE v DONTEZ TILLMAN, No. 147469; Court of Appeals No. 296267.

PEOPLE v MCCLOUD, No. 147471; Court of Appeals No. 296256.

PEOPLE v CHARLES LEWIS, No. 148425; Court of Appeals No. 315520.

PEOPLE v ELKINS, No. 148497; Court of Appeals No. 317848.

PEOPLE v ROSCOE, No. 148890; reported below: 303 Mich App 633.

PEOPLE v CINTRON, No. 148934; Court of Appeals No. 317018.

PEOPLE v BURGOS, No. 148965; Court of Appeals No. 319533.

PEOPLE v FARR, No. 149095; Court of Appeals No. 316949.

PEOPLE v WILLIE EDWARDS, No. 149119; Court of Appeals No. 318081.

PEOPLE v SAMEL, No. 149154; Court of Appeals No. 320017.

K & M REAL ESTATE, LLC v RUBLOFF DEVELOPMENT GROUP, INC, Nos. 149181 and 149182; Court of Appeals Nos. 313892 and 315479.

PEOPLE v BROOKS, No. 149184; Court of Appeals No. 320110.

PEOPLE v DENNIS BROWN, No. 149216; Court of Appeals No. 319716.

PEOPLE v SCOTT DAVIS, No. 149226; Court of Appeals No. 318786.

PEOPLE v DALEPHENIA JONES, No. 149231; Court of Appeals No. 313050.

PEOPLE v HITT, No. 149256; Court of Appeals No. 319919.

BLACKMAN v GEICO INDEMNITY COMPANY, No. 149331; Court of Appeals No. 319910.

DUCHARME v DUCHARME, No. 149369; reported below: 305 Mich App 1.

SOKOLOWSKI v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 149374; Court of Appeals No. 307519.

PEOPLE v DOUGLAS KENNEDY, No. 149378; Court of Appeals No. 319489.

PEOPLE v HODGE, No. 149384; Court of Appeals No. 320841.

PEOPLE v HERBERT ALLEN, No. 149393; Court of Appeals No. 320199.

PEOPLE v BURT, No. 149394; Court of Appeals No. 320566.

PEOPLE v DANIELLE SCOTT, No. 149395; Court of Appeals No. 320119.

PEOPLE v SOUTHWELL, No. 149403; Court of Appeals No. 317896.

PEOPLE v KAVEO SALTERS, No. 149409; Court of Appeals No. 313766.

PEOPLE v GARDETTE, No. 149473; Court of Appeals No. 321187.

PEOPLE v DUC VAN NGUYEN, No. 149476; Court of Appeals No. 314193.

PEOPLE v MCNEES, No. 149486; Court of Appeals No. 320527.

PEOPLE v STONE, No. 149488; Court of Appeals No. 320620.

PEOPLE v SAREINI, No. 149497; Court of Appeals No. 321473.

PEOPLE v LEE OWENS, No. 149498; Court of Appeals No. 321159.

PEOPLE v JOY, No. 149511; Court of Appeals No. 320978.

PEOPLE v ZIMMERMAN, No. 149542; Court of Appeals No. 320644.

PEOPLE v GRAVELLE, No. 149555; Court of Appeals No. 314713.

PEOPLE v BEANE, No. 149576; Court of Appeals No. 320960.

PEOPLE v BOUWMAN, No. 149581; Court of Appeals No. 307325.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v WHEELER, No. 149587; Court of Appeals No. 320646.

PEOPLE v NORTHROP, No. 149590; Court of Appeals No. 315972.

PEOPLE v COPLEY, No. 149601; Court of Appeals No. 321292.

PEOPLE v MURPHY-ELLERSON, No. 149602; Court of Appeals No. 312651.

PEOPLE v MATTHEW CHRISTIAN, No. 149612; Court of Appeals No. 319051.

PEOPLE v HILLIARD WILSON, No. 149618; Court of Appeals No. 321313.

PEOPLE v KENNETH ANDERSON, No. 149626; Court of Appeals No. 321055.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HAROLD THOMAS, No. 149642; Court of Appeals No. 321773.

PEOPLE v BRUCE HOWARD, No. 149657; Court of Appeals No. 321224.

PEOPLE v ROY DANIELS, No. 149659; Court of Appeals No. 321476.

PEOPLE v SKINNER, No. 149668; Court of Appeals No. 313930.

TURNER v J & J SLAVIK, INC, No. 149673; Court of Appeals No. 313936.

HOUSEY v MACOMB PROBATE COURT, No. 149674; Court of Appeals No. 309060.

RHINEHART v CITY OF DETROIT, No. 149682; Court of Appeals No. 313511.

PEOPLE v SUTTLE, No. 149689; Court of Appeals No. 314773.

PEOPLE v CARSWELL, No. 149693; Court of Appeals No. 308573.

PEOPLE v JOHN BENNETT, No. 149694; Court of Appeals No. 311903.

PEOPLE v DAVID SANDERS, No. 149702; Court of Appeals No. 321107.

PEOPLE v JOHN KEITH, No. 149704; Court of Appeals No. 315169.

PEOPLE v MAXIMILLAN HUGHES, No. 149707; Court of Appeals No. 321429.

PEOPLE v STANLEY, No. 149709; Court of Appeals No. 314660.

PEOPLE v WOLFBAUER, No. 149720; Court of Appeals No. 319541.

PONTIAC OSTEOPATHIC HOSPITAL v DEPARTMENT OF COMMUNITY HEALTH, No. 149723; Court of Appeals No. 319885.

FOREST HILLS COOPERATIVE v CITY OF ANN ARBOR, Nos. 149731 and 149732; reported below: 306 Mich App 572.

FEDERAL HOME LOAN MORTGAGE CORPORATION v TACCONELLI, No. 149746; Court of Appeals No. 320415.

PEOPLE v STANLEY SMITH, No. 149759; Court of Appeals No. 314966.

PEOPLE v SERVOSS, No. 149816; Court of Appeals No. 320148.

PEOPLE v DARDEN, No. 149827; Court of Appeals No. 314562.

PEOPLE v LEON GAINES, No. 149828; Court of Appeals No. 321536.

PEOPLE v GAMBLE, No. 149834; Court of Appeals No. 321642.

PEOPLE v HORTON, No. 149859; Court of Appeals No. 316472.

PEOPLE v PERSICHINO, No. 149878; Court of Appeals No. 322137.

PEOPLE v MAIER, No. 149885; Court of Appeals No. 321834.

PEOPLE v GOLDEN, No. 149891; Court of Appeals No. 312542.

PEOPLE v JUSTIN HOWARD, No. 149900; Court of Appeals No. 313598.

IBRAHIMOVIC v ZIMMERMAN, No. 149903; Court of Appeals No. 314139.

PEOPLE v JOSHUA JAMES, No. 149910; Court of Appeals No. 322275.

PEOPLE v RYAN CUNNINGHAM, No. 149922; Court of Appeals No. 320997.

PEOPLE v FINLEY, No. 149923; Court of Appeals No. 315248.

PEOPLE v AMARI JOHNSON, No. 149928; Court of Appeals No. 322315.

PEOPLE v WILLIE JONES, No. 149931; Court of Appeals No. 314171.

ZAMMIT v CITY OF NEW BALTIMORE, No. 149945; Court of Appeals No. 318482.

PEOPLE v POE, No. 149950; Court of Appeals No. 322107.

PEOPLE v LEVERETTE, No. 149951; Court of Appeals No. 321495.

PEOPLE v CHRISTOPHER ALEXANDER, No. 149952; Court of Appeals No. 321137.

FANNIE MAE v WILLIS, No. 149985; Court of Appeals No. 315256.

NICHOLS v HOWMET CORPORATION, No. 150025; reported below: 306 Mich App 215.

PEOPLE v SEDINE, No. 150048; Court of Appeals No. 322165.

PEOPLE v WARREN, No. 150106; Court of Appeals No. 321216.

SERVIS v PUTTEN, No. 150305; Court of Appeals No. 320208.

Superintending Control Denied December 30, 2014:

CHAMBERS v ATTORNEY GRIEVANCE COMMISSION, No. 148271.

DENES v ATTORNEY GRIEVANCE COMMISSION, No. 149856.

Reconsideration Denied December 30, 2014:

PEOPLE v PILTON, No. 147030; Court of Appeals No. 306212. Leave to appeal denied at 497 Mich 867.

MENARD, INC v DEPARTMENT OF TREASURY, Nos. 147883, 147884, 147885, 147886, and 147887; reported below: 302 Mich App 467. Leave to appeal denied at 495 Mich 1000.

PEOPLE v BARBARA JOHNSON, Nos. 148317, 148318, 148319, 148320, 148321, 1482322, and 148323; reported below: 302 Mich App 450. Leave to appeal denied at 495 Mich 853.

PEOPLE v MARGOSIAN, Nos. 148663, 148664, and 148665; Court of Appeals Nos. 306847, 306850, and 306851. Leave to appeal denied at 495 Mich 1008.

PEOPLE v GARY, No. 148912; Court of Appeals No. 313561. Leave to appeal denied at 497 Mich 868.

PEOPLE v RUFUS WILLIAMS, No. 148986; Court of Appeals No. 318157. Leave to appeal denied at 497 Mich 868.

NOLEN v WILLIAM BEAUMONT HOSPITAL, No. 149156; Court of Appeals No. 307627. Leave to appeal denied at 497 Mich 869.

MILLER v STOTHERS, No. 149367; Court of Appeals No. 320305. Leave to appeal denied at 497 Mich 862.

In re CITY OF BENTON HARBOR MAYORAL RECALL ELECTION, No. 150019; Court of Appeals No. 323326. Leave to appeal denied at 497 Mich 862.

Leave to Appeal Denied January 9, 2015:

In re RYAN, No. 150657; Court of Appeals No. 318571.

Summary Disposition January 30, 2015:

PEOPLE v SMART, No. 149040; reported below: 304 Mich App 244. On January 13, 2015, the Court heard oral argument on the application for leave to appeal the February 11, 2014 judgment of the Court of Appeals. On the order of the Court, the application is again considered. MCR 7.302(H)(1). As the parties concede, MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made "in the course of plea discussions" with prosecuting attorney. Therefore, in lieu of granting leave to appeal, we overrule the Court of Appeals statement to the contrary in *People v Hannold*, 217 Mich App 382, 391 (1996). In all respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by the Court.

Leave to Appeal Denied January 30, 2015:

In re ROLON, No. 150718; Court of Appeals No. 320511.

In re DAWSON, No. 150781; Court of Appeals No. 320434.

Summary Disposition February 3, 2015:

PEOPLE v COOPER, No. 149478; Court of Appeals No. 320747. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WILSON v DEAN, No. 149852; Court of Appeals No. 320417. Pursuant to MCR 7.302(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 STRONG, No. 149979; Court of Appeals No. 320673. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court, which shall, if it has not already done so, make the corrections to the presentence report specified in that court's April 17, 2013 order and forward a copy of the amended presentence report to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v PEER, No. 150133; Court of Appeals No. 322550. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's issue regarding the Gladwin Circuit Court's assessment of court costs. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *People v Konopka* (Court of Appeals Docket No. 319913). After *Konopka* is decided, the Court of Appeals shall reconsider the defendant's issue in light of *People v Cunningham*, 496 Mich 145 (2014), MCL 769.1k (as amended effective 10/17/14), and *Konopka*. It shall then deny or grant the application on this issue, or otherwise exercise its authority under MCR 7.216(A)(7).

GALIEN TOWNSHIP SCHOOL DISTRICT v DEPARTMENT OF EDUCATION, No. 150406; reported below: 306 Mich App 410. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals instruction to remand this case to the Ingham Circuit Court for reinstatement of the Superintendent of Public Instruction's March 14, 2013 final decision. We remand this case to the Court of Appeals to expressly address plaintiff Galien Township School District's alternative arguments for overturning the Superintendent's decision, which were not addressed by that court during its initial review of the case. 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 February 3, 2015:

PEOPLE v SINCLAIR, No. 148782; Court of Appeals No. 318677.

PEOPLE v PEPAJ, No. 149096; Court of Appeals No. 318787.

PEOPLE v DARRELL NELSON, No. 149117; Court of Appeals No. 320200.

PEOPLE v HUTCHERSON, No. 149134; Court of Appeals No. 317835.

PEOPLE v EUGENE LOVE, No. 149135; Court of Appeals No. 320925.

PEOPLE v REESE, No. 149163; Court of Appeals No. 320776.

PEOPLE v RODNEY HARRIS, No. 149185; Court of Appeals No. 318352.

PEOPLE v CHILDRESS, No. 149196; Court of Appeals No. 319538.

PEOPLE v JURICH, No. 149198; Court of Appeals No. 319506.

In re DON H BARDEN TRUST, Nos. 149320 and 149321; Court of Appeals Nos. 312027 and 314391.

OWENS-BROCKWAY GLASS CONTAINER, INC v CITY OF CHARLOTTE, No. 149399; Court of Appeals No. 316838.

SNOW COUNTRY CONTRACTING, INC v IRONWOOD TOWNSHIP BOARD OF ZONING APPEALS, No. 149438; Court of Appeals No. 318671.

INTERNATIONAL OUTDOOR, INC v CITY OF ROSEVILLE, No. 149462; Court of Appeals No. 313153.

PEOPLE v HAIRSTON, No. 149507; Court of Appeals No. 320691.

KELLY v STREETER, No. 149531; Court of Appeals No. 318629.

PEOPLE v PLATTE, No. 149539; Court of Appeals No. 307858.

PEOPLE v MICHAEL SMITH, No. 149544; Court of Appeals No. 308609.

AUTO-OWNERS INSURANCE COMPANY v ROBERT E MCGOWAN TRUST, No. 149548; Court of Appeals No. 314118.

PEOPLE v CASE, No. 149557; Court of Appeals No. 319621.

PEOPLE v GLOVER, No. 149570; Court of Appeals No. 321705.

BIUNDO v MAHAL, No. 149597; Court of Appeals No. 313569.

PEOPLE v CHILDS, No. 149608; Court of Appeals No. 321071.

PEOPLE v PHILLIP PAYNE, No. 149614; Court of Appeals No. 314563.

PEOPLE v BOODY, No. 149617; Court of Appeals No. 314418.

VILLARREAL v IDS PROPERTY CASUALTY INSURANCE COMPANY, No. 149621; Court of Appeals No. 314891.

PEOPLE v HICKS, No. 149629; Court of Appeals No. 320963.

PEOPLE v PAUL DYE, No. 149635; Court of Appeals No. 318162.

PEOPLE v WHEELDON, No. 149636; Court of Appeals No. 314420.

PEOPLE v THOMAS TYRONE CARTER, No. 149638; Court of Appeals No. 310865.

PEOPLE v DETAMORE, No. 149651; Court of Appeals No. 320953.

PEOPLE v LEVACK, No. 149658; Court of Appeals No. 311630.

PEOPLE v COVERDILL, No. 149662; Court of Appeals No. 313679.

PEOPLE v JEFFRIES, No. 149665; Court of Appeals No. 319791.

PEOPLE v MILTON, No. 149666; Court of Appeals No. 319631.

DEMERY v AUTO CLUB INSURANCE ASSOCIATION, No. 149667; Court of Appeals No. 310731.

BERNSTEIN, J., not participating.

PEOPLE v WILCOX, No. 149677; Court of Appeals No. 314612.

PEOPLE v LISA WOODS, No. 149678; Court of Appeals No. 321075.

PEOPLE v TERANCE MCINTYRE, No. 149679; Court of Appeals No. 320743.

HEISEY v YOVINO, No. 149687; Court of Appeals No. 310159.

PEOPLE v CRAIG CLARK, No. 149700; Court of Appeals No. 311946.

PEOPLE v DAVID THOMAS, No. 149710; Court of Appeals No. 313305.

PEOPLE v NATHANIEL MITCHELL, No. 149715; Court of Appeals No. 319182.

SCOTT v CHRISTENSEN, No. 149721; Court of Appeals No. 312349.

BEIER HOWLETT, PC v POLICE AND FIRE RETIREMENT SYSTEMS OF DETROIT, No. 149724; Court of Appeals No. 308688.

PEOPLE v MURPHY, No. 149727; Court of Appeals No. 314333.

PEOPLE v CROWELL, No. 149729; Court of Appeals No. 321223.

PEOPLE v JOEL ALLEN, No. 149735; Court of Appeals No. 321298.

PEOPLE v CHORAZYCZEWSKI, No. 149736; Court of Appeals No. 320990.

NORMAN YATOOMA & ASSOCIATES PC v 1900 ASSOCIATES LLC, Nos. 149740 and 149741; Court of Appeals Nos. 313487 and 316754.

PEOPLE v REGINALD ROBERTSON, No. 149743; Court of Appeals No. 322032.

PEOPLE v EARL DAVIS, No. 149750; Court of Appeals No. 320848.

PEOPLE v TRAVIS BENNETT, No. 149751; Court of Appeals No. 319666.

PEOPLE v MICHAEL GRAY, No. 149753; Court of Appeals No. 321775.

PEOPLE v WARDELL FORD, No. 149754; Court of Appeals No. 321297.

PEOPLE v UNRUH, No. 149757; Court of Appeals No. 321293.

PEOPLE v BRANTLEY, No. 149760; Court of Appeals No. 321468.

PEOPLE v RUBEN ESPINOZA, No. 149764; Court of Appeals No. 319431.

PEOPLE v MAJORS, No. 149765; Court of Appeals No. 313412.

PEOPLE v TODD PORTER, No. 149766; Court of Appeals No. 319380.

PEOPLE v LATHAM, No. 149769; Court of Appeals No. 321952.

PEOPLE v EDWARD GARLAND, No. 149771; Court of Appeals No. 320556.

PEOPLE v GRADY HUDSON, No. 149772; Court of Appeals No. 321166.

PEOPLE v BUCHANAN, No. 149778; Court of Appeals No. 321244.

PEOPLE v DOROTHY MORRIS, No. 149779; Court of Appeals No. 320679.

PEOPLE v LOVELL, No. 149783; Court of Appeals No. 319508.

PEOPLE v GRAYSON, No. 149803; Court of Appeals No. 306515.

PEOPLE v TRAXLER, No. 149804; Court of Appeals No. 314951.

PEOPLE v HENIX, No. 149805; Court of Appeals No. 320656.

PERRY v DEPARTMENT OF HUMAN SERVICES, No. 149806; Court of Appeals No. 315243.

PEOPLE v CLINTON, No. 149807; Court of Appeals No. 320490.

In re APPLICATION OF WISCONSIN ELECTRIC POWER COMPANY, Nos. 149810 and 149811; Court of Appeals Nos. 301111 and 313605.

PEOPLE v JUAN STEWART, No. 149822; Court of Appeals No. 321784.

PEOPLE v ASHLEY, No. 149824; Court of Appeals No. 315361.

PEOPLE v FORTENBERRY, No. 149826; Court of Appeals No. 320910.

FERNANDEZ v FERNANDEZ, No. 149838; Court of Appeals No. 315584.

PEOPLE v DERRICK BROWN, No. 149840; Court of Appeals No. 315945.

In re ESTATE OF PERUN, No. 149855; Court of Appeals No. 313869.

PEOPLE v DONALD GARLAND, No. 149868; Court of Appeals No. 321360.

PEOPLE v URIE, No. 149883; Court of Appeals No. 315005.

PEOPLE v WEEKS, No. 149886; Court of Appeals No. 320758.

PEOPLE v WEEKS, No. 149888; Court of Appeals No. 320759.

CVS CAREMARK v STATE TAX COMMISSION, No. 149893; reported below: 306 Mich App 58.

SCHENCK v ASMAR, No. 149899; Court of Appeals No. 315053.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v HILL, No. 149912; Court of Appeals No. 314763.

PEOPLE v TENKAMENIN RICE, No. 149915; Court of Appeals No. 313754.

DUNBAR v RICHARD A HANDLON CORRECTIONAL FACILITY WARDEN, No. 149920; Court of Appeals No. 321343.

PEOPLE v SIMPSON, No. 149929; Court of Appeals No. 315777.

PEOPLE v STEVEN ANDERSON, No. 149941; Court of Appeals No. 313025.

PEOPLE v BRZEZINSKI, No. 149944; Court of Appeals No. 321650.

NORRIS-JURY v STATE FARM INSURANCE COMPANY, No. 149954; Court of Appeals No. 311148.

PEOPLE v ROBERT WRIGHT, No. 149962; Court of Appeals No. 313072.

PEOPLE v KENNETH TAYLOR, No. 149971; Court of Appeals No. 322169.

PEOPLE v DERRIEN CUNNINGHAM, No. 149973; Court of Appeals No. 313427.

PEOPLE v GUSTER, No. 149978; Court of Appeals No. 314734.

CARUSO v CARUSO, No. 149986; Court of Appeals No. 320239.

G&B II, PC v GUDEMAN, No. 149988; Court of Appeals No. 315607.

PEOPLE v GESON JACKSON, No. 149992; Court of Appeals No. 315737.

PEOPLE v HOWELL, No. 149993; Court of Appeals No. 322008.

PEOPLE v FISHER, No. 149994; Court of Appeals No. 316111.

PEOPLE v BENSON, No. 149996; Court of Appeals No. 320833.

PEOPLE v ALLOWAY JOHNSON, No. 149999; Court of Appeals No. 315208.

PEOPLE v KIRK, No. 150007; Court of Appeals No. 314416.

PEOPLE v CRISLER, No. 150009; Court of Appeals No. 320653.

In re BOWERS, No. 150013; Court of Appeals No. 320799.

DAYSON v MEINBERG, No. 150017; Court of Appeals No. 315508.

PEOPLE v TILTON, No. 150022; Court of Appeals No. 315401.

DAVIS v HIGHLAND PARK BOARD OF EDUCATION, Nos. 150026, 150027, and 150028; Court of Appeals Nos. 315002, 315511, and 316235.

PEOPLE v MAXIE, No. 150056; Court of Appeals No. 314607.

PEOPLE v RONALD DIXON, No. 150057; Court of Appeals No. 322051.

PEOPLE v ROSS, No. 150059; Court of Appeals No. 322252.

PEOPLE v NICHOLS, No. 150060; Court of Appeals No. 315284.

PEOPLE v KESEAN WILSON, No. 150063; Court of Appeals No. 322097.

MERCEDES-BENZ FINANCIAL v POWELL, No. 150064; Court of Appeals No. 311680.

PEOPLE v THOMAS SMITH, No. 150073; Court of Appeals No. 322204.

JACKSON v ENTERPRISE LEASING COMPANY OF DETROIT, LLC (NIXON v ENTERPRISE LEASING COMPANY OF DETROIT, LLC), Nos. 150077 and 150078; Court of Appeals Nos. 314653 and 318005.

PEOPLE v CORNELIUS, No. 150079; Court of Appeals No. 320525.

PEOPLE v JAHLEEL HOSKINS, No. 150087; Court of Appeals No. 322412.

PEOPLE v ROSS, No. 150096; Court of Appeals No. 321042.

PEOPLE v REDLOWSK, No. 150105; Court of Appeals No. 320888.

OKRIE v STATE OF MICHIGAN, No. 150111; reported below: 306 Mich App 445.

PEOPLE v DERRICK REID, No. 150117; Court of Appeals No. 315085.

ROTY v QUALITY RENTAL, LLC, No. 150121; Court of Appeals No. 313056.

PEOPLE v MCCREE, No. 150137; Court of Appeals No. 315226.

PEOPLE v WHITELAW, No. 150139; Court of Appeals No. 321052.

DELTON-KELLOGG SCHOOLS v DEPARTMENT OF EDUCATION, Nos. 150144 and 150145; reported below: 306 Mich App 410.

In re KWJ, No. 150434; Court of Appeals No. 323618.

SANTO v ADULT WELL BEING SERVICES, No. 150481; Court of Appeals No. 322624.

OWENS-BROCKWAY GLASS CONTAINER, INC v STATE TAX COMMISSION, No. 150524; Court of Appeals No. 314190.

PEOPLE v THURMOND, No. 150614; Court of Appeals No. 323865.

Superintending Control Denied February 3, 2015:

JETER v ATTORNEY GRIEVANCE COMMISSION, No. 149797.

MERRITT v ATTORNEY GRIEVANCE COMMISSION, No. 150041.

Leave to Appeal Before Decision by the Court of Appeals Denied February 3, 2015:

SPECTRUM HEALTH HOSPITALS v WESTFIELD INSURANCE COMPANY, No. 150384; Court of Appeals No. 323804.

Reconsideration Denied February 3, 2015:

CITY OF RIVERVIEW v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 147924, 147927, 147925, 147928, 147926, and 147929; Court of Appeals Nos. 301549, 302903, 301551, 302904, 301552, and 302905. Leave to appeal denied at 497 Mich 862.

PEOPLE v MOORE, No. 148721; Court of Appeals No. 318658. Leave to appeal denied at 497 Mich 867.

PEOPLE v GLADDEN, No. 148877; Court of Appeals No. 309717. Leave to appeal denied at 497 Mich 867.

PEOPLE v TRAVIS OWENS, No. 149147; Court of Appeals No. 318067. Leave to appeal denied at 497 Mich 902.

PEOPLE v DOCKETT, No. 149325; Court of Appeals No. 320486. Leave to appeal denied at 497 Mich 903.

PEOPLE v ESSEX, No. 149334; Court of Appeals No. 317960. Leave to appeal denied at 497 Mich 903.

PEOPLE v JACKWAY, No. 149353; Court of Appeals No. 313703. Leave to appeal denied at 497 Mich 870.

BUTTON v TIM BILLS TRUCKING, INC, No. 149389; Court of Appeals No. 306724. Leave to appeal denied at 497 Mich 930.

CHAKKOUR v CHAKKOUR, No. 150198; Court of Appeals No. 322306. Leave to appeal denied at 497 Mich 906.

Summary Disposition February 4, 2015:

PEOPLE v ROBERT CARLTON, No. 150342; Court of Appeals No. 321630. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We direct the Court of Appeals attention to the fact that it has granted leave to appeal on a separate issue in this case, and that that appeal is currently pending in the Court of Appeals (Docket No. 321630).

PEOPLE v COMER, No. 148900; Court of Appeals No. 318854. Pursuant to MCR 7.302(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 CHRISTOPHER BENNETT, No. 149264; Court of Appeals No. 320306. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court and remand this case to the trial court for resentencing. As the prosecuting attorney concedes, the defendant should not have been assessed 25 points for offense variable (OV) 13. The conspiracy offense for which he was convicted is not a "crime[] against a person" under MCL 777.43(1)(c), as it is a "crime[] against public safety." MCL 777.18; *People v Bonilla-Machado*, 489 Mich 412 (2011). On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range or, if it cannot follow its preliminary sentence evaluation under *People v Cobbs*, 443 Mich 276 (1993), permit him to withdraw his plea. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Granted February 4, 2015:

HODGE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 149043; Court of Appeals No. 308723. By order of September 26, 2014, this case was held in abeyance for *Moody v Home Owners Ins Co* (Docket Nos. 149041, 149046). On the Court's own motion, we vacate our abeyance order of September 26, 2014. On order of the Court, the application for leave to appeal the February 25, 2014 judgment of the Court of Appeals is again considered, and it is granted, limited to the issues: (1) whether a district court is divested of subject-matter jurisdiction when a plaintiff alleges less than $25,000 in damages in his or her complaint, but seeks more than $25,000 in damages at trial, i.e., whether the "amount in controversy" exceeds $25,000 under such circumstances,

see MCL 600.8301(1); and, if not, (2) whether such conduct nevertheless divests the district court of subject-matter jurisdiction on the basis that the amount alleged in the complaint was made fraudulently or in bad faith. See, e.g., *Fix v Sissung*, 83 Mich 561, 563 (1890).

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 SEAN HARRIS, Nos. 149872, 149873, and 150042; reported below: 306 Mich App 116. The parties shall address: (1) whether the Disclosures by Law Enforcement Officers Act, MCL 15.391, *et seq*., precludes the use of false statements by a law enforcement officer in a prosecution for obstruction of justice; and (2) whether the waivers signed by the defendants bar the use of their statements in a criminal prosecution as violative of state or federal rights against self-incrimination.

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *People v Harris* (Docket No. 149872) only.

WYANDOTTE ELECTRIC SUPPLY v ELECTRICAL TECHNOLOGY SYSTEMS, INC, No. 149989; Court of Appeals No. 313736. The parties shall include among the issues to be briefed: (1) whether the plaintiff served on the principal contractor the 30-day notice within the meaning of MCL 129.207; (2) whether the plaintiff is entitled to damages, if any, that include a time-price differential and attorney fees; and (3) whether MCL 600.6013(7) is applicable to the judgment in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered February 4, 2015:

COALITION PROTECTING AUTO NO-FAULT v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 150001; reported below: 305 Mich App 301. The parties shall file supplemental briefs within 35 days of the date of this order addressing only the question of whether MCL 500.134 violates Const 1963, art 4, § 25 by creating an exemption to the Freedom of Information Act (FOIA—MCL 15.231 *et seq*.) without reenacting and republishing the sections of FOIA that are altered or amended. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 4, 2015:

PEOPLE v WARE, No. 149558; Court of Appeals No. 314864.

PEOPLE v JOHNATHAN FORD, No. 149562; Court of Appeals No. 319705.

PEOPLE v MATTHEW JONES, No. 149935; Court of Appeals No. 322086.

KLEIN v HP PELZER AUTOMOTIVE SYSTEMS, INC, No. 149939; reported below: 306 Mich App 67.

PEOPLE v HOLLIS, No. 150115; Court of Appeals No. 322237.

Rehearing Denied February 4, 2015:

ADAIR v STATE OF MICHIGAN, No. 147794; opinion at 497 Mich 89.
BERNSTEIN, J., not participating.

Reconsideration Denied February 4, 2015:

THE SERVICE SOURCE, INC v DHL EXPRESS (USA), INC, No. 147860; Court of Appeals No. 301013. Leave to appeal denied at 497 Mich 911.
BERNSTEIN, J., not participating.

Motion for Clarification Denied February 4, 2015:

PEOPLE v BOROM, No. 148674; Court of Appeals No. 313750. Order following oral argument at 497 Mich 931.
BERNSTEIN, J., not participating.

Application for Leave to Appeal Dismissed February 4, 2015:

PEOPLE v HERSHEY, No. 148627; reported below: 303 Mich App 330.

Summary Disposition February 6, 2015:

In re FARRIS, No. 147636; Court of Appeals No. 311967. On order of the Court, the joint motion of the parties requesting this Court to vacate the order terminating the respondent's parental rights is denied. By order of September 19, 2014, we granted leave to appeal the August 8, 2013 judgment of the Court of Appeals. We vacate that part of our September 19, 2014 order granting leave to appeal. The application for leave to appeal the August 8, 2013 judgment is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Antrim Circuit Court, Family Division, for reconsideration in light of *In re Sanders*, 495 Mich 394 (2014).

PEOPLE v CODY PATTON, No. 150006; Court of Appeals No. 322521. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court to provide the defendant the opportunity to withdraw his plea, for the reason that the trial court failed to adhere to the court's sentence evaluation provided at the plea hearing or to allow the defendant to withdraw his plea. *People v Cobbs*, 443 Mich 276 (1993); MCR 6.302(C)(3). We are not persuaded that the standards set forth in *People v Hill*, 221 Mich App 391, 398 (1997), require reassigning the case to a different judge. We further order the trial court to determine, in accordance with Administrative Order 2003-03, whether the defendant is indigent and, if so, to appoint counsel to represent him in connection with the remand proceedings. 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.

Oral Argument Granted in Case Pending on Application for Leave to Appeal February 6, 2015:

PEOPLE v LYLES, No. 150040; Court of Appeals No. 315323. The parties shall file supplemental briefs within 35 days of the date of this order addressing whether it is more probable than not that the failure to properly instruct the jury regarding evidence of the defendant's good character was outcome determinative. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 6, 2015:

In re SANTOS, No. 150844; Court of Appeals No. 320220.

PEOPLE v CHELMICKI, No. 149472; reported below: 305 Mich App 58.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur in the order denying leave to appeal, except as to one issue raised in defendant's application. In particular, I agree with defendant that the Court of Appeals erred by affirming the trial court's decision to admit statements contained in the victim's written police statement under the present sense impression exception to the hearsay rule. I believe that the Court of Appeals has improperly expanded the present sense impression exception in a manner that is not supported by Michigan law and is inconsistent with the rationale underlying the exception. However, because the statements at issue were properly admitted as recorded recollections, I would vacate the portion of the Court of Appeals' opinion discussing present sense impressions and otherwise deny leave.

I. FACTUAL SUMMARY AND PROCEDURAL HISTORY

This case arises from a domestic violence incident between two intoxicated individuals at their apartment. The assault ended right before the police kicked down the door. After the police officers entered the apartment, they discovered that defendant had escaped through a bedroom window. The police officers then left the victim alone in the apartment to pursue defendant, whom they eventually found nearby. After the police officers arrested defendant and secured him in a patrol car, one officer sat with defendant for approximately 15 to 20 minutes while another went to the police station to get a camera. When the police officer returned with the camera, the other officer went into the apartment to have the victim and her neighbor handwrite statements. While the victim wrote her statement, she was engaged in a conversation with her neighbor, complaining about defendant. The victim's statement contained a description of the incident, including statements made by defendant.

Due to her intoxicated state during the incident, the victim had limited memory of the incident at trial. Therefore, the trial court

admitted various hearsay statements contained in the victim's police statement as present sense impressions[1] and recorded recollections.[2]

Defendant appealed his resulting convictions of domestic violence and unlawful imprisonment. The Court of Appeals affirmed, holding that the statements were properly admitted under both hearsay exceptions.[3] Regarding the issue of substantial contemporaneity, which is required for the statements to be admissible as present sense impressions, the Court stated:

> [T]he statement was made at a time "substantially contemporaneous" with the event, as the evidence showed, at most, a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement. MRE 803(1) "recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable." [*People v*] *Hendrickson*, 459 Mich [229, 236 (1998)] (opinion by KELLY, J.) (noting an instance in which a 16-minute interval was held to satisfy the "substantially contemporaneous" requirement).[4]

II. LEGAL ANALYSIS

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[5] "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule."[6] The rule against the admission of hearsay evidence is deeply rooted in our common law.[7] Hearsay is considered unreliable evidence because it is not subject to traditional testimonial safeguards and poses four main risks: (1) the declarant's flawed perception; (2) defects in the declarant's memory; (3) miscommunication, stemming

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[1] MRE 803(1).

[2] MRE 803(5).

[3] *People v Chelmicki*, 305 Mich App 58, 63 (2014).

[4] *Id*.

[5] MRE 801(c).

[6] *People v Gursky*, 486 Mich 596, 606 (2010), citing MRE 802.

[7] 5 Wigmore, Evidence (Chadborn rev), § 1364, p 28 (stating that by the beginning of the 1700s, the rule against hearsay achieved "general and settled acceptance . . . as a fundamental part of [Anglo-American] law"). Despite its deeply rooted tradition, the hearsay rule has received much criticism in recent decades, and some commentators argue that the rule should be replaced entirely or drastically reduced, as it has been in most common law jurisdictions outside the United States. See, e.g., Sklansky, *Hearsay's Last Hurrah*, 2009 Sup Ct Rev 1, 1-2 (2009).

from either the declarant misspeaking or the witness misunderstanding; and (4) a lack of sincerity or veracity in the declarant's statement.[8] Excluding hearsay evidence minimizes these risks because witnesses are instead required to testify under oath, subject to cross-examination, in the presence of the jury so it can observe the witnesses' demeanor.[9]

In this case, the statements contained in the victim's written police statement are hearsay because they are out-of-court statements used to prove the truth of the matter asserted, i.e., that the events described and the admissions made by defendant occurred as described in the statement. I agree with the Court of Appeals that the trial court did not abuse its discretion by admitting the statements as recorded recollections.[10] However, for the reasons below, I believe that the Court of Appeals erred by holding that the statements were admissible as present sense impressions.

Under MRE 803(1), a present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A present sense impression has been deemed "reliable enough to warrant an exception to the hearsay rule" because it eliminates (or substantially alleviates) two of the dangers posed by hearsay: insincerity and memory loss.[11] To be admissible as a present sense impression, hearsay evidence must satisfy three conditions: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event."[12] The statements at

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[8] Graham & Graham, Federal Practice & Procedure, Evidence (1st ed), § 6324.

[9] 2 McCormick, Evidence (7th ed), § 245, p 179-181.

[10] The recorded recollection exception, MRE 803(5), allows for the admission of hearsay evidence when the following three requirements are met:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) [t]he declarant must now have an insufficient recollection as to such matters; [and] (3) [t]he document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v Dinardo*, 290 Mich App 280, 293 (2010) (quotation marks and citation omitted) (alterations in original).]

[11] McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla St U L Rev 907, 914 (2001) ("While dangers of misperception and mistransmission remain, the dangers of memory loss and insincerity are eliminated or greatly reduced.").

[12] *People v Hendrickson*, 459 Mich 229, 236 (1998) (opinion by KELLY, J.).

issue in this case meet the first two conditions because the victim's statements provided a description of the domestic violence and, as the victim of the assault, she personally perceived the event. Only the third requirement—substantial contemporaneity—is at issue in this case.

Although present sense impressions are deemed reliable because they eliminate or substantially alleviate the hearsay dangers of insincerity and memory loss, these dangers only dissipate if the statement is "made while the declarant was perceiving the event or condition, or *immediately thereafter*."[13] And while the present sense impression exception " 'recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable,' "[14] a close reading of the holdings in this area of the law reveals that Michigan courts have adhered to a limited view of the phrase "immediately thereafter."

Recognizing the importance of substantial contemporaneity, in *Hewitt v Grand Trunk W R Co*, the Court of Appeals stated that "[t]he purpose and intent of [the present sense impression exception] can be served most effectively by limiting the scope of that exception to statements made while describing the event or condition or *instantly thereafter*."[15] Applying this rule, the Court excluded statements made to a police officer "at least several, and possibly as many as 30, minutes" after the incident.[16]

Two years later, the Court of Appeals began to equivocate on the meaning of "immediately thereafter." For example, in *Johnson v White*, the Court of Appeals initially held that "immediately thereafter" does not mean "instantly thereafter" and affirmed the trial court's admission of a statement made "sometime between less than a minute, or as long as four

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[13] MRE 803(1) (emphasis added).

[14] *Hendrickson*, 459 Mich at 236, quoting FRE 803(1), advisory committee note.

[15] *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 317-318 (1983) (emphasis added), citing FRE 803(1), advisory committee note, and *United States v Narciso*, 446 F Supp 252, 288 (ED Mich, 1977). This interpretation has the added benefit of being consistent with the plain meaning of the relevant phrase "or immediately thereafter." See *Craig v Oakwood Hosp*, 471 Mich 67, 78 (2004) (stating that, as with statutes, rules of evidence are interpreted according to their plain meaning). "Thereafter" simply means "after that." *Merriam-Webster Dictionary* <http://merriam-webster.com/dictionary/thereafter> (accessed February 3, 2015) [http://perma.cc/5RDD-D4AR]. In the temporal context, "immediately" means "without interval of time: STRAIGHTWAY . . . ." *Merriam-Webster Dictionary* <http://merriam-webster.com/dictionary/> (accessed February 3, 2015) [http://perma.cc/AM37-YUGM]. Thus, the rule encompasses statements "made while the declarant was perceiving the event," or statements made "immediately thereafter"—i.e., statements made without an interval of time after the declarant perceived the event.

[16] *Hewitt*, 123 Mich App at 317.

minutes, after the accident occurred."[17] On remand, the Court changed course and reapplied the *Hewitt* panel's more restrictive interpretation of "immediately thereafter" to hold that the statement, made several minutes after the perceived event, was not admissible as a present sense impression.[18] On further appeal, this Court affirmed the first Court of Appeals' holding, stating that *Hewitt* took a "restrictive view of the phrase 'immediately thereafter . . . .' "[19] But this Court distinguished *Hewitt* because, in the *Johnson* case, the testimony "indicated that the time frame could have been less than four minutes, [and therefore] the trial court could properly find, after hearing and observing the witness, that the declarant's statement was made immediately after he perceived the accident."[20] Notably, however, we did not overrule *Hewitt* or indicate that it incorrectly stated the law.

This Court revisited this area of the law 10 years later in *People v Hendrickson*, which involved a 911 call placed by the victim just after an assault had taken place.[21] Although it had previously been recognized by the Court of Appeals in *Hewitt*, this Court for the first time adopted the "substantial contemporaneity" test,[22] citing two passages from the advisory committee notes to FRE 803(1).[23] First, *Hendrickson* observed

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[17] *Johnson v White*, 144 Mich App 458, 468-469 (1985); see also *Duke v American Olean Tile Co*, 155 Mich App 555, 570-571 (1986) (holding that a statement made approximately three minutes after the perceived event qualified as a present sense impression, citing *Johnson* and noting that "the phrase 'immediately thereafter' is not synonymous with 'instantly thereafter' ").

[18] *Johnson v White (On Remand)*, 154 Mich App 425, 429 (1986), citing *Johnson*, 144 Mich App at 471-474 (M. J. KELLY, J., concurring).

[19] *Johnson v White*, 430 Mich 47, 57 (1988). Note that the *Hewitt* Court acknowledged that its interpretation could be viewed as "unduly restrictive," but it opined that "a more expansive interpretation would only serve to further blur the distinction between the 'present sense impression' exception and the 'excited utterance' exception . . . ." *Hewitt*, 123 Mich App at 317.

[20] *Johnson*, 430 Mich at 57.

[21] *Hendrickson*, 459 Mich at 234 (opinion by KELLY, J.).

[22] *Id.* at 236 ("The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be '*substantially contemporaneous*' with the event.") (citations omitted) (emphasis added).

[23] *Id.* at 235-236. Because the "Michigan Rules of Evidence were based on the Federal Rules of Evidence," *People v Kreiner*, 415 Mich 372, 378 (1982), and the wording of MRE 803(1) is nearly identical to its federal counterpart, the advisory committee notes and federal cases and com-

that "[t]he principle underlying [the present sense impression] exclusion is that the 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.' "[24] However, it also explained that "the exception 'recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable.' "[25] Next, citing *Johnson v White*, this Court observed that "[c]onsistent with this analysis, we have concluded that a four-minute interval between the perceived event and a declarant's statement satisfied the 'immediately after' condition."[26] It then noted that in *United States v Mejia-Velez*, "a New York federal district court found that sixteen minutes between the perceived event and the statement satisfied the 'substantially contemporaneous' condition."[27] *Hendrickson* then stated that the contemporaneity requirement was satisfied given that "the 911 recorded victim's statement was that the beating *had just taken place*; the defendant was in the process of leaving the house as the victim spoke."[28]

In this case, the Court of Appeals concluded that "a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement" was contemporaneous enough for the statements to be admitted as present sense impressions.[29] However, I believe the Court of Appeals' holding is erroneous for the following reasons.

First, the Court of Appeals' conclusion is inconsistent with the limited scope of the exception recognized under prior Michigan law. Before the Court of Appeals' decision in this case, no published opinion from the Court of Appeals or this Court had allowed a statement made more than, at most, four minutes after a perceived event to be admitted as a present sense impression.[30]

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mentary can be persuasive authority in interpreting the Michigan Rules of Evidence. See *People v Katt*, 468 Mich 272, 280 (2003).

[24] *Hendrickson*, 459 Mich at 235, quoting FRE 803(1), advisory committee note.

[25] *Hendrickson*, 459 Mich at 236, citing FRE 803(1), advisory committee note.

[26] *Hendrickson*, 459 Mich at 236, citing *Johnson*, 430 Mich at 56.

[27] *Hendrickson*, 459 Mich at 236-237, citing *United States v Mejia-Velez*, 855 F Supp 607 (ED NY, 1994).

[28] *Hendrickson*, 459 Mich at 237 (emphasis added).

[29] *Chelmicki*, 305 Mich App at 63.

[30] In *Hendrickson*, this Court read *Johnson* as "conclud[ing] that a four-minute interval . . . satisfied the 'immediately after' condition." *Hendrickson*, 459 Mich at 236. However, this is an imprecise reading of *Johnson*. In *Johnson*, we distinguished *Hewitt* (which, as noted, excluded statements made "at least several, and possibly as much as thirty, minutes" after the incident) because in *Johnson*, the testimony "indicated that the time frame *could have been less than four minutes*, [and therefore] the trial

Second, in reaching its conclusion, the Court of Appeals gave only cursory treatment to the issue and relied on multiple layers of dicta. The only authority cited in support of the Court of Appeals' decision was *Hendrickson*'s citation to *Mejia-Velez*. But the rationale for *Hendrickson*'s citation to that case is unclear since *Hendrickson* concluded that the contemporaneity requirement was satisfied given that "the 911 recorded victim's statement was that the beating *had just taken place* . . . ."[31] Thus, the citation to *Mejia-Velez* was plainly dicta, given that contemporaneity was not actually at issue in *Hendrickson*[32] and, even if it had been, there really was no question regarding contemporaneity since the victim's statement occurred just after the event took place.

Finally, the Court of Appeals' conclusion is completely at odds with the rationale that justifies the exception in the first place. The rationale underlying the present sense impression has been described as follows:

> "Underlying [FRE] 803(1) is the assumption that statements of perception substantially contemporaneous with an event are highly trustworthy because: (1) the statement being simultaneous with the event there is no memory problem; (2) there is little or nor [sic] time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements."[33]

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court could properly find, after hearing and observing the witness, that the declarant's statement was made *immediately after* he perceived the accident." *Johnson*, 430 Mich at 57 (emphasis added). Thus, far from establishing four minutes as any sort of bright-line rule, *Johnson* stands for the unremarkable proposition that while a statement made more than several minutes after an incident may not satisfy the "immediately after" requirement, when the time frame is delimited as "less than four minutes," it is possible for a trial judge to conclude that the statement was made "immediately after" the declarant perceived the event. Regardless, even assuming arguendo that *Johnson* created a general rule that statements made four minutes after an event are admissible as present sense impressions, that rule would not justify the *15-minute* interval allowed in this case.

[31] *Hendrickson*, 459 Mich at 237 (emphasis added).

[32] The primary issue in *Hendrickson* was whether independent evidence of the underlying event was required before admitting a statement as a present sense impression. *Id*. at 238. Ironically, the legal principle from *Mejia-Velez* that *Hendrickson* referred to was itself arguably dicta since the federal court provided an alternative basis for admission of the statement. See *Mejia-Velez*, 855 F Supp at 614 (stating that even if the statements at issue were not admissible under the present sense impression exception, they were still admissible as excited utterances).

[33] *Narciso*, 446 F Supp at 288, quoting 5 Weinstein & Berger, Evidence, ¶ 803(1)[01] (1975). In *Hendrickson*, this Court stated these factors in a

Applying these factors to this case shows that the statements at issue do not possess sufficient indicia of trustworthiness to justify their admission.

With regard to the first factor, the lapse in time between the perceived event and the victim's statements was of sufficient duration to raise concerns about the accuracy of the victim's memory. In this case, the victim did not write her statements while she was perceiving the event, or even "immediately" after the violence ended. Rather, a series of events occurred between the perceived event and the victim's statement: the police entered the apartment; a search ensued; defendant was located, arrested, and secured in the patrol car; and then an officer waited with defendant for 15 to 20 minutes in the patrol car before finally obtaining the victim's statement. Therefore, although the precise timeline is unclear, the record indicates that the lapse in time between the perceived event and the victim's statement was *at least* 15 minutes, which is more than enough time to raise doubts about the victim's memory.[34] Moreover, when she wrote the requested statement, the victim and her neighbor were complaining about defendant. The fact that the victim was engaged

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slightly different manner: "(1) the simultaneous event and description leave no time for reflection, (2) the likelihood for calculated misstatements is minimized, and (3) generally, the statement is made in the presence of another witness who has the opportunity to observe and verify its accuracy." *Hendrickson*, 459 Mich at 235, citing *Narciso*, 446 F Supp at 288, and *People v Brown*, 80 NY2d 729, 732-733 (1993). However, I believe that *Narciso* presents a more accurate description of the considerations underlying the exception. When determining whether a statement is admissible as a present sense impression, "the appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought." McCormick, § 271, p 362. But reflective thought affects both the declarant's memory on a subconscious level and the declarant's ability to fabricate on a conscious level. See *Duke*, 155 Mich App at 570 (explaining that a statement made three minutes after a perceived event "was made soon enough after the event and under circumstances which negate the likelihood of memory problems and calculated distortions of the event"); *State v Tucker*, 205 Ariz 157, 165-166 (Ariz, 2003) ("The more time that elapses between the event and the statement, the stronger the possibility that a declarant will attempt, either consciously or subconsciously, to alter his or her description of the event."). Thus, the lack of opportunity to engage in reflective thought protects against both lapses in memory and calculated misstatements, which are the first two trustworthiness factors articulated in *Narciso*. For these reasons, I will use the *Narciso* factors to analyze the statements at issue in this case.

[34] *Present Sense Impressions*, 28 Fla St U L Rev at 914 (noting that "[p]eople, including testifying witnesses and hearsay declarants, forget quickly").

in a conversation with another person about defendant while she wrote her statement further undermines the trustworthiness of the victim's statement.[35]

As to the second factor, the lapse in time between the perceived event and the victim's statements left ample time for calculated misstatements. In this case, the victim was left alone in her apartment for at least 15 minutes, which provided her ample opportunity to engage in reflective thought about what she was going to say to the police officers. In addition, the victim's statements were not made spontaneously—instead, they were made at the request of the police.[36] But statements solicited by the police are far from the impulsive, unpremeditated statements contemplated by the present sense impression exception; rather, those statements are, by their very nature, deliberate and reflective.[37] "A declarant who . . . provides statements for a particular reason"—here for a police investigation—"creates the possibility that the statements are not contemporaneous, and, more likely, are calculated interpretations of events rather than near simultaneous perceptions."[38] Because the victim's statements here

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[35] *Id*. at 915 (noting that " '[i]nformation presented after an event can change a person's report of that event' ") (citation omitted); see also *Davis v State*, 133 P3d 719, 728-729 (Alas App, 2006) (concluding that a statement made to police officers 5 to 10 minutes after an accident was not admissible as a present sense impression when, among other things, the declarant had engaged in conversations with other eyewitnesses).

[36] See FRE 803(1), advisory committee note (stating that "[s]pontaneity is the key factor" in determining whether a statement is admissible as a present sense impression); see also *United States v Boyce*, 742 F3d 792, 797-798 (CA 7, 2014) (observing that "answering questions rather than giving a spontaneous narration could increase the chances that the statements were made with calculated narration").

[37] Compare *Edwards v State*, 736 So 2d 475, 478-479 (Miss App, 1999) ("For a witness to give a response to an officer's question is by definition not 'spontaneous,' no matter how soon it is made after the event that is the focus of the questioning."), and *United States v Green*, 556 F3d 151, 157 (CA 3, 2009) (holding that a statement was disqualified as a present sense impression due to a 50-minute lapse in time and after the declarant had been questioned by officials, which "affirmatively indicate[d] that [the declarant] made his statement after he was expressly asked to reflect upon the events in question"), with *People v Cross*, 202 Mich App 138, 141-142 (1993) (admitting a statement made to a police officer as a present sense impression when the interval between the event and the statement was less than a minute and the statement was "unsolicited").

[38] *United States v Woods*, 301 F3d 556, 562 (CA 7, 2002) (holding that "narrative statements . . . clearly addressed to the FBI agents listening in via the microphone" were not present sense impressions

were made at the request of police, the statements were more likely to have been purposeful and the product of reflective thought, which further undermines their trustworthiness.

The third factor also weighs against admission because the statements were not made in the presence of a third party who also observed the event and could verify their accuracy. Rather, the victim provided her statement to a police officer who was not present during the incident. During the assault, the victim's neighbor heard noises indicating that a fight was occurring and was told by the victim that defendant had turned on the gas stove to blow up the apartment complex; however, the neighbor was not an eyewitness to the assault and could not verify the details of the assault that were contained in the victim's statements. Therefore, neither the police officer nor the neighbor had an independent basis to verify the veracity of the victim's statements, which also undermines the trustworthiness of her statements.[39]

III. CONCLUSION

The Court of Appeals erred by concluding that the victim's written statement provided to a police officer 15 to 20 minutes after the event was properly admitted as a present sense impression. Prior Michigan law does not support such an expansive interpretation. Nor does the Court of Appeals' conclusion square with the rationale behind the rule, i.e., that the substantial contemporaneity of the statement with the perceived event provides the requisite guarantees of trustworthiness to justify a departure from the general rule excluding hearsay.

For these reasons, I would hold that the victim's statements were not admissible as present sense impressions because they were not substantially contemporaneous with the perceived event. But because the statements were admissible on an alternative ground as recorded recollections, I would simply vacate the portion of the Court of Appeals' opinion discussing present sense impressions and otherwise deny leave to appeal.

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because "[t]hese statement were made for the benefit of the agents—*i.e.*, were calculated and provided for a reason"); see also *Consol Environmental Mgt, Inc—Nucor Steel Louisiana v Zen-Noh Grain Corp*, 981 F Supp 2d 523, 531 (ED La, 2013) ("When a statement is made for a specific purpose such as litigation, it lacks the indicia of reliability that motivate the rule.").

[39] See *People v Bowman*, 254 Mich App 142, 145 (2002) (holding that a statement was not admissible as a present sense impression because, among other things, it was made "in a separate conversation with someone not present during the first conversation"); *Hewitt*, 123 Mich App at 317 (holding that the present sense impression exception did not apply because, among other things, the statement was made to a police officer who could not corroborate the truth of the statement because he was not present during the incident).

MCCORMACK, J., joins the statement of VIVIANO, J.

BERNSTEIN, J., took no part in the disposition of this matter, which the Court considered before he assumed office and in which his vote would not be result—determinative, in order to avoid unnecessary delay to the parties.

Leave to Appeal Denied February 20, 2015:

PEOPLE v ANTHONY JOHNSON, No. 150956; Court of Appeals No. 324815.

COWAN v FATA and WESP v FATA, Nos. 150982 and 150983; Court of Appeals Nos. 32577 and 325793.

Summary Disposition March 3, 2015:

PEOPLE v COTTO, No. 148532; Court of Appeals No. 317931. Pursuant to MCR 7.302(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 whether the trial court erroneously assessed the defendant 15 points on Offense Variable 10, MCL 777.40, for predatory conduct. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

SPEICHER v COLUMBIA TOWNSHIP BOARD OF TRUSTEES, No. 148999; Court of Appeals No. 313158. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of Speicher v Columbia Twp and Columbia Twp Planning Comm'n, 497 Mich 125 (2014). We direct the Court of Appeals to particularly consider the language of MCL 15.271(4) that awards attorney fees "[i]f a public body is not complying with this act, and a person commences a civil action to compel or enjoin further noncompliance with the act and succeeds in obtaining relief in the action . . . ."

Leave to Appeal Denied March 3, 2015:

PEOPLE v HART, No. 148283; Court of Appeals No. 316354.

PEOPLE v MISIEWICZ, No. 148357; Court of Appeals No. 316462.

PEOPLE v DEMARCO HENDERSON, No. 149306; Court of Appeals No. 319863.

PEOPLE v WESTBROOK, No. 149421; Court of Appeals No. 231078.

PEOPLE v CAMMONS, No. 149518; Court of Appeals No. 319269.

PEOPLE v BEAGLE, No. 149530; Court of Appeals No. 320021.

PEOPLE v JOHNSTON, No. 149533; Court of Appeals No. 321933.

PEOPLE v CALBERT, No. 149545; Court of Appeals No. 313692.

PEOPLE v DERRICK JOHNSON, No. 149605; Court of Appeals No. 310075.

PEOPLE v CALBERT, No. 149649; Court of Appeals No. 313692.

PEOPLE v PALMER, No. 149680; Court of Appeals No. 319437.

PEOPLE v MCKNIGHT, No. 149688; Court of Appeals No. 320657.

PEOPLE v LARRY JONES, No. 149748; Court of Appeals No. 320597.

PEOPLE v BEACH, No. 149749; Court of Appeals No. 319460.

PEOPLE v THOMAS WALKER, No. 149761; Court of Appeals No. 322361.

PEOPLE v PEARSON, Nos. 149762 and 149763; Court of Appeals Nos. 322176 and 320545.

PEOPLE v RAPLEY, No. 149767; Court of Appeals No. 320317.

PEOPLE v BARTULIO, No. 149768; Court of Appeals No. 320498.

PEOPLE v VORASE, No. 149801; Court of Appeals No. 312622.

PEOPLE v WESTON, No. 149820; Court of Appeals No. 321389.

PEOPLE v SCHWARZ, No. 149823; Court of Appeals No. 315372.

PEOPLE v DERAY SMITH, No. 149825; Court of Appeals No. 321054.

PEOPLE v GUBBINI, No. 149833; Court of Appeals No. 314215.

PEOPLE v FAWAZ, No. 149846; Court of Appeals No. 315647.

PEOPLE v OLGREN, No. 149848; Court of Appeals No. 310259.

PEOPLE v GOINES, No. 149858; Court of Appeals No. 312383.

PEOPLE v RAFIKI DIXON, No. 149863; Court of Appeals No. 315276.

PEOPLE v RAFFLER, No. 149866; Court of Appeals No. 313683.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v YOUNGBLOOD, No. 149869; Court of Appeals No. 315703.

PEOPLE v KAZNOWSKI, No. 149876; Court of Appeals No. 314285.

PEOPLE v JONATHAN POSEY, No. 149882; Court of Appeals No. 314441.

PEOPLE v BANKS, No. 149892; Court of Appeals No. 313887.

RUONAVAARA v DEPARTMENT OF COMMUNITY HEALTH, No. 149904; Court of Appeals No. 320897.

PEOPLE v TRIPLETT, No. 149926; Court of Appeals No. 315049.

PEOPLE v VILLAREAL, No. 149927; Court of Appeals No. 319928.

PEOPLE v JIMMIE MORRIS, No. 149934; Court of Appeals No. 308221.

PEOPLE v REMBISH, No. 149957; Court of Appeals No. 308916.

PEOPLE v LONGMIRE, No. 149958; Court of Appeals No. 312071.

PEOPLE v CHARLES BROWN, No. 149959; Court of Appeals No. 314986.

HSBC BANK USA, NA v YOUNG, No. 149987; Court of Appeals No. 313212.

PEOPLE v REMBISH, No. 150004; Court of Appeals No. 308738.

MORRIS v SCHNOOR, No. 150023; Court of Appeals No. 315006.

PEOPLE v MALCOM, No. 150033; Court of Appeals No. 315265.

PEOPLE v BLUEW, No. 150036; Court of Appeals No. 313397.

PEOPLE v JONATHON JONES, No. 150037; Court of Appeals No. 308929.

JOHNSON v DEPARTMENT OF CORRECTIONS, No. 150047; Court of Appeals No. 321383.

KOTT-MILLARD v CITY OF TRAVERSE CITY and LONG v CITY OF TRAVERSE CITY, Nos. 150053 and 150054; Court of Appeals Nos. 314971 and 314975.

PEOPLE v BREEDING, No. 150058; Court of Appeals No. 312279.

PEOPLE v QUINLAN, No. 150066; Court of Appeals No. 315395.

PEOPLE v RAINS, No. 150069; Court of Appeals No. 317723.

PEOPLE v DONOVAN YOUNG, No. 150097; Court of Appeals No. 310435.

PEOPLE v DEMONE HALL, No. 150103; Court of Appeals No. 315691.

PEOPLE v LEONARD WILLIAMS, No. 150104; Court of Appeals No. 315486.

PEOPLE v KEVIN CRAIG, No. 150124; Court of Appeals No. 311045.

T R PIEPRZAK COMPANY, INC v CITY OF TROY, No. 150127; Court of Appeals No. 314451.

PEOPLE v MCCORMICK, No. 150152; Court of Appeals No. 322174.

PEOPLE v VERNON JOHNSON, No. 150156; Court of Appeals No. 315879.

CURRIE v MOSIER INDUSTRIAL SERVICES CORP, No. 150158; Court of Appeals No. 314776.

CITY OF BERKLEY v SOWERS, No. 150177; Court of Appeals No. 320666.

SMITH v WILLIAMS, No. 150179; Court of Appeals No. 321781.

PEOPLE v DAVID THOMPSON, No. 150194; Court of Appeals No. 322670.

PEOPLE v WADE, No. 150209; Court of Appeals No. 315790.

RODRIGUEZ v HANDLON CORRECTIONAL FACILITY WARDEN, No. 150217; Court of Appeals No. 321701.

PEOPLE v BRUCE JOHNSON, No. 150225; Court of Appeals No. 322546.

PEOPLE v BEACH, No. 150233; Court of Appeals No. 322147.

PEOPLE v FLYNN, No. 150235; Court of Appeals No. 315989.

PEOPLE v MILNER, No. 150238; Court of Appeals No. 315810.

BESSINGER v OUR LADY OF GOOD COUNSEL, No. 150242; Court of Appeals No. 316143.

PEOPLE v ASHWOOD, No. 150254; Court of Appeals No. 315952.

PEOPLE v BOWMAN, No. 150273; Court of Appeals No. 322650.

FIEGER FIEGER KENNEY GIROUX & DANZIG PC v DETTMER, Nos. 150276 and 150277; Court of Appeals Nos. 315732 and 315733.

PEOPLE v GAUTHIER, No. 150290; Court of Appeals No. 322554.

JACKSON v JONES, No. 150306; Court of Appeals No. 322353.

PEOPLE v SHELDON HUGHES, No. 150313; Court of Appeals No. 322932.

PEOPLE v HAYES, No. 150314; Court of Appeals No. 316647.

PEOPLE v TUCKER, No. 150315; Court of Appeals No. 322227.

PEOPLE v MINARD, No. 150324; Court of Appeals No. 319959.

PEOPLE v LANKFORD-GIBSON, No. 150328; Court of Appeals No. 322705.

FIEGER FIEGER KENNEY GIROUX & DANZIG PC v DETTMER, Nos. 150330 and 150331; Court of Appeals Nos. 315732 and 315733.

FIEGER FIEGER KENNEY GIROUX & DANZIG PC v DETTMER; No. 150334; Court of Appeals No. 315732.

PEOPLE v BRYS, No. 150339; Court of Appeals No. 322699.

HOWARD v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 150340; Court of Appeals No. 322288.

PEOPLE v SHAVERS, No. 150452; Court of Appeals No. 321746.

PEOPLE v LISTER, No. 150598; Court of Appeals No. 316845.

PEOPLE v QUANTAE BAILEY, No. 150628; Court of Appeals No. 322263.

CORRION v THUMB CORRECTIONAL FACILITY WARDEN, No. 150662; Court of Appeals No. 324310.

PEOPLE v LYONS, No. 150676; Court of Appeals No. 319252.

PEOPLE v WILLIE CARTER, No. 150730; Court of Appeals No. 324352.

PEOPLE v KEITH WATKINS, No. 150731; Court of Appeals No. 318060.

CHARTER TOWNSHIP OF LANSING v INGHAM COUNTY DRAIN COMMISSIONER and CHARTER TOWNSHIP OF LANSING v INGHAM COUNTY DRAIN COMMISSIONER, Nos. 150826 and 150827; Court of Appeals Nos. 316870 and 318446.

Superintending Control Denied March 3, 2015:

HILLS v ATTORNEY GRIEVANCE COMMISSION, No.150207.

Reconsideration Denied March 3, 2015:

PEOPLE v DERRICK SMITH, No. 148814; Court of Appeals No. 319151. Leave to appeal denied at 496 Mich 865.

PEOPLE v WILLIAM HALL, No. 149297; Court of Appeals No. 319050. Leave to appeal denied at 497 Mich 856.

JONES v NUTTAL AFC COMPANY, No. 149322; Court of Appeals No. 318001. Leave to appeal denied at 497 Mich 869.

MURAD v METRO CAR COMPANY, No. 149346; Court of Appeals No. 318343. Leave to appeal denied at 497 Mich 856.

MATHIS v E C BROOKS CORRECTIONAL FACILITY WARDEN, No. 149354; Court of Appeals No. 320403. Leave to appeal denied at 497 Mich 870.

KINNEY v FICANO, No. 149468; Court of Appeals No. 311358. Leave to appeal denied at 497 Mich 870.

In re PETITION FOR FORECLOSURE OF CERTAIN PARCELS OF PROPERTY, No. 149506; Court of Appeals No. 309229. Leave to appeal denied at 497 Mich 871.

CITIGROUP GLOBAL MARKETS REALTY CORPORATION v SCHMITZ, No. 149610; Court of Appeals No. 309019. Leave to appeal denied at 497 Mich 871.

Summary Disposition March 4, 2015:

ESTATE OF RYAN CHARLES v SPARTAN STEEL COATING, LLC, No. 151091; Court of Appeals No. 323538. Pursuant to MCR 7.302(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 stay is granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

BERNSTEIN, J., would deny leave to appeal.

Summary Disposition March 6, 2015:

DOE v DEPARTMENT OF CORRECTIONS, No. 151034; Court of Appeals No. 324602. Pursuant to MCR 7.302(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 stay is granted. Trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

We direct the Court of Appeals' attention to the fact that on October 22, 2014, we also remanded John Doe 1 v Dep't of Corrections (COA Docket Nos. 321013, 321756) to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 6, 2015:

PEOPLE v MCADOO, Nos. 150191 and 150192; Court of Appeals Nos. 313880 and 313881.

MCCORMACK, J. (concurring). I concur in the order denying leave to appeal. I write separately to note my unease with the expert testimony regarding the toolmark evidence offered by the prosecution. In recent years significant doubt has been cast on the reliability and scientific foundation of that evidence. According to a 2009 forensic science report from the National Research Council of the National Academies, toolmark analysis lacks the empirical and statistical work that is needed to support conclusions regarding identity. The report noted that

> [t]oolmark and firearms analysis suffers from the same limitations [as other types of] impression evidence. Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods. [National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (Washington, DC: National Academies Press, 2009), p 154.]

The report also raised concerns regarding the subjectivity and error rate in toolmark analysis, as well as the lack of a precisely defined testing process. *Id*. at 155. Given these criticisms, I believe there are serious questions about whether such evidence has an adequate scientific foundation to allow its admission under MRE 702. See *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749, 779-783 (2004) (discussing the trial court's role as "gatekeeper" for the admission of expert testimony). I concur in this Court's order denying leave to appeal, however, because this issue is unpreserved and I am not convinced that the defendant has demonstrated that he is entitled to relief given the other evidence of guilt.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

Summary Disposition March 13, 2015:

In re REGINIER, No. 147839; Court of Appeals No. 313657. By order of

October 28, 2014, the application for leave to appeal the July 23, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Farris* (Docket No. 147636). On order of the Court, the order granting leave to appeal in Farris having been vacated on February 6, 2015, and the parties having filed a joint motion to remand the case to the Tuscola Circuit Court, Family Division, for reconsideration in light of *In re Sanders*, 495 Mich 394 (2014), we grant the motion to remand. We do not retain jurisdiction.

Summary Disposition March 20, 2015:

RODRIGUEZ v FEDEX FREIGHT EAST, INC, No. 149222; Court of Appeals No. 312187. On March 11, 2015, the Court heard oral argument on the application for leave to appeal the March 25, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment addressing the state-law abuse-of-process and fraud claims raised by the plaintiff and reinstate the July 20, 2012 order of the Wayne Circuit Court granting summary disposition to the defendants. It is well established that "a second suit for fraud, based on perjury ('intrinsic fraud'), may not be filed against a person involved in a first suit, if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Daoud v De Leau*, 455 Mich 181, 203 (1997). The record clearly supports a finding that the issues that the plaintiff is now raising were or could have been resolved in the 2003 litigation.

Leave to Appeal Denied March 20, 2015:

In re ARS, No. 150142; Court of Appeals No. 318638.

In re KELLER, No. 151054; Court of Appeals No. 321603.

In re BEELER/HALL, No. 151062; Court of Appeals No. 321648.

Rehearing Denied March 20, 2015:

HODGE v US SECURITY ASSOCIATES, INC, No. 149984; opinion at 497 Mich 189. Reported below: 306 Mich App 139.

Summary Disposition March 25, 2015:

CONLEY v CHARTER TOWNSHIP OF BROWNSTOWN, No. 148811; Court of Appeals No. 310971. By order of July 29, 2014, the application for leave to appeal the January 16, 2014 judgment of the Court of Appeals was held in abeyance pending the decisions in *Hunter v Sisco* (Docket No. 147335) and *Hannay v Dep't of Transportation* (Docket No. 146763). On order of the Court, the cases having been decided on December 19, 2014, 497 Mich 45 (2014), the application is again considered. In light of these decisions,

pursuant to MCR 7.302(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 Wayne Circuit Court for further proceedings not inconsistent with this order.

PEOPLE v COWAN, No. 149595; Court of Appeals No. 319132. Pursuant to MCR 7.302(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 the questions: (1) whether the defendant is entitled to relief because of the deliberate or negligent failure of the State of Michigan to execute the probation violation warrant while the defendant was known to be serving a prison sentence in Indiana, compare *People v Ortman*, 209 Mich App 251 (1995), and *People v Diamond*, 59 Mich App 581 (1975), with *Moody v Daggett*, 429 US 78; 97 S Ct 274; 50 L Ed 2d 236 (1976); and (2) whether the defendant has shown good cause for failing to raise this issue on direct review. The Court of Appeals is directed to decide this case on an expedited basis. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LUTHER, No. 149980; Court of Appeals No. 321962. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

SHOTWELL v DEPARTMENT OF TREASURY, No. 150024; reported below: 305 Mich App 360. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment concerning de facto officers. The Court of Appeals erred in concluding that "a material question of fact may have remained regarding petitioner's status as a de facto officer." The Michigan Tax Tribunal concluded that petitioner was not a de facto officer, and its findings are supported by competent, material, and substantial evidence on the whole record. *Briggs Tax Service v Detroit Public Schools*, 485 Mich 69, 75 (2010). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v BREWCZYNSKI, No. 150086; Court of Appeals No. 322674. Pursuant to MCR 7.302(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 Granted March 25, 2015:

PEOPLE v TOMASIK, No. 149372; Court of Appeals No. 279161. The parties shall include among the issues to be briefed: (1) whether the Kent Circuit Court erred by admitting the entire recording of the defendant's interrogation in light of People v Musser, 494 Mich 337 (2013), and, if so, whether admission of the evidence amounted to plain error; (2) whether the trial court erred in admitting Thomas Cottrell's expert testimony regarding child sexual abuse accommodation syndrome under current MRE 702, and People v Kowalski, 492 Mich 106 (2012), and, if so, whether admission of the testimony amounted to plain error; and (3)

whether the trial court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders in light of People v Grissom, 492 Mich 296 (2012).

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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 25, 2015:

PEOPLE v DUNBAR, No. 150371; reported below: 306 Mich App 562. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). We order the Muskegon Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Michael L. Oakes, 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. If the defendant is not indigent, he must retain his own counsel.

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 whether the license plate affixed to the defendant's vehicle violated MCL 257.225(2) where it was obstructed by a towing ball, thereby permitting law enforcement officers to conduct a traffic stop of the defendant's vehicle. 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 issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 25, 2015:

PEOPLE v SAM SANDERS, No. 149299; Court of Appeals No. 320827. By order of November 25, 2014, the Calhoun Circuit Court was directed to submit to the Court and the parties a copy of the transcript of the October 18, 2013 evidentiary hearing, and the prosecuting attorney was directed to answer the application for leave to appeal the April 2, 2014 order of the Court of Appeals. On order of the Court, the transcript and the answer having been received, the application for leave to appeal is again considered. We caution the Calhoun Circuit Court that when expansion of the record is necessary to resolve a defendant's motion for relief from

judgment under MCR Subchapter 6.500, it can only do so within the constraints set out in MCR 6.507(A). Pursuant to MCR 6.507(A), a trial court "may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court." In this case, the circuit court did not direct the parties to expand the record, but rather acted sua sponte to conduct an evidentiary hearing at which the defendant's trial counsel was questioned directly by the court regarding certain actions taken while representing the defendant at trial. The defendant appeared for the evidentiary hearing, but was not represented by counsel. The prosecution confirms that both it and the defendant were merely observers at this hearing. When the circuit court determines that an evidentiary hearing is required to resolve an issue, as occurred here, it must comply with MCR 6.508(C), and it must appoint counsel for an indigent defendant, as required by MCR 6.505(A). Notwithstanding this procedural error, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GETER, No. 149773; Court of Appeals No. 315987.

CROWELL v DEPARTMENT OF CORRECTIONS/DIRECTOR, No. 149972; Court of Appeals No. 320851.

PEOPLE v WEISHUHN, No. 150093; Court of Appeals No. 322172.

PEOPLE v HAUGH, No. 150629; Court of Appeals No. 323565.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 26, 2015:

In re MCCARTHY, No. 151039; Court of Appeals No. 318855. The parties and the lawyer-guardian ad litem (LGAL) shall file briefs no later than April 17, 2015, addressing whether termination of parental rights was in the best interests of the child. In particular, the parties and the LGAL shall address the effect given to the child's age, her expressed desire for her mother to retain parental rights, and the LGAL's concurrence that parental rights should not be terminated. See MCL 722.23(i). The parties should not submit mere restatements of their application papers.

Summary Disposition March 27, 2015:

PEOPLE v SLEDGE and PEOPLE v STEVEN COLLINS, Nos. 151082 and 151083; Court of Appeals Nos. 324680 and 324681. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the orders of the Court of Appeals and we remand this case to the Court of Appeals for consideration as on leave granted.

Summary Disposition March 31, 2015:

In re PAROLE OF STRUTZ, No. 150252; Court of Appeals No. 323101. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that by order dated March 31, 2015, we remanded *In re Parole of Steven J. Strutz* (Docket No. 150261) to the Court of Appeals for consideration as on leave granted.

In re PAROLE OF STRUTZ, No. 150261; Court of Appeals No. 323101. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that by order dated March 31, 2015, we remanded *In re Parole of Steven J. Strutz* (Docket No. 150252) to the Court of Appeals for consideration as on leave granted.

GATES V GRAND BLANC COMMUNITY SCHOOLS, No. 150358; Court of Appeals No. 322958. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

FROST V CITIZENS INSURANCE COMPANY, No. 150382; Court of Appeals No. 316157. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration of the intervening plaintiff's issue of whether the insurance policy issued by the defendant can be voided ab initio. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *Bazzi v Sentinel Ins Co* (Court of Appeals Docket No. 320518). After *Bazzi* is decided, the Court of Appeals shall reconsider the intervening plaintiff's issue in light of *Bazzi*.

PEOPLE V JAMES NELSON, No. 150414; Court of Appeals No. 322472. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for consideration of the defendant's motion to withdraw his guilty plea and for other relief. We clarify that our order dated February 6, 2013, in *People v Nelson*, 493 Mich 932 (2013), authorized substitute appellate counsel to pursue appellate remedies consistent with, but not limited to, filing an application for leave to appeal in the Court of Appeals. The Oakland Circuit Court shall promptly consider the defendant's motion. The parties may seek leave to appeal in the Court of Appeals from the circuit court's decision on remand. MCR 7.316(C)(7).

Leave to Appeal Denied March 31, 2015:

HOLTON V WARD, No. 149230; Court of Appeals No. 308454.

PEOPLE V AGUILAR, No. 149523; Court of Appeals No. 308066.

PEOPLE V ROSAS, No. 149525; Court of Appeals No. 308067.

VICTOR v THIRTY-FOURTH CIRCUIT COURT, No. 149571; Court of Appeals No. 315094.

PEOPLE v LATTA, No. 149591; Court of Appeals No. 320500.

PEOPLE v YOWELL, No. 149640; Court of Appeals No. 320899.

PEOPLE v PEOPLES, No. 149681; Court of Appeals No. 319561.

PEOPLE v COURTNEY, No. 149711; Court of Appeals No. 321148.

PEOPLE v RINCKEY, No. 149712; Court of Appeals No. 319824.

PEOPLE v FOLEY, No. 149714; Court of Appeals No. 319303.

PEOPLE v JOHN ALEXANDER, No. 149793; Court of Appeals No. 321130.

PEOPLE v LARRY SMITH, No. 149796; Court of Appeals No. 321665.

PEOPLE v CRUMP, No. 149802; Court of Appeals No. 321814.

PEOPLE v BYARS, No. 149808; Court of Appeals No. 320598.

PEOPLE v TERRY BAILEY, No. 149821; Court of Appeals No. 320064.

PEOPLE v LANIER, No. 149832; Court of Appeals No. 321607.

PEOPLE v ANTHONY JONES, No. 149842; Court of Appeals No. 321594.

PEOPLE v POYNTZ, No. 149881; Court of Appeals No. 321142.

PEOPLE v LORENZO DAVIS, No. 149887; Court of Appeals No. 321294.

PEOPLE v DYSON, No. 149908; Court of Appeals No. 322026.

PEOPLE v ROBERT MOORE, No. 149909; Court of Appeals No. 320347.

PEOPLE v VASQUEZ, No. 149913; Court of Appeals No. 321563.

PEOPLE v VINCENT MOORE, No. 149916; Court of Appeals No. 322106.

PEOPLE v WILLIAM JOHNSON, No. 149925; Court of Appeals No. 321726.

PEOPLE v HANEY, No. 149930; Court of Appeals No. 321108.

PEOPLE v RAHKAIM, No. 149933; Court of Appeals No. 321663.

PEOPLE v JULIAN EDWARDS, No. 149936; Court of Appeals No. 321132.

PEOPLE v CHEESE, No. 149942; Court of Appeals No. 315906.

PEOPLE v STALLING, No. 149946; Court of Appeals No. 311850.

A FOREVER RECOVERY, INC v PENNFIELD TOWNSHIP, No. 149965; Court of Appeals No. 320538.

MANSOUR v MANSOUR, No. 149974; Court of Appeals No. 313362.

PEOPLE v MAJOR, No. 150003; Court of Appeals No. 315304.

PEOPLE v MIX, No. 150018; Court of Appeals No. 315355.

PEOPLE v NAVARRO, No. 150031; Court of Appeals No. 312879.

PEOPLE v MANUEL, No. 150046; Court of Appeals No. 316756.

PEOPLE v TOMMIE WATKINS, No. 150080; Court of Appeals No. 313390.

PEOPLE v JACOB WELLS, No. 150081; Court of Appeals No. 315197.

PEOPLE v DONOVAN MARTIN, No. 150082; Court of Appeals No. 315203.

CAMP v CITY OF CHARLEVOIX, No. 150084; Court of Appeals No. 306066.

PEOPLE v CHARLES TAYLOR, No. 150089; Court of Appeals No. 315809.

PEOPLE v REEVES, No. 150125; Court of Appeals No. 315840.

EASTWICK SQUARE TOWNHOUSE COOPERATIVE v CITY OF ROSEVILLE, No. 150128; Court of Appeals No. 309538.

PEOPLE v HOWARD MCDONALD, No. 150130; Court of Appeals No. 313601.

PEOPLE v TONG LOR, No. 150136; Court of Appeals No. 310090.

PEOPLE v TOU LOR, No. 150138; Court of Appeals No. 310097.

PEOPLE v DEWEESE, No. 150141; Court of Appeals No. 321002.

PEOPLE v PAUL DANIEL, No. 150150; Court of Appeals No. 308230.

PEOPLE v MCGLOWN, No. 150155; Court of Appeals No. 308231.

PEOPLE v PETER DANIEL, No. 150157; Court of Appeals No. 308575.

IRON MOUNTAIN INFORMATION MANAGEMENT, INC v CITY OF LIVONIA, No. 150159; Court of Appeals No. 312753.

PAMELA B JOHNSON TRUST v ANDERSON, Nos. 150160 and 150161; Court of Appeals Nos. 315397 and 316024.

PEOPLE v LOGAN GAINES, No. 150162; reported below: 306 Mich App 289.

PEOPLE v LOGAN GAINES, No. 150164; reported below: 306 Mich App 289.

PEOPLE v LOGAN GAINES, No. 150166; reported below: 306 Mich App 289.

PEOPLE v JORDAN WILLIAMS, No. 150168; Court of Appeals No. 323147.

PEOPLE v LESONDA THOMPSON, No. 150169; Court of Appeals No. 321295.

PEOPLE v FRITZ, No. 150174; Court of Appeals No. 315951.

PAG, INC v ALPINIST ENDEAVORS, LLC, No. 150176; Court of Appeals No. 309253.

PEOPLE v DURR, No. 150211; Court of Appeals No. 313567.

PEOPLE v PHILLIP PATTON, No. 150212; Court of Appeals No. 314373.

NORTH LAKE INVESTMENTS, LLC v DROLETT, No. 150213; Court of Appeals No. 316222.

In re ESTATE OF PRICE, No. 150218; Court of Appeals No. 314992.

PEOPLE v STURGIS, No. 150224; Court of Appeals No. 314821.

PEOPLE v KAITNER, No. 150230; Court of Appeals No. 314868.

ABRAHAM v THUMB CORRECTIONAL FACILITY WARDEN, No. 150236; Court of Appeals No. 322095.

SHAFT v JACKSON NATIONAL LIFE INSURANCE COMPANY, No. 150240; Court of Appeals No. 315030.

PEOPLE v NORTH, No. 150245; Court of Appeals No. 316061.

PEOPLE v ALISHA HALL, No. 150246; Court of Appeals No. 313795.

PEOPLE v DEANDRE MOORE, No. 150259; Court of Appeals No. 313565.

PEOPLE v PAUL HALL, No. 150275; Court of Appeals No. 322400.

PEOPLE v KINARD, No. 150287; Court of Appeals No. 322538.

PEOPLE v BIGGER, No. 150291; Court of Appeals No. 313830.

PEOPLE v LAPHAM, No. 150300; Court of Appeals No. 321782.

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 150309; Court of Appeals No. 314990.

PEOPLE v SHANANAQUET, No. 150316; Court of Appeals No. 316430.

PEOPLE v BUCKLEY, No. 150323; Court of Appeals No. 316992.

PEOPLE v CARLISLE, No. 150335; Court of Appeals No. 320221.

PEOPLE v HRRAHMAN, No. 150346; Court of Appeals No. 316459.

PEOPLE v DEMING, No. 150349; Court of Appeals No. 322101.

PEOPLE v BUISH, No. 150350; Court of Appeals No. 322725.

HUNTER v AUTO CLUB INSURANCE ASSOCIATION, No. 150373; Court of Appeals No. 316795.

HADDAD v HADDAD, Nos. 150374 and 150375; Court of Appeals Nos. 315686 and 316492.

PEOPLE v ROSIN, No. 150378; Court of Appeals No. 322663.

JONES v JONES, No. 150385; Court of Appeals No. 323330.

PEOPLE v SALATHIEL BROWN, No. 150389; Court of Appeals No. 316648.

PEOPLE v MAYBANKS, No. 150390; Court of Appeals No. 323211.

PEOPLE v URSERY, No. 150391; Court of Appeals No. 316367.

PEOPLE v JOHNNY DAVIS, No. 150393; Court of Appeals No. 316645.

DYKES-BEY v DEPARTMENT OF CORRECTIONS, No. 150398; Court of Appeals No. 321982.

PEOPLE v LEONTAE CRAIG, No. 150399; Court of Appeals No. 323004.

PEOPLE v YATES, No. 150407; Court of Appeals No. 323718.

PEOPLE v KAHLER, No. 150412; Court of Appeals No. 316504.

PEOPLE v MATHER, No. 150415; Court of Appeals No. 316176.

PEOPLE v LANES, No. 150416; Court of Appeals No. 314268.

PEOPLE v STIVERS, No. 150417, Court of Appeals No. 322821.

PEOPLE v ENGLISH, No. 150420; Court of Appeals No. 316833.

PEOPLE v CAVENDER, No. 150428; Court of Appeals No. 320650.

PEOPLE v STOLL, No. 150429; Court of Appeals No. 316864.

PEOPLE v TOMAS, No. 150432; Court of Appeals No. 316286.

PEOPLE v VANHORN, No. 150456; Court of Appeals No. 322470.

PEOPLE v ROBERT TURNER, No. 150459; Court of Appeals No. 317095.

PEOPLE v MARKS, No. 150466; Court of Appeals No. 323691.

PEOPLE v BENSON LUCAS, No. 150473; Court of Appeals No. 316588.

PEOPLE v PARVAJ, No. 150474; Court of Appeals No. 323552.

PEOPLE v BAHR, No. 150494; Court of Appeals No. 322952.

PEOPLE v ISAIAH PRICE, No. 150499; Court of Appeals No. 321907.

PEOPLE v CARON ADAMS, No. 150506; Court of Appeals No. 323171.

PEOPLE v CAVAZOS, No. 150528; Court of Appeals No. 316850.

PEOPLE v DORROUGH, No. 150531; Court of Appeals No. 315763.

PEOPLE v KARSON, No. 150545; Court of Appeals No. 316485.

PEOPLE v HAMPTON, No. 150904; Court of Appeals No. 315801.

PEOPLE v MCCULLY, No. 150931; Court of Appeals No. 323750.

DUBUC v COPELAND PAVING, INC, No. 151041; Court of Appeals No. 325228.

Reconsideration denied March 31, 2015:

PEOPLE v LAPINE, No. 148274; Court of Appeals No. 313548. Leave to appeal denied at 497 Mich 902.

PEOPLE v CHAD COOK, No. 148864; Court of Appeals No. 319447. Leave to appeal denied at 497 Mich 902.

PEOPLE v ARMOUR, No. 148880; Court of Appeals No. 315470. Leave to appeal denied at 497 Mich 887.

PEOPLE v O'NEAL, No. 148921; Court of Appeals No. 311760. Leave to appeal denied at 497 Mich 892.

PEOPLE v RAY, No. 149050; Court of Appeals No. 319461. Leave to appeal denied at 497 Mich 887.

PEOPLE v CHRISTMANN, No. 149133; Court of Appeals No. 320031. Leave to appeal denied at 497 Mich 888.

PEOPLE v STEGALL, No. 149202; Court of Appeals No. 318249. Leave to appeal denied at 497 Mich 902.

PEOPLE v BEEMER, No. 149219; Court of Appeals No. 313602. Leave to appeal denied at 497 Mich 893.

DIRECTOR, WORKERS' COMPENSATION AGENCY v MACDONALD'S INDUSTRIAL PRODUCTS, INC, No. 149243; Court of Appeals No. 311184. Leave to appeal denied at 497 Mich 888.

PEOPLE v GARCIA, No. 149340; Court of Appeals No. 309081. Leave to appeal denied at 497 Mich 888.

PEOPLE v ANDERSON, No. 149392; Court of Appeals No. 311448. Leave to appeal denied at 497 Mich 888.

PEOPLE v SCOTT, No. 149395; Court of Appeals No. 320119. Leave to appeal denied at 497 Mich 947.

LOWE'S HOME CENTERS, INC v MARQUETTE TOWNSHIP and HOME DEPOT USA, INC v BREITUNG TOWNSHIP, Nos. 149407 and 149408; Court of Appeals Nos. 314111 and 314301. Leave to appeal denied at 497 Mich 930.

PEOPLE v DELL, No. 149450; Court of Appeals No. 317797. Leave to appeal denied at 497 Mich 891.

PEOPLE v MCNEES, No. 149486; Court of Appeals No. 320527. Leave to appeal denied at 497 Mich 947.

PEOPLE v HOWE, No. 149655; Court of Appeals No. 313143. Leave to appeal denied at 497 Mich 905.

PEOPLE v KISSNER, No. 149836; Court of Appeals No. 322052. Leave to appeal denied at 497 Mich 906.

PEOPLE v GREER, No. 149874; Court of Appeals No. 321416. Leave to appeal denied at 497 Mich 906.

Summary Disposition April 1, 2015:

PEOPLE v SIDERS, No. 148448; Court of Appeals No. 313828. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Monroe Circuit Court, and we remand this case to the

trial court for resentencing. The trial court erred in scoring five points for Offense Variable (OV) 17, MCL 777.47. That offense variable can only be scored for larceny from a person, MCL 750.357, if the crime involved the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1). In this case, the defendant's operation of a vehicle occurred after he completed the crime of larceny from a person. See *People v Smith-Anthony*, 494 Mich 669, 689 n 61 (2013) ("In a larceny case, the crime is completed when the taking occurs."); see also *People v McGraw*, 484 Mich 120, 122 (2009) ("[A] defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise."). Accordingly, in this case, OV 17 should not be scored. This lowers the defendant's guidelines range to 29 to 71 months. Under *People v Francisco*, 474 Mich 82, 89 (2006), the defendant is entitled to resentencing.

PEOPLE v MELVIN MARSHALL, No. 150134; Court of Appeals No. 308654. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment that affirmed the trial court's scoring of Offense Variable (OV) 13, and we remand this case to the Kent Circuit Court for resentencing.

The trial court assessed 25 points for OV 13. But pursuant to MCL 777.43(2)(c), "[e]xcept for offenses related to membership in an organized criminal group or that are gang-related, . . . conduct scored in offense variable 11 or 12" must not be scored under OV 13. As the Court of Appeals correctly held, the defendant's acts of resisting or obstructing the police would have been properly scored under OV 12, but it erred in concluding that those acts were "related to membership in an organized criminal group" or "gang-related." Therefore, the trial court erred in scoring OV 13 because, without the resisting or obstructing, there may not have been "3 or more crimes against a person." MCL 777.43(1)(c). Because the erroneous scoring of OV 13 changed the applicable guidelines range, the defendant is entitled to resentencing. See People v Francisco, 474 Mich 82 (2006).

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Granted April 1, 2015:

In re WANGLER, No. 149537; reported below: 305 Mich App 438. The parties shall include among the issues to be briefed: (1) the meaning of the phrase "dispositional order" within the context of a termination of parental rights proceeding; (2) whether the termination order constituted the first dispositional order; and (3) whether and to what extent the collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993), extends to the respondent's due process challenge.

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.

JESPERSON v AUTO CLUB INSURANCE ASSOCIATION, No. 150332; reported below: 306 Mich App 632. The parties shall include among the issues to be briefed: (1) whether the defendant adequately raised the affirmative defense of the one-year statute of limitations stated in MCL 500.3145(1) without explicitly describing it in its answer to the plaintiff's amended complaint; (2) if not, whether the Court of Appeals erred in rejecting the plaintiff's argument that the defendant waived the affirmative defense by pointing to the trial court's authority to exercise its discretion to allow the defendant to amend its answer; and (3) if the defendant did not waive the statute of limitations defense, whether its payment of benefits to the plaintiff more than one year after the date of the accident satisfied the second exception to the one-year statute of limitations established in the first sentence of § 3145(1).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 1, 2015:

MORRIS v MORRIS, SCHNOOR & GREMEL, INC, and MORRIS, SCHNOOR & GREMEL, PROPERTIES, LLC v MORRIS, SCHNOOR & GREMEL, INC, Nos. 149631, 149632, and 149633; Court of Appeals Nos. 315007, 315702, and 315742. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order. They should not submit mere restatements of their application papers.

Leave to Appeal Denied April 1, 2015:

PEOPLE v JERMAINE JACKSON, No. 148800; Court of Appeals No. 312755.

PEOPLE v ALZUBAIDY, No. 149425; Court of Appeals No. 308409.

PEOPLE v MOSS, No. 149728; Court of Appeals No. 320350.

PEOPLE v DUANE CRAIG, No. 149739; Court of Appeals No. 312590.

GORDENEER v LANE, No. 149780; Court of Appeals No. 319479.

WEBBER TOWNSHIP v AUSTIN, Nos. 149813 and 149814; Court of Appeals Nos. 313479 and 315050.

PEOPLE v XAVIER SMITH, No. 150055; Court of Appeals No. 315031.

PEOPLE v INGERSOLL, No. 150901; Court of Appeals No. 324966.

BITTERMAN v VILLAGE OF OAKLEY, No. 151075; reported below: ___ Mich App ___.

Summary Disposition April 3, 2015:

PEOPLE v GLENN DAVIS, No. 149998; Court of Appeals No. 321375. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence imposed by the Kent Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred in scoring Offense Variable 11 at 50 points in the absence of evidence that any additional penetrations "arose out of" the sentencing offense. See MCL 777.41; *People v Johnson*, 474 Mich 96 (2006).

PEOPLE v MAURICE HENDERSON, No. 150728; Court of Appeals No. 315983. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the May 3, 2012 letter from the Michigan Department of Corrections to the prosecutor was sufficient to trigger start of the 180-day period set forth in MCL 780.131. At the time that letter was sent, the Department did not have notice of any pending untried warrant, indictment, information, or complaint against the defendant, and the letter therefore did not meet the statutory requirements for applying the 180-day rule. We remand this case to the Court of Appeals for consideration of the Muskegon Circuit Court's finding of a second 180-day rule violation that the Court of Appeals declined to address. We do not retain jurisdiction.

Leave to Appeal Granted April 3, 2015:

LANDIN v HEALTHSOURCE SAGINAW, INC, No. 149663; reported below: 305 Mich App 519. On order of the Court, the application for leave to appeal the June 3, 2014 judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the plaintiff may maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a). See *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982). In discussing this issue, the parties shall also address whether the Whistleblowers' Protection Act, MCL 15.361 *et seq*., provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a). See MCL 333.20180(1).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 3, 2015:

PEOPLE v FATEEN MUHAMMAD, No. 150119; Court of Appeals No. 317054. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the defendant's acknowledgement that he received a felony complaint that contained a habitual offender notice filed in district court satisfies the requirement set forth in MCL 769.13 that the habitual offender notice be served "within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense;" and (2) if not, the proper application of the harmless error tests articulated in MCR 2.613 and

MCL 769.26 to violations of the habitual offender notice requirements set forth in MCL 769.13, compare *People v Cobley*, 463 Mich 893 (2000), with *People v Johnson*, 495 Mich 919 (2013). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied April 3, 2015:

BEDFORD PUBLIC SCHOOLS v BEDFORD EDUCATION ASSOCIATION MEA/NEA, NO. 149718; reported below: 305 Mich App 558.

BERNSTEIN, J. (*concurring*). I write to express my concerns regarding the problematic drafting of MCL 423.215b(1).

Appellant teachers' wages can be increased in two ways: by a "step increase," which is a wage increase based on seniority, or by a "lane change," an increase in the level of graduate education. MCL 423.215b(1), as amended by 2014 PA 322, states in relevant part:

> Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date. [Emphasis added.]

The issue presented here is whether the statute's bar on wage increases applies to a lane change wage increase, which is not expressly listed in the statute.

When applying the traditional rules of statutory interpretation to MCL 423.215b(1), it appears that the statute does not apply to pay increases as a result of a lane change. First, " '[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory.' " *Robinson v City of Lansing*, 486 Mich 1, 21 (2010) (citation omitted) (alterations in original). To interpret the statute to bar lane change wage increases would render the language specifying that wage step increases are included in the statutory bar unnecessary. It seems clear that a step increase is a wage increase; therefore, in order to give meaning to the Legislature's explicit inclusion of the phrase "step increase," it must be that the statute does not bar all wage increases. Although the mere use of the word "includes" does not give much guidance about whether the list following is inclusive or exclusive, the doctrine of *expressio unius est exclusio alterius* suggests the latter. The specific inclusion of "step increase" can be read to imply the exclusion of a "lane change" wage increase. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74-75; 711 NW2d 340 (2006).

However, some text in MCL 423.215b(1) supports the determination that a lane change wage increase is also barred. The statute states that "a public

employer shall pay and provide wages and benefits at levels and *amounts that are no greater* than those in effect on the expiration date of the collective bargaining agreement." MCL 423.215b(1) (emphasis added). As explained earlier, a teacher's wage is determined by both lane changes and step increases. Any lane change is ultimately an increase in the teacher's wages. Under the clear language of the statute, a teacher's wage cannot increase while a collective-bargaining agreement is not in place. Therefore, it would appear that any change in a teacher's status that would increase that teacher's wage is barred by MCL 423.215b(1). Indeed, that interpretation makes sense considering that the statute even requires teachers to bear any increased costs of insurance benefits while a collective-bargaining agreement is not in place. Further, the legislative history of MCL 423.215b(1) supports the contention that the Legislature sought to bar any and all increases to teachers' pay.[1] An explanation of the fiscal impact of House Bill 4152, which added MCL 423.215b, explains that it would "prevent[] any wage increases (e.g., automatic 'step increases') . . . ." Senate Legislative Analysis, HB 4152 (H-2), March 16, 2011. The inclusion of the phrase "e.g., . . . 'step increases' " signifies an intent to make wage "step increases" merely an example of the types of wage increases that are barred by MCL 423.215b(1).

The lack of clarity displayed by this statute demonstrates the danger posed by the use of nonspecific lists in legislation. When lists do not expressly identify their scope—whether the list is merely illustrative and inclusive or limited and exclusive—they can lead to uncertainty, forcing the courts to step in. Had the Legislature in MCL 423.215b(1) stated that "[t]he prohibition in this subsection includes, but is not limited to, increases that would result from wage step increases," the Legislature's intent would have been clear. I encourage the Legislature in the future to be clearer in order to better inform not only the courts of its intent, but the general public as well.

PITSCH HOLDING COMPANY, INC v PITSCH ENTERPRISES, INC, No. 150095; Court of Appeals No. 315800.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would instead reverse in part the judgment of the Court of Appeals for the reasons stated by the partial dissent in that Court. Plaintiff is a holding company for a demolition enterprise. That enterprise's five shareholders are siblings. For reasons unrelated to this case, Gary Pitsch was removed as an active member of the company but remains a shareholder. He then started his own company, defendant Pitsch Enterprises, Inc., which engages in the metal scrap business, as well as in demolition and excavation work. Plaintiff sued Pitsch and his company, alleging violation of a noncompete provision in the shareholder's agreement. A jury awarded plaintiff $128,000 in damages for breach

[1] I recognize that this Court will not consult legislative history when a statute is unambiguous. See, e.g, *In re Certified Questions from United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 116 (2003). However, I think that the legislative history of 2011 PA 54, which enacted MCL 423.215b, is illustrative of the problem that this statute presents.

of the provision, and in a split decision, the Court of Appeals affirmed. *Pitsch Holding Co, Inc v Pitsch Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2014 (Docket No. 315800). The partial dissent opined that plaintiff had failed toprovide adequate evidence to justify the jury's award of damages for breach of the noncompete provision.[1] I agree.

Defendant argues that plaintiff failed to present any evidence of actual damages given that it could not show that it had lost any contract to defendant in the bidding process. That is, although plaintiff and defendant may have both bid on some of the same contracts (defendant thus violating the noncompete provision), there is no evidence that defendant obtained any of these contracts. "[C]ausation of damages is an essential element of any breach of contract action . . . ." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178 (2014). Plaintiff's proofs were limited to tax returns indicating that its revenues had declined during the previous five-year period while defendant's revenues had increased by a similar amount. However, there is no evidence that plaintiff's decline in revenue was in any way caused by, or attributable to, defendant's violation of the noncompete provision, and that is what must be shown in a case such as this.

ZAHRA, J., joins the statement of MARKMAN, J.

In re WARE, No. 151195; Court of Appeals No. 322564.

Reconsideration granted April 3, 2015:

DOE v DEPARTMENT OF CORRECTIONS, No. 151034; Court of Appeals No. 324602. Summary disposition at 497 Mich 974. On order of the Court, the motion for reconsideration of this Court's March 6, 2015 order is considered, and it is granted in part. On reconsideration, we vacate that part of the March 6, 2015 order stating that "[t]rial court proceedings are stayed pending the completion of this appeal." We modify the order to grant the motion for stay only with regard to the Washtenaw Circuit Court's class certification orders, dated October 29, 2014, and November 21, 2014. As before, 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. In all other respects, the motion for reconsideration is denied.

Summary Disposition April 10, 2015:

LUCKETT v SOUTHEAST MACOMB SANITARY DISTRICT, No. 149229; Court of Appeals No. 313280. Pursuant to MCR 7.302(H)(1), in lieu of granting

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[1] *Pitsch Holding Co, Inc v Pitsch Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2014 (Docket No. 315800) (SHAPIRO, J., concurring in part and dissenting in part), p 1.

leave to appeal, we reverse in part the judgment of the Court of Appeals and we remand this case to the Macomb Circuit Court for entry of summary disposition in favor of defendant Rick Kittell. The only evidence concerning the illumination of the Rio Vista Pier lights before the snowmobile accident was Kittell's log in which he recorded that the pier lights were all illuminated approximately 20 minutes prior to the accident. The plaintiffs' evidence all concerned the status of the lights following the accident. There is no evidence that Kittell was grossly negligent, that is, that he engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Neither is there any evidence that Kittell's acts or omissions were the proximate cause of the plaintiff's injuries. See *Robinson v Detroit,* 462 Mich 439 (2000).

BERNSTEIN, J. (*dissenting*). I respectfully dissent from this Court's order reversing in part the judgment of the Court of Appeals and remanding to the trial court for entry of summary disposition in favor of all defendants. I would instead deny leave to appeal. I believe the Court of Appeals correctly ruled that because there exists a genuine issue of material fact with respect to defendant Rick Kittell, he is not entitled to summary disposition.

Plaintiffs are the parents of William Luckett IV, a minor at the time this suit was initially filed. On March 12, 2008, William was driving his father's snowmobile on a frozen lake when he crashed into a pier and was thrown onto the ice. William was rendered quadriplegic as a result of the accident. On William's behalf, plaintiffs sued defendants, who were responsible for maintaining the lights on the pier. Plaintiffs conceded that governmental immunity entitled defendant Southeast Macomb Sanitary District to summary disposition under MCR 2.116(C)(7). However, plaintiffs maintained that the individual defendants, Patrick O'Connell and Kittell, were liable because their conduct amounted to "gross negligence" that was the "proximate cause of the injury." See MCL 691.1407(2)(c). The trial court ruled that the evidence was insufficient to establish gross negligence, granting summary disposition in favor of both O'Connell and Kittell pursuant to MCR 2.116(C)(7) and (10). The Court of Appeals affirmed the trial court's decision with respect to O'Connell but reversed with respect to Kittell. The Court of Appeals concluded that a genuine issue of material fact existed regarding whether Kittell's acts or omissions amounted to gross negligence and that a reasonable jury could conclude that Kittell's conduct was the proximate cause of the accident. *Luckett v South Macomb Disposal Auth*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2014 (Docket No. 313280).

I agree with the Court of Appeals. With respect to Kittell, while there was conflicting evidence, when that evidence is viewed in the light most favorable to plaintiff, I believe that a genuine issue of material fact exists. See MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120 (1999). A motion for summary disposition should only be granted if evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(C)(10) and (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 361-363 (1996). A close

case " 'calls for jury instruction and jury verdict rather than a verdict by order of the court.' " *Washington v Jones*, 386 Mich 466, 471 (1971), quoting *Tien v Barkel*, 351 Mich 276, 283 (1958). In this particular case, with respect to Kittell, I believe the proofs should be submitted to a jury to determine the ultimate outcome of the claim.

PEOPLE v FREDERICK, No. 150546; Court of Appeals No. 323642. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall address whether the "knock and talk" procedure conducted in this case is consistent with US Const, Am IV, as articulated in *Florida v Jardines*, 133 S Ct 1409 (2013). We note that a similar issue is presented in *People v Van Doorne* (Docket No. 150548), which we remanded to the Court of Appeals for consideration as on leave granted by order dated April 10, 2015.

PEOPLE v VAN DOORNE, No. 150548; Court of Appeals No. 323643. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall address whether the "knock and talk" procedure conducted in this case is consistent with US Const, Am IV, as articulated in *Florida v Jardines*, 133 S Ct 1409 (2013). We note that a similar issue is presented in *People v Frederick* (Docket No. 150546), which we remanded to the Court of Appeals for consideration as on leave granted by order dated April 10, 2015.

Leave to Appeal Denied April 10, 2015:

LATHAM v BARTON MALOW COMPANY, Nos. 148928 and 148929; Court of Appeals Nos. 312141 and 313606.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying defendant's application for leave to appeal. This case presents a significant issue arising from modern precedents in which this Court has departed from common-law understandings concerning the responsibilities of general contractors for the negligence of subcontractors and their employees. There has, in my judgment, been clear error here in applying these precedents and, accordingly, I would reverse the judgment of the Court of Appeals and remand to the trial court with instructions to grant summary disposition in favor of defendant.

Plaintiff was employed as a carpenter by subcontractor B&H Construction to work on the construction of a new high school, as to which project defendant served as the general contractor. Plaintiff was charged with the installation of dry wall on top of a mezzanine that was elevated 17 feet above the ground. Unlike every other worker to do work atop the mezzanine, plaintiff and a partner employed a scissors lift to elevate themselves and their materials onto the mezzanine. When the lift reached the proper height, plaintiff noticed that because it was parked at an angle, there was a gap between the mezzanine and the lift. Nonetheless, plaintiff and his partner decided to begin moving materials onto the mezzanine from the lift. While they were doing so, a piece of dry wall

snapped, and plaintiff slipped through the gap and fell 17 feet, seriously and permanently injuring his feet. Plaintiff brought suit against defendant, relying on the "common work area" doctrine to assert his claim.

Other workers accessing the same mezzanine employed a ladder for this purpose and then used a forklift to raise their materials onto the mezzanine. This method did not require the use of fall protection equipment. However, the method used by plaintiff did require such equipment because it involved the possibility of having to traverse a gap between two platforms. Plaintiff's claim is that defendant failed to install hook points for an alternative "double lanyard" system that would have prevented his fall. Plaintiff, however, has presented no evidence (1) that any other subcontractor, or any of its workers (but for his partner), contemplated using the method that he employed to ascend to the mezzanine, (2) that any other employee ascended as he did without fall protection equipment, or (3) that as a result of these circumstances any other worker employed by any other subcontractor on the site was exposed to the same risk that led to his own injury.

Under the common law, plaintiff's claim clearly would have been barred because a general contractor "could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capitol Welding, Inc*, 471 Mich 45, 48 (2004). This Court, however, created an exception to the common-law rule, which is known as the "common work area" doctrine. *Funk v Gen Motors Corp*, 392 Mich 91, 104 (1974). Under this exception, a general contractor can be held liable for the negligence of a subcontractor or its employees if the plaintiff can show that

> (1) the defendant, either the property owner or general 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 workmen (4) in a common work area. [*Ormsby*, 471 Mich at 54.]

In creating this exception, this Court opined that "[p]lacing 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, *Funk*, 392 Mich at 104, while the dissent observed that the exception represented a "significant departure from time tested theories of tort liability" and that general contractors must be "prepared to assume responsibility for any injury received by the employee of a subcontractor, no matter how negligent the employee may be," *id*. at 116 (COLEMAN, J., dissenting).

It is not my intention to take issue with either the creation of the "common work area" exception in *Funk* or with the elaboration of this exception in the subsequent decisions of *Ormsby and Latham v Barton Malow Co*, 480 Mich 105 (2008). Rather, it is my intention only to suggest that this Court bears a continuing obligation to the bench and bar, and to

those businesses and employees engaged in the construction industry, to clearly limn the nature and breadth of the "common work area" exception. The exception is a product of this Court, and it is our responsibility to provide reasonable guidance about what we mean by it. The instant case illustrates well the confusion that the exception has generated.

In shaping the "common work area" doctrine, we have asserted that it is not to be applied in a manner that imposes strict liability. *Latham*, 480 Mich at 113-114 ("To hold that the unavoidable height itself was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability . . . . This has never been the law."). Rather, "[i]n some instances, as to some risks, it will appear unwarranted to impose the responsibility on anyone other than the immediate employer of the workman . . . ." *Funk*, 392 Mich at 109-110 (emphasis added).

When this Court created the doctrine in Funk, the plaintiff had been injured as the result of a risk in the workplace that was shared by almost every other worker. It was in that situation that we determined that the law should "discourage those in control of a worksite from ignoring or being careless about unsafe working conditions . . . ." *Latham*, 480 Mich at 112. We noted further that the

> failure to provide safety equipment for the men working along the steel did not represent just an occasional lapse . . . . Iron workers . . . and pipe fitters and electricians . . . were exposed to similar risks. [*Funk*, 392 Mich at 103 (emphasis added).]

Under *Funk* then, the "common work area" doctrine was to apply only in situations in which a "significant" number of workers were exposed to a "similar risk" to that which caused plaintiff's injury. It is only in those situations that it makes sense to hold the general contractor liable on the grounds that it is the only entity in a position to ameliorate a risk that is presumably pervasive or common throughout the workplace. On the other hand, it makes little sense to hold the general contractor liable for injuries resulting from an isolated risk merely because there are other workers in the same workplace exposed to other isolated risks. It is precisely in such a situation that it is "unwarranted to impose the responsibility on anyone other than the immediate employer of the workman . . . ." *Id*. at 109-110.

That is, the "common work area" exception to the common-law rule that the general contractor cannot be held liable for the negligence of subcontractors and their employees 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; accordingly, the risk must be defined more generally than in terms only of workers who used a scissors lift without fall protection equipment to elevate themselves to the mezzanine level 17 feet above the ground and were then required to traverse a 18-inch gap while transferring materials from the lift onto the mezzanine. This Court today offers no guidance on either of these matters and thus allows the lower courts to transform a relatively narrowly understood and commonsensical exception to a longstanding common-law rule into an entirely revamped rule in which traditional legal duties and obligations on construction worksites are inadvertently, but significantly, being redefined.

Plaintiff here was permitted to proceed with his claim even though he failed to present evidence that a "significant" number of workers were exposed to the specific risk that ultimately led to his injury. Rather, he merely asserted that other workers from other trades had worked on the same mezzanine, and this was accepted by the lower courts as sufficient to establish that there was a situation creating a "high degree of risk to a significant number of workmen . . . in a common work area." *Ormsby*, 471 Mich at 54. This Court, however, responded in an earlier opinion that this analysis was defective and that plaintiff must instead show that there were a significant number of workers exposed to the "danger of *working at heights without fall protection equipment*" in order to prevail. *Latham*, 480 Mich at 114. It was not enough for plaintiff to assert broadly and peremptorily that others were exposed to the "similar risk" of working at heights. Nonetheless, on remand, plaintiff made a virtually identical showing to the one he made before our remand, and he has yet again prevailed on the merits.

Plaintiff's injury occurred while he was incurring a risk shared by only a single other person at the worksite. He was injured while he was ascending to the mezzanine by scissors lift, a method that no other worker at the worksite employed, much less while lacking the required fall protection equipment. Even overlooking plaintiff's personal responsibility for this risk having arisen, unlike the failure of the general contractor in *Funk*, defendant's failure to ensure that plaintiff used fall protection equipment did represent an "occasional lapse." *No one else* save for his partner—indeed not a single employee of any other contractor—was exposed to anything approximating the *same risk* as plaintiff. In the instant situation, unlike in *Funk*, it is entirely "unwarranted to impose the responsibility on anyone other than the immediate employer of the workman . . . ." *Funk*, 392 Mich at 109-110.

As a result of the Court of Appeals' analysis, a general contractor can now be held liable for a workplace injury arising from a risk faced by no other workers as long as the risk can either be defined in a sufficiently encompassing manner to bring within its scope workers who in all reality have faced a distinctive risk from that of the injured plaintiff or aggregated with other risks by clever exercises in classification. It is not

the proper function of this Court to act as an alternative to the Occupational Safety and Health Administration by scanning the workplace to assess whether there are random defects or hazards that can be accumulated and aggregated so that an individualized and discrete risk can be recharacterized as one faced by a "significant" number of employees and the general contractor can become legally responsible. The goal of the "common work area" doctrine is to "discourage those in control of a worksite from ignoring or being careless about unsafe working conditions," *Latham*, 480 Mich at 112, not to impose liability for risks unrelated to the injury that the plaintiff actually suffered. Plaintiff here failed to present evidence that he was injured as the result of a risk shared in common with any other worker, much less a "significant" number of other workers, and therefore defendant is entitled to summary disposition. If there is a question concerning the certitude of that observation, this appeal nonetheless merits a grant of leave in order to address and clarify the issues that have been raised by this Court's creation of the "common work area" exception to the rule of nonliability of general contractors for the negligence of their subcontractors and those subcontractors' employees.

MUELLER v BOUIS, No. 149990; Court of Appeals No. 321758.

BOUIS v MUELLER, No. 150014; Court of Appeals No. 321157.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying plaintiff's application for leave to appeal and instead would remand to the trial court for further consideration of plaintiff's claim of defamation. In my judgment, neither the trial court nor the Court of Appeals has afforded plaintiff his full day in court on this claim.

The two parties have been engaged in a dispute concerning whether on their second date plaintiff sexually assaulted defendant. On their first date four days earlier, the parties had engaged in consensual sexual relations. The prosecutor declined to charge plaintiff, although defendant did obtain a personal protection order against plaintiff arising from repeated text messages disputing her allegations.

Plaintiff eventually sued defendant for defamation arising out of her statements to investigators and friends alleging the sexual assault. After discovery, the trial court granted summary disposition in defendant's favor, ruling that defendant's allegations made to the police and prosecutors were protected by either absolute or qualified privilege, or both. I agree with this decision. However, the trial court failed to address the merits of the defamation action arising from defendant's nonprivileged statements to her friends, and the Court of Appeals denied leave to appeal.

"At common law, words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal." *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728 (2000). "Where defamation per se has occurred, the person defamed is entitled to recover general damages in at least a nominal amount." *Id*. at 728. Furthermore, and particularly relevant to this case, a plaintiff can sustain a defamation action when the

alleged defamatory communication can be shown with sufficient particularity to be "of and concerning the plaintiff." See *Weiss v Whittemore*, 28 Mich 366, 371-372 (1873) (stating that facts describing the plaintiff as "the agent for the sale of the Steinway pianos" were "sufficient to lay the foundation for the allegation that the words were published of and concerning the plaintiff in respect to his said business").

Defendant's alleged communications to friends that she had been sexually assaulted potentially constituted defamation per se because they charged plaintiff with the commission of a crime. Although plaintiff was denied an opportunity to depose defendant's friends before the trial court granted summary disposition, there is evidence that they were told by defendant that she had been sexually assaulted by plaintiff. One of these individuals, "a trusted male friend," later served the personal protection order on plaintiff. At the time these communications first occurred, defendant had knowledge only of plaintiff's first name, his status as a law student temporarily on leave from school, and the location of the apartment complex where he lived and to where the parties had proceeded on their second date. Those communications, if they can be established, seem sufficient to establish that they were "of and concerning" plaintiff because a simple investigation could have uncovered, and indeed did shortly thereafter uncover, plaintiff's identity.

To be quite clear, I have no idea what did or did not occur on the parties' second date, and there has been no judicial determination of any kind in this regard. All that I do know is that plaintiff is not prepared to drop this matter. He has filed a civil lawsuit alleging defamation, and he has apparently set forth the prerequisites for proceeding with such a lawsuit. If so, plaintiff is entitled to judicial consideration and resolution of the aspects of his claim that concern nonprivileged communications. One cannot under the law engage in a sexual assault, and one cannot under the law falsely accuse another of engaging in a sexual assault. I would remand this case to the trial court for further proceedings.

MCCORMACK and BERNSTEIN, JJ., join the statement of MARKMAN, J.

PEOPLE V GONZALEZ-RAYMUNDO, Nos. 150813 and 150814; reported below: 308 Mich App 175.

YOUNG, C.J., would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal and would instead grant leave to assess whether defendant, a non-English-language speaker, is entitled to a new trial because his counsel and not defendant waived his right to a simultaneous translation. Defendant was provided an interpreter by the trial court, but on the first day of trial, his counsel stated on the record that

> I want to avoid the chance of any prejudice, so we'd like to preserve the right to waive the interpreter during the course of the proceedings and explain things to the defendant on break. And you can hear straight from the defendant's mouth if you like, Your Honor, that this is indeed our wish.

The trial court assented, and consequently defendant received the assistance of an interpreter throughout trial, but the interpreter did not

provide simultaneous translation. Defendant was convicted of four counts of third-degree criminal sexual conduct.

At a *Ginther*[1] hearing, defense counsel testified that "[a]ll I know is that this was the strategy I recommended to [defendant] and he went along with it to the point that I don't recall him making any objection." Defendant did not testify at the hearing. Nonetheless, the trial court granted defendant a new trial because he did not personally waive his right to simultaneous translation, and the Court of Appeals affirmed. *People v Gonzalez-Raymundo*, 308 Mich App 175 (2014) (Docket Nos. 316744 and 319718).

" '[W]aiver is the "intentional relinquishment or abandonment of a known right." ' " *People v Carines*, 460 Mich 750, 762 n 7 (1999), quoting *United States v Olano*, 507 US 725, 733 (1993). "While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel." *People v Carter*, 462 Mich 206, 218 (2000). For the following reasons, I question whether the lower courts correctly ruled that a new trial is warranted under the present circumstances.

First, neither the right to an interpreter nor the right to simultaneous translation have yet been deemed to be constitutional rights by either this Court or by the United States Supreme Court, much less to constitute extraordinary "structural" constitutional rights. Accordingly, when a rule of automatic reversal for failure to obtain the defendant's personal waiver has only been applied to violations of "a narrow class of foundational constitutional rights" such as the right to counsel and the right to plead not guilty, *People v Vaughn*, 491 Mich 642, 655-657 (2012), what is the rationale for imposing such an unyielding rule in the present context?

Second, the right to an interpreter and the right to simultaneous translation are fundamentally distinct. Once the trial court has appointed an interpreter to assist the defense, the specific use of the interpreter—whether to provide simultaneous translation or otherwise—would seem to be a matter of trial strategy that does not require that the defendant's personal assent be given to the court. That is, as numerous courts have recognized, the trial court satisfies its obligation, imposed by court rule and statute in Michigan, by appointing an interpreter to assist the defense, and the particular use to which the interpreter is put at trial is determined by counsel's judgment. See *Markiewicz v State*, 109 Neb 514, 520-521 (1922) ("The defendant and his attorney were furnished the means by which the defendant could be fully apprised with knowledge of the proceedings and the course of the testimony, and it was for them to determine how far they should avail themselves of the services of the interpreter furnished."); *Suarez v State*, 481 So 2d 1201, 1204 (Fla, 1985) (citing *Markiewicz*); *State v Casipe*, 5 Hawaii App 210, 216 (1984) (citing same). See also *People v Alvarez*, 14 Cal 4th 155, 209 (1996) ("We cannot conclude . . . that the superior court denied defendant any right he had to the assistance of an

[1] *People v Ginther*, 390 Mich 436 (1973).

interpreter. It made an interpreter available to assist him throughout the proceedings."). Respectfully, the lower courts have taken no cognizance of this distinction.

Third, although new MCR 1.111 was not in effect at the time pertinent to this case, the Court of Appeals' decision will impose duties on trial courts significantly beyond those required by that court rule, which provides, in relevant part:

> (B) Appointment of a Foreign Language Interpreter.
>
> (1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.
>
> * * *
>
> (C) Waiver of Appointment of Foreign Language Interpreter. A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter.

Under the Court of Appeals' decision, a trial court must now not only appoint an interpreter when required to do so by court rule, but it must also monitor the use of the interpreter by the defense during trial to ensure that the defendant either receives simultaneous translation or else personally waives his or her right to do so. Neither of these requirements can be found in MCR 1.111, which already stands as an exceedingly broad rule. In my view, a trial court's compliance with MCR 1.111 is sufficient to protect the rights of a defendant needing interpreter assistance. Cf. *People v Williams*, 470 Mich 634, 646-647 (2004) ("The record reflects that the trial court conscientiously complied with *every* requirement of MCR 6.005(D) . . . . The trial court satisfied all of the waiver-of-counsel procedure required under MCR 6.005(D) and did not err in granting defendant's request to waive counsel . . . .").

Finally, the record fails to support a conclusion that a new trial is necessary. Defense counsel's *Ginther* hearing testimony does not suggest that defendant opposed waiving his right to simultaneous translation or that defendant was inclined to, or *would have*, exercised his right to simultaneous translation at the original trial had he been directly questioned. Given this absence, it is not clear to me why defendant should now be granted a second trial, the only apparent rationale for which is to afford defendant a second (or third) opportunity to assert what may be nothing more than a non-right to a personal waiver.

Accordingly, I would grant leave to appeal to assess whether defense counsel's waiver of the right to simultaneous translation on behalf of his client should be afforded respect by this Court.

SATGUNAM v HACKNEY, GROVER, HOOVER, & BEAN, No. 151274; Court of Appeals No. 323798.

Summary Disposition April 17, 2015:

HELTON v BEAMAN, No. 148927; reported below: 304 Mich App 97. 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 result reached in the February 4, 2014 judgment of the Court of Appeals, which affirmed the Oakland Circuit Court's denial of the plaintiff's request to revoke the defendants' acknowledgment of parentage as to the subject child. We agree with the Court of Appeals authoring and concurring judges that *In re Moiles*, 303 Mich App 59 (2013), wrongly held that a trial court is not required to make a best interest determination under MCL 722.1443(4) in deciding whether to revoke an acknowledgment of parentage. For the reasons explained in section II of the concurring opinion, we hold that an order revoking an acknowledgment of parentage constitutes an order "setting aside a paternity determination" and, therefore, is subject to a best interest analysis under MCL 722.1443(4). We also agree with the lower courts that in this case in which the defendants have raised the child who is now eleven years old from birth, and in which the plaintiff has had little to no meaningful interaction with the child during that time, it is not in the child's best interests to revoke the acknowledgment of parentage.

PEOPLE v TYNER, No. 149800; Court of Appeals No. 309729. Pursuant to MCR 7.302(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 Wayne Circuit Court for proceedings consistent with its April 12, 2012 order granting the defendant's motion for new trial and relief from judgment.

A trial court's decision to grant a new trial based upon newly-discovered evidence is reviewed for an abuse of discretion. See *People v Terrell*, 289 Mich App 553, 558 (2010), lv den 489 Mich 858 (2011). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Musser*, 494 Mich 337, 348 (2013). Here, the trial court held that three statements by Carlos Strong to his mother, Carol Turner, and his former girlfriend, Rasheedah Pearson, constituted excited utterances. Those statements indicated that defendant was not at the crime scene on the night of the shooting. Finding that the statements satisfied the test for newly-discovered evidence, including that they would make a different result reasonably probable on retrial, the trial court ordered a new trial. See *People v Cress*, 468 Mich 678 (2003). The Court of Appeals erred by substituting its own opinion of the credibility and veracity of the witnesses for that of the trial court. Given the trial court's superior position to assess the credibility and veracity of the witnesses, its determination that the newly-discovered evidence

would make a different result probable on retrial was not so egregious that it was outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269 (2003). See also *Alder v Flint City Coach Lines, Inc*, 364 Mich 29, 38 (1961) (CARR, J., concurring) ("This Court has repeatedly held that a trial judge, in passing on a motion for a new trial, is vested with a large discretion. The wisdom of such rule is obvious. The judge has the advantage of seeing the witnesses on the stand, of listening to their testimony, of noting the attitude of the jury to various matters that may arise during the trial, and is in far better position than is an appellate court to pass on questions of possible prejudice, sympathy, and matters generally that occur in the course of a trial but which do not appear of record.").

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

Leave to Appeal Denied April 17, 2015:

PEOPLE v TROWBRIDGE, No. 146357; Court of Appeals No. 300460.

In re THOMAS, No. 151206; Court of Appeals No. 321924.

In re HENDRICKSON, No. 151293; Court of Appeals No. 322278.

Superintending Control Denied April 17, 2015:

WATERS v BOARD OF LAW EXAMINERS, No. 151119.

Summary Disposition April 23, 2015:

ZAWACKI v ELLIOTT, No. 151097; Court of Appeals No. 322623. Pursuant to MCR 7.302(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 Granted April 23, 2015:

In re FILIBECK ESTATE, No. 149671; reported below: 305 Mich App 550. The parties shall include among the issues to be briefed: (1) whether a constructive trust was properly imposed where the defendant raised funds from third party donors to defray a relative's unexpected medical expenses for a life threatening condition, and those funds were placed in a credit union account in the defendant's own name, which she later withdrew for her personal benefit before the relative's death; (2) whether the decedent-beneficiary of the donated funds made a valid *inter vivos* or *causa mortis* gift of the funds to the defendant, including delivery of the funds to the defendant; and (3) if there was no such valid gift, whether the trial court erred in concluding that the remaining balance of donated funds must be paid to the decedent-beneficiary's estate, cf *Matter of Gonzalez*, 262 NJ Super 456, 460-463; 621 A 2d 94 (Ch Div 1992).

RONNISCH CONSTRUCTION GROUP, INC v LOFTS ON THE NINE, LLC, No. 150029; reported below: 306 Mich App 203. The parties shall address whether the Court of Appeals erred in holding that the plaintiff contractor, who filed a claim of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq*., and then filed a circuit court action against the defendant property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to an award of attorney fees as a "prevailing party" under MCL 570.1118(2), when the plaintiff prevailed in binding arbitration on its contract claim, but neither the arbitrator nor the circuit court resolved the plaintiff's foreclosure of lien claim. See *HA Smith Lumber & Hardware Co v Decina*, 480 Mich 987 (2007).

Leave to Appeal Denied April 23, 2015:

MCDONELL v ERICKSON, No. 149862; Court of Appeals No. 315343.

PEOPLE v ZULLER, No. 150256; Court of Appeals No. 322938.

PEOPLE v PIERRE TAYLOR, No. 150491; Court of Appeals No. 318633.

PEOPLE v MCCASKILL, No. 150683; Court of Appeals No. 312409.

Summary Disposition April 24, 2015:

PEOPLE v ADAM DIXON, No. 149964; Court of Appeals No. 322418. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Grand Traverse Circuit Court to amend the defendant's judgment of sentence for fourth-degree criminal sexual conduct to commence on April 25, 2014, the date of his sentencing. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569 (1996).

BAILEY v GREAT LAKES MUTUAL INSURANCE COMPANY, No. 150307; Court of Appeals No. 321655. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We direct the Court of Appeals' attention to *Ellis v Farm Bureau Ins Co,* 482 Mich 1119 (2008).

Leave to Appeal Denied April 24, 2015:

PEOPLE v ASHLY SMITH, No. 149357; Court of Appeals No. 312721. On March 10, 2015, the Court heard oral argument on the application for leave to appeal the April 1, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

KELLY, J. (*dissenting*). I respectfully dissent from the majority's decision to deny leave to appeal and instead would reverse the judgment of the Court of Appeals and remand this case for a new trial. Because trial

counsel failed to conduct a reasonable investigation into defendant's alibi defense, counsel's decision not to present the defense at trial constituted ineffective assistance of counsel.

Defendant was charged with several crimes, including armed robbery. The defense theory at trial was misidentification. Following a bench trial, defendant was convicted as charged. The Court of Appeals remanded the case to the trial court for a *Ginther* hearing,[1] limited to the issue of whether trial counsel performed ineffectively by failing to adequately investigate or present an alibi defense. Five witnesses testified at the hearing: defendant, his trial counsel, and the three alibi witnesses who appeared the day of trial but were not called to testify. The trial court ultimately determined that trial counsel's decision to not present the alibi testimony was reasonable and, regardless, that the failure to present the defense had no effect on the outcome of the proceeding. The Court of Appeals affirmed defendant's convictions and sentences in a split, unpublished decision.[2]

INEFFECTIVE ASSISTANCE

Both the Michigan and the United States Constitutions require that a criminal defendant be afforded the assistance of counsel.[3] In *Strickland v Washington*, 466 US 668, 686 (1984), the United States Supreme Court stated that "the right to counsel is the right to the effective assistance of counsel." (Quotation marks and citation omitted.) The Court established a bifurcated test for ineffective-assistance claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Id*. at 687.]

In holding that the Michigan Constitution does not afford defendants greater protection than its federal counterpart, this Court adopted the *Strickland* test in *People v Pickens*, 446 Mich 298, 338 (1994).

DEFICIENT PERFORMANCE

The *Strickland* Court recognized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

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[1] See *People v Ginther*, 390 Mich 436 (1973).

[2] *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 312721).

[3] Const 1963, art 1, § 20; US Const, Am VI.

particular investigations unnecessary."[4] "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[5] "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," but "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]"[6]

Trial counsel met with defendant to discuss trial strategy for the first time the night before trial. That meeting lasted approximately 15 minutes, a fact not disputed by counsel. Defendant testified at the *Ginther* hearing that aside from this one meeting on the eve of trial, counsel had only spoken with him during court proceedings and in the bullpen of the jail. Counsel did not dispute that during these earlier encounters defendant informed her of his alibi defense, providing her with the names and contact information for potential alibi witnesses. Nevertheless, counsel did not file a notice of alibi witness, as she was statutorily required to do under Michigan law.[7] Filing a notice of alibi defense does not bind counsel to pursue that strategy. Rather, it simply evidences an "intention to claim that defense," MCL 768.20(1), and provides an opportunity for counsel to conduct further investigation into the validity of the defense.

Further, trial counsel did not speak with any of the alibi witnesses until the day of trial and, as a result, counsel did not have sufficient time to consider the relative cohesiveness of their testimony or the manner in which their testimony could affect the credibility of the victim's testimony. Had counsel met with the witnesses before trial, she could have determined the extent to which their testimony would have been advantageous to the defense. Instead, the decision to not present the alibi witnesses was based on a hurried meeting with them the day of the trial.[8] The decision to not elicit testimony from alibi witnesses was a product of inadequate research, which is not afforded a presumption of reasonableness under *Strickland*.[9] Because trial counsel failed in her duty to conduct a reasonable investigation, her performance was constitutionally deficient.

Trial counsel agreed at the *Ginther* hearing that her decision not to raise an alibi defense was strategic and "based on the idea that this

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[4] *Strickland*, 466 US at 691.

[5] *Id*.

[6] *Id*. at 690-691.

[7] MCL 768.20.

[8] While not addressed by the courts below, defendant and one of the female witnesses testified at the *Ginther* hearing that trial counsel did not feel that the two female witnesses were dressed appropriately for court. Defendant testified that trial counsel said she would not call either of them because of their attire.

[9] See *Strickland*, 466 US at 690-691.

identification was so weak that by putting on the alibi witnesses you didn't want to jeopardize the acquittal that you thought you were going to get." However, this rationale further supports my opinion that trial counsel rendered a deficient performance. First, an alibi defense would have supported the misidentification defense that counsel presented at trial; if the victim's identification of defendant was erroneous, then defendant was necessarily at some other place at the time the crime was committed. Second, if counsel believed that the prosecution's case-in-chief was so weak that an alibi witness was unnecessary, she could have tested this assumption by moving for a directed verdict after the prosecution rested pursuant to MCR 6.419(D). If the trial court had refused to grant the motion, trial counsel would have been able to then decide whether to present the alibi defense. As with the failure to file a notice of alibi defense, there would have been no negative consequences to the defense in moving for a directed verdict. Defendant had nothing to lose and everything to gain.

For these reasons, the trial court's conclusion that counsel had made a "strategic decision" to not call the alibi witnesses is clearly erroneous. Although the trial court emphasized some inconsistencies in the witnesses' statements, the majority of the inconsistencies existed between the testimony of the two female witnesses and the one male witness. The trial court did not seem to recognize that counsel could have decided to present only the testimony of the two female witnesses, whose testimony supported one another's. In analyzing the inconsistencies among these three accounts, the trial court engaged in hindsight analysis, which is contrary to *Strickland*'s instruction that a reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[10] Because trial counsel's decisions were not borne of adequate investigation at the time they were made, the trial court clearly erred by finding that counsel's decisions were reasonable.

PREJUDICE

In order to be entitled to relief under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[11] This Court has also recognized that " '[w]here there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.' "[12]

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[10] *Id*. at 690.

[11] *Id*. at 694.

[12] *People v Trakhtenberg*, 493 Mich 38, 56 (2012), quoting *Brown v Smith*, 551 F3d 424, 434-435 (CA 6, 2008).

In the present case, the evidence of defendant's guilt was particularly weak. The only evidence against defendant was the testimony of the victim. There was no other evidence corroborating the victim's eyewitness account. Further, the victim was forced to lie face down during the robbery, which was over within minutes. The defense also presented evidence that the victim held a racial bias toward defendant. On cross-examination, the victim admitted that he made remarks "in a racial context" regarding the defendant on Facebook after the robbery. Although the victim testified that he was "one hundred and ten percent" certain that defendant was the perpetrator, at other times his testimony was more equivocal. For instance, he also admitted that "the more I look back on it" after the robbery, "I convinced myself I did see what I seen."

The only evidence that supported a guilty conviction here was the uncorroborated testimony of a single witness. Therefore, a lesser magnitude of errors will suffice to establish prejudice. The trial court based its finding of no prejudice on the fact that the three witnesses could not account for defendant's whereabouts for each minute of the evening the crime was committed. However, the trial court failed to understand that counsel could have minimized the inconsistencies of alibi witness testimony by calling only the two female witnesses. Furthermore, the two women testified that they were with defendant for the large majority of the evening and that defendant left their presence for, at most, 20 minutes. Given the distance between defendant's apartment and the scene of the crime, 20 minutes would have been barely sufficient for defendant to have committed the crime. The two women also testified that they and defendant had all suffered from a stomach flu that night. This detail is significant because it establishes how these women were able to remember the events of that particular night, and it suggests that defendant would have been physically unable to commit the crime in a 20-minute period.

I believe that the trial court's conclusion that counsel's errors did not affect the outcome of the proceedings was clearly erroneous. The trial court's determination was based on a misunderstanding of how an effective alibi defense could have been presented. The trial court did not understand that counsel need not have called all three witnesses, nor did the trial court understand the relevant timeline. Moreover, I do not believe that the trial court properly applied the standard that this Court outlined in *People v Trakhtenberg*,[13] i.e., that the prejudice inquiry must necessarily take into account the strength or weakness of the prosecution's case.

CONCLUSION

Given counsel's dilatory and seemingly impassive preparation, I conclude that counsel's performance was constitutionally deficient under *Strickland* and that her failure to prepare for trial prejudiced defendant.

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[13] *Trakhtenberg*, 493 Mich 38.

Therefore, I would reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial.

MCCORMACK and BERNSTEIN, JJ., join the statement of KELLY, J.

In re ALI-MALIKI/ALEXANDER/AL-DHEFERY, No. 151200; Court of Appeals No. 321420.

Summary Disposition April 28, 2015:

PEOPLE v ANTHONY EVANS, No. 150517; Court of Appeals No. 322162. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). The circuit court granted original appointed appellate counsel's motion to vacate the order of appointment of appellate counsel, but denied the defendant's motion for new appellate counsel. Even though counsel represented in his motion that there were no valid grounds for either a plea withdrawal or an appeal of the sentence imposed, he did not accompany his motion with legal analysis "referring to anything in the record that might arguably support the appeal," and the trial court did not make a finding that the "case is wholly frivolous." *Anders v California*, 386 US 738; 744, 87 S Ct 1396, 1400; 18 L Ed 2d 493 (1967). On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate post-conviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. We do not retain jurisdiction.

PEOPLE v RATHAM, No. 150221; Court of Appeals No. 322823. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Washtenaw Circuit Court in Case No. 13-341-FH, and we remand this case to the trial court for resentencing. The defendant's minimum sentencing guidelines called for an intermediate sanction of 0 to 17 months. An intermediate sanction does not include a prison term even if the minimum prison sentence is within the guidelines range. *People v Stauffer*, 465 Mich 633, 635 (2002). Here, the trial court did not articulate a substantial and compelling reason for imposing a prison term of 12 to 48 months. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range, in accordance with *People v Babcock*, 469 Mich 247 (2003).

Reconsideration Granted April 28, 2015:

PEOPLE v WINES, No. 147013; Court of Appeals No. 312441. On order of the Court, the motion for reconsideration of this Court's December 30, 2014 order is considered, and it is granted. We vacate our order dated December 30, 2014. On reconsideration, it appearing to this Court that

the case of *Montgomery v Louisiana*, cert gtd ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (2015), is pending before the United States Supreme Court, and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decision in that case.

Leave to Appeal Denied; Cross-Application Held in Abeyance April 28, 2015:

PEOPLE v HEMINGER, No. 150843; Court of Appeals No. 316959. The application for leave to appeal as cross-appellant is considered and, it appearing to this Court that the cases of *People v Hartwick* (Docket No. 148444) and *People v Tuttle* (Docket No. 148971) 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 as cross-appellant, we order that the application be held in abeyance pending the decisions in those cases.

We further order that any proceedings on remand as directed by the Court of Appeals are stayed pending the completion of this appeal.

Reconsideration Denied April 28, 2015:

RODRIGUEZ v FEDEX FREIGHT EAST, INC, No. 149222; Court of Appeals No. 312187. Summary disposition at 497 Mich 976.

YOUNG, C.J. (*concurring*). I concur in this order of denial because I believe that this motion for reconsideration was entirely meritless and vexatious. I would, therefore, have sanctioned both the plaintiff and his attorney $1,000 for violating MCR 7.316(D).

MACON v SAGINAW CIRCUIT COURT JUDGE, No. 149337; Court of Appeals No. 319387. Leave to appeal denied at 497 Mich 888.

PEOPLE v ANTWINE, Nos. 149470 and 149471; Court of Appeals Nos. 309028 and 313826. Leave to appeal denied at 497 Mich 889.

PEOPLE v BENTON, No. 149513; Court of Appeals No. 310249. Leave to appeal denied at 497 Mich 889.

COLE v HENRY FORD HEALTH SYSTEM, No. 149580; Court of Appeals No. 313824. Summary disposition at 497 Mich 881.

DUDLEY v BANK OF AMERICA, No. 149583; Court of Appeals No. 312771. Leave to appeal denied at 497 Mich 890.

ZAMMIT v CITY OF NEW BALTIMORE, No. 149945; Court of Appeals No. 318482. Leave to appeal denied at 497 Mich 949.

PEOPLE v MACON, No. 149643; Court of Appeals No. 319390. Leave to appeal denied at 497 Mich 890.

Order on Motion to Review Taxation of Costs Entered April 28, 2015:

FALK v ATTORNEY GRIEVANCE COMMISSION, No. 149308. The motion for review of taxation of costs is granted in part, pursuant to MCL 600.2445(2), MCR 7.219, and MCR 7.318. In light of the unusual circumstances of this case, in which the Court directed the Attorney Grievance Commission to follow the procedures set forth in MCR 9.131, we conclude that the plaintiff improved his position by filing the motion to amend the complaint for superintending control. The Clerk is thus directed to issue a letter taxing costs of $37.50 in favor of the plaintiff, which is one-half of the motion filing fee.

Leave to Appeal Denied April 28, 2015:

CHERRY v RIGGS, No. 148994; Court of Appeals No. 319071.

CLOUTIER v METZGER, No. 149569; Court of Appeals No. 319636.

PEOPLE v BUCCANNION, No. 149585; Court of Appeals No. 314380.

PEOPLE v CIDNEY INGRAM, No. 149676; Court of Appeals No. 315078.

PEOPLE v TYLER, No. 149788; Court of Appeals No. 321028.

PEOPLE v EUGENE POSEY, No. 149790; Court of Appeals No. 318409.

PEOPLE v WILLIS, No. 149847; Court of Appeals No. 322354.

THE RESERVE AT HERITAGE VILLAGE ASSOCIATION v WARREN FINANCIAL ACQUISITION, LLC, No. 149851; reported below: 306 Mich App 92.

BERNSTEIN, J., not participating due to a familial relationship.

ASSET ACCEPTANCE, LLC v PONTE, No. 149865; Court of Appeals No. 319624.

PEOPLE v HOWARD SMITH, No. 149867; Court of Appeals No. 319896.

PEOPLE v EPPES, No. 149880; Court of Appeals No. 321770.

PEOPLE v TIERNEY, No. 149889; Court of Appeals No. 321700.

In re REINSTATEMENT PETITION OF ANTHONY A MURASKI, No. 149896.

PEOPLE v WHITING-BROWN, No. 149905; Court of Appeals No. 322126.

PEOPLE v CARY STOKES, No. 149932; Court of Appeals No. 320186.

PEOPLE v RODGERS, No. 149943; Court of Appeals No. 321535.

PEOPLE v KEITH SHARP, No. 149963; Court of Appeals No. 320260.

PEOPLE v KOVARY, No. 149967; Court of Appeals No. 319921.

PEOPLE v ISAIAH SMITH, No. 149968; Court of Appeals No. 321795.

PEOPLE v BUFORD, No. 149969; Court of Appeals No. 321664.

PEOPLE v COLUMBERT, No. 149970; Court of Appeals No. 321577.

PEOPLE v SCOTT STEVENS, No. 149977; Court of Appeals No. 321299.

PEOPLE v MARCUS TILLMAN, No. 149981; Court of Appeals No. 321836.

PEOPLE v DOUGLASS, No. 149995; Court of Appeals No. 322336.

PEOPLE v PITTMAN, No. 150012; Court of Appeals No. 322425.

VAJK v CITY OF IRON RIVER, No. 150015; Court of Appeals No. 320550.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA v PEAKER SERVICES, INC, No. 150016; reported below: 306 Mich App 178.

PEOPLE v JAMES WALTER JONES, No. 150050; Court of Appeals No. 312645.

PEOPLE v KABASA, No. 150061; Court of Appeals No. 311453.

PEOPLE v BEEBE, No. 150065; Court of Appeals No. 322132.

PEOPLE v DENARD, No. 150067; Court of Appeals No. 322100.

PEOPLE v ZORA, No. 150070; Court of Appeals No. 321508.

PEOPLE v JASON CLARK, No. 150071; Court of Appeals No. 321635.

PEOPLE v BADGER, No. 150072; Court of Appeals No. 321876.

PEOPLE v STEIN, No. 150074; Court of Appeals No. 321646.

PEOPLE v GREGORY JOHNSON, No. 150075; Court of Appeals No. 322201.

PEOPLE v ESPINOSA, No. 150094; Court of Appeals No. 322214.

PEOPLE v KNOP, No. 150098; Court of Appeals No. 321943.

PEOPLE v MARCUS MARTIN, No. 150107; Court of Appeals No. 321997.

PEOPLE v GIPSON, No. 150114; Court of Appeals No. 320828.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v DEVANTE CARTER, No. 150151; Court of Appeals No. 322453.

PEOPLE v DAVID HARDY, No. 150153; Court of Appeals No. 321748.

PEOPLE v ROGERS, No. 150154; Court of Appeals No. 322588.

PEOPLE v MARCUS MAURICE MARTIN, No. 150170; Court of Appeals No. 322903.

PEOPLE v STOWE, No. 150173; Court of Appeals No. 315215.

KESTI v AHO, No. 150180; Court of Appeals No. 316357.

PEOPLE v HEARD, No. 150185; Court of Appeals No. 322871.

PEOPLE v DANNY THOMPSON, No. 150186; Court of Appeals No. 322496.

PEOPLE v AMIN JACKSON, No. 150193; Court of Appeals No. 322442.

PEOPLE v ALFETLAWI, No. 150195; Court of Appeals No. 313855.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v JERMAINE KEITH, No. 150196; Court of Appeals No. 322582.

PEOPLE v POTLOW, No. 150204; Court of Appeals No. 321949.

PEOPLE v LAYTON WALLACE, No. 150210; Court of Appeals No. 322498.

PEOPLE v BRUCE LOVE, No. 150222; Court of Appeals No. 322083.

PEOPLE v WITHERELL, No. 150223; Court of Appeals No. 322841.

MULVENA v DEPARTMENT OF TRANSPORTATION, No. 150228; Court of Appeals No. 320435.

PEOPLE v REED, Nos. 150247, 150248, 150249, and 150250; Court of Appeals Nos. 308647, 308648, 308649, and 308650.

PEOPLE v MATTISON, No. 150255; Court of Appeals No. 321810.

PEOPLE v ROBERT TILLMAN, No. 150257; Court of Appeals No. 316145.

PEOPLE v HUDGENS, No. 150278; Court of Appeals No. 321151.

PEOPLE v KENNETH MCGEE, No. 150279; Court of Appeals No. 321752.

PEOPLE v DEAN, No. 150280; Court of Appeals No. 321993.

PEOPLE v LYTLE, No. 150288; Court of Appeals No. 322620.

PEOPLE v HAYDEN, No. 150302; Court of Appeals No. 316758.

PEOPLE v MULLINS, No. 150303; Court of Appeals No. 321996.

PEOPLE v ALFRED OWENS, No. 150304; Court of Appeals No. 322729.

FILAS v TEACHER TENURE COMMISSION, No. 150308; Court of Appeals No. 323353.

PEOPLE v PAYTON, No. 150312; Court of Appeals No. 322238.

PEOPLE v EDDIE SMITH, No. 150322; Court of Appeals No. 323098.

PEOPLE v KNOTT, No. 150326; Court of Appeals No. 322378.

PEOPLE v CLEARY, No. 150337; Court of Appeals No. 322089.

In re SULLIVAN, No. 150347; Court of Appeals No. 321808.

PEOPLE v MADISON, No. 150351; Court of Appeals No. 316580.

REDFORD v AUTO CLUB INSURANCE ASSOCIATION, No. 150357; Court of Appeals No. 316740.

WALSH v KRAFT FOODS GLOBAL, INC, No. 150360; Court of Appeals No. 312611.

PEOPLE v SONTEZ WELLS, No. 150361; Court of Appeals No. 322831.

PEOPLE v PERKINS, No. 150362; Court of Appeals No. 323198.

PORT AUSTIN TOWNSHIP v EDWARDS, No. 150365; Court of Appeals No. 321761.

NEWTON v SILVIO, No. 150367; Court of Appeals No. 315556.

PEOPLE v PICKETT, No. 150370; Court of Appeals No. 317464.

PEOPLE v FLETCHER, No. 150379; Court of Appeals No. 316184.

PEOPLE v STEVEN NELSON, No. 150392; Court of Appeals No. 316065.

PEOPLE v COTTON, No. 150401; Court of Appeals No. 315717.

PEOPLE v ROBERTS, No. 150408; Court of Appeals No. 316948.

PEOPLE v WARD, No. 150410; Court of Appeals No. 316764.

PEOPLE v BLUNT, No. 150411; Court of Appeals No. 321839.

PEOPLE v COATES, No. 150424; Court of Appeals No. 315913.

PEOPLE v BRODY JOHNSON, No. 150433; Court of Appeals No. 316052.

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY v WOLICKI, No. 150436; Court of Appeals No. 313588.

PEOPLE v ARENDONDO, No. 150448; Court of Appeals No. 323186.

PEOPLE v NOEL PATTON, No. 150451; Court of Appeals No. 323009.

PEOPLE v NEWKIRK, No. 150453; Court of Appeals No. 323638.

PEOPLE v MORRISON, No. 150465; Court of Appeals No. 321899.

PEOPLE v ORLANDO STEVENS, No. 150475; Court of Appeals No. 309831.

HIESHETTER v HIESHETTER, No. 150485; Court of Appeals No. 320180.

ROZANSKI v GENERAL MOTORS, No. 150492; Court of Appeals No. 321367.

PEOPLE v BAGINERE, No. 150497; Court of Appeals No. 316788.

PEOPLE v BOSTON, No. 150498; Court of Appeals No. 322580.

PEOPLE v AIDEN, No. 150505; Court of Appeals No. 315884.

PEOPLE v CHAPMAN, No. 150508; Court of Appeals No. 323204.

BILLS v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 150514; Court of Appeals No. 322054.

MORRIS v ESTATE OF RUBY MORRIS, No. 150525; Court of Appeals No. 315892.

PEOPLE v BLACK, No. 150532; Court of Appeals No. 323432.

WARNER v SCHLAF and SCHLAF v WARNER, Nos. 150533 and 150534; Court of Appeals Nos. 316613 and 316616.

PEOPLE v FORSYTH, No. 150536; Court of Appeals No. 321963.

PEOPLE v RODNEY JOHNSON, No. 150538; Court of Appeals No. 323527.

PEOPLE v MICHAEL EVANS, No. 150539; Court of Appeals No. 323813.

BATESON v HAMILL ESTATE, No. 150552; Court of Appeals No. 317116.

PEOPLE v KAMMERAAD, No. 150559; reported below: 307 Mich App 98.

PEOPLE v TOMASZYCKI, No. 150562; Court of Appeals No. 323431.

PEOPLE v COLE, No. 150563; Court of Appeals No. 321787.

FERNANDERS v DEPARTMENT OF MILITARY AFFAIRS, No. 150564; Court of Appeals No. 323585.

PEOPLE v HASSANIN, No. 150567; Court of Appeals No. 323477.

PEOPLE v CRAIG LEWIS, Nos. 150574 and 150575; Court of Appeals Nos. 316804 and 317189.

PEOPLE v JERELL JOHNSON, No. 150576; Court of Appeals No. 317246.

PEOPLE v CHASE, No. 150577; Court of Appeals No. 317102.

PEOPLE v CHRISTOPHER TAYLOR, No. 150599; Court of Appeals No. 315542.

PEOPLE v GRAHAM, No. 150602; Court of Appeals No. 322363.

PEOPLE v LEESE, No. 150603; Court of Appeals No. 323500.

PEOPLE v DANIEL CARLTON, No. 150607; Court of Appeals No. 322986.

PEOPLE v JORDAN, No. 150609; Court of Appeals No. 316342.

PEOPLE v TERRY DAWSON, No. 150620; Court of Appeals No. 316787.

POLLOCK v CHESTERFIELD TOWNSHIP, No. 150627; Court of Appeals No. 316950.

PEOPLE v YOUNGS, No. 150630; Court of Appeals No. 316444.

PEOPLE v WILLIAM PRICE, Nos. 150631 and 150632; Court of Appeals Nos. 317245 and 319744.

FIRST HORIZON HOME LOANS v GRIMES, No. 150635; Court of Appeals No. 322091.

PEOPLE v REPAY, No. 150646; Court of Appeals No. 323399.

PEOPLE v BARRON, No. 150653; Court of Appeals No. 323583.

PEOPLE v OLDS, No. 150654; Court of Appeals No. 316581.

PEOPLE v JAQUINN WOODS, No. 150660; Court of Appeals No. 323767.

ISRAEL v PUTRUS, No. 150665; Court of Appeals No. 316249.

PEOPLE v CROFF, No. 150667; Court of Appeals No. 314409.

PEOPLE v GALLEGOS, No. 150669; Court of Appeals No. 323598.

PEOPLE v RICKEY WHITE, No. 150670; reported below: 307 Mich App 425.

PEOPLE v GIOGLIO, No. 150687; Court of Appeals No. 317360.

PEOPLE v JEFF THOMPSON, No. 150689; Court of Appeals No. 323550.

PEOPLE v BULLOCK, No. 150690; Court of Appeals No. 323506.

PEOPLE v AGEE, No. 150696; Court of Appeals No. 318254.

PEOPLE v WERNER, No. 150720; Court of Appeals No. 324940.

PEOPLE v MICHAEL DAVID JONES, No. 150722; Court of Appeals No. 324941.

PEOPLE v CURRY, No. 150732; Court of Appeals No. 317090.

PEOPLE v LOVELACE, No. 150738; Court of Appeals No. 323714.

PEOPLE v NORMAN, No. 150742; Court of Appeals No. 323948.

PEOPLE v PABLO ESPINOZA, No. 150745; Court of Appeals No. 323756.

PEOPLE v MICHAELWILLIAMS, No. 150771; Court of Appeals No. 318860.

PEOPLE v PATHIC, No. 150775; Court of Appeals No. 323817.

PEOPLE v TURNPAUGH, No. 150848; Court of Appeals No. 324529.

WALSH v KRAFT FOODS GLOBAL, INC, No. 150996; Court of Appeals No. 312611.

PEOPLE v BARNES, No. 151081; Court of Appeals No. 325395.

CONSUMERS ENERGY COMPANY v LENTZ, No. 151213; Court of Appeals No. 325705.

Superintending Control Denied April 28, 2015:

CUSMANO v ATTORNEY GRIEVANCE COMMISSION, No. 149818.

THORNTON v ATTORNEY GRIEVANCE COMMISSION, No. 150011.

CHAPMAN v ATTORNEY GRIEVANCE COMMISSION, No. 150462.

BERNSTEIN, J., not participating due to his prior relationship with the Sam Bernstein Law Firm.

SELBEE v ATTORNEY GRIEVANCE COMMISSION, No. 150712.

CRYSTAL v ATTORNEY GRIEVANCE COMMISSION, No. 150714.

Summary Disposition April 29, 2015:

PEOPLE v VELEZ, No. 148528; Court of Appeals No. 315209. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that the facts of this case are identical to those in *People v Cotto* (Docket No. 148532), which we remanded to the Court of Appeals for consideration as on leave granted by order dated March 3, 2015.

BCIC PARKS, LLC v JAFFE, RAITT HEUER & WEISS, PROFESSIONAL CORPORATION, No. 150178; Court of Appeals No. 321356. Pursuant to MCR 7.302(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 April 29, 2015:

CULLUM v LOPATIN, No. 149955; Court of Appeals No. 313739. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether: (1) the trial court was required to consider all of the factors outlined in MCL 600.2955(1) in light of *Edry v Adelman*, 486 Mich 634 (2010); (2) the trial court abused its discretion in holding that plaintiff's expert's opinion was inadmissible under MRE 702 because it was based on speculation; and (3) the Court of Appeals applied the correct standard of review. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The motion to expand the record is denied.

Leave to Appeal Denied April 29, 2015:

PEOPLE v SPENCER, No. 149879; Court of Appeals No. 321714.

PEOPLE v DAVIES, No. 150034; Court of Appeals No. 315948.

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT v STREFLING OIL COMPANY, No. 150051; Court of Appeals No. 314336.

PEOPLE v RAY DENNIS, No. 150329; Court of Appeals No. 322737.

PEOPLE v ROLLAND, No. 150686; Court of Appeals No. 323787.

Summary Disposition May 1, 2015:

NASH v DUNCAN PARK COMMISSION and NASH v DUNCAN PARK TRUST, Nos. 149168 and 149169; reported below: 304 Mich App 599. On order of the Court, leave to appeal having been granted and the briefs and oral

arguments of the parties having been considered by the Court, we vacate our order of October 24, 2014. We further vacate that part of the March 20, 2014 Court of Appeals opinion addressing whether the Duncan Park Commission is a "board" of the City of Grand Haven. That issue was not raised below and the Court of Appeals should not have reached it sua sponte. In all other respects, leave to appeal is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

BERNSTEIN, J. (*concurring in part and dissenting in part*). While I agree with the majority's decision to vacate the order granting leave to appeal in this case as improvidently granted and deny leave, I respectfully dissent from the majority's decision to vacate the part of the Court of Appeals' opinion addressing whether the Duncan Park Commission (Commission) is a "board" of the city of Grand Haven.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides narrow exceptions to the general rule that governmental entities are immune from tort liability. The question presented by this case is whether an entity like the Commission is a "board . . . of a political subdivision," MCL 691.1401(e), and therefore entitled to immunity.

The Court of Appeals concluded that the Commission was not a board of a political subdivision, emphasizing that the Commission was not subject to any meaningful oversight by Grand Haven. I agree with the Court of Appeals' conclusion that "[r]ather than serving as an instrumentality or 'political subdivision' of Grand Haven, the Commission is an independent, autonomous, private body that administers privately held land." *Nash v Duncan Park Comm,* 304 Mich App 599, 634-635 (2014).

Like private entities that are not entitled to governmental immunity, the Commission functions independently from the municipal government. The Commission, as a private entity would, maintains and operates Duncan Park without significant supervision from Grand Haven. The ordinance that created the Commission allows the Commission to make its own rules and regulations. Although the mayor formally ratifies the appointment of each member of the Commission, it is the Commission itself that chooses its own successors who serve unlimited terms. Unlike other boards and commissions created by Grand Haven and bound by the Grand Haven City Charter, the Commission appoints its members without the city council's confirmation.

If an entity does not function and operate as a governmental entity, then it should not receive the privileges of governmental immunity no matter what label the entity has given itself. As the Court of Appeals stated, "Designating the Commission a 'board' does not transform a private group into a political subdivision." *Id*. at 635. I agree with this statement and would retain its inclusion in the Court of Appeals' opinion to emphasize that the entitlement to governmental immunity should not be so readily accessible to an entity operating without governmental oversight in a manner similar to a private entity. Accordingly, while I agree with the majority's decision to preserve the result of the Court of Appeals' opinion, I would simply vacate the order granting leave as

improvidently granted and deny leave to appeal, leaving in place the entirety of the Court of Appeals' opinion.

Summary Disposition May 1, 2015:

PEOPLE v MARTINEZ-VASCONCEL, No. 150711; Court of Appeals No. 322385. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Kent Circuit Court, and we remand this case to the trial court for resentencing. The plea agreement provided for a sentence within a sentencing guidelines range of 0 to 18 months. Thus, the trial court was required to impose an intermediate sanction as defined by MCL 769.31(b), which may not exceed a jail term of 12 months unless the trial court states on the record a substantial and compelling reason to sentence the defendant to the jurisdiction of the Department of Corrections. MCL 769.34(4)(a). Here, the trial court sentenced the defendant to a term of imprisonment without any acknowledgment on the record that this was a departure from the plea and sentence agreement. On remand, the trial court shall sentence the defendant to an intermediate sanction, or provide the defendant an opportunity to withdraw the plea. See *People v Muttscheler*, 481 Mich 372 (2008); MCR 6.302(C)(3); MCR 6.310(B)(2). We do not retain jurisdiction.

Leave to Appeal Denied May 1, 2015:

MCCARTHY v CITY OF TRENTON, No. 150343; Court of Appeals No. 316600.

BERNSTEIN, J. (*dissenting*). I respectfully dissent from this Court's decision to deny leave to appeal in this case, as I believe that the Court of Appeals' treatment of the notice requirements of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, needlessly complicates the concept of notice and may lead to confusion among legal practitioners.

The GTLA provides an exception to governmental immunity for injuries arising out of highway defects. The statute defines "highway" as including—among other thoroughfares—public sidewalks. MCL 691.1401(c). To avail himself or herself of the exception, the injured person must give notice in accordance with MCL 691.1404, which states in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3)[1] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The

[1] MCL 691.1404(3) extends the notice period in cases involving injuries to minors or to persons who are physically or mentally incapable of giving notice.

> notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

In an action against a city, the individuals who may be served with notice under Subsection (2) are the mayor, the city clerk, and the city attorney. MCR 2.105(G)(2).

On February 5, 2012, plaintiff tripped and fell from a sidewalk in the city of Trenton, which is the defendant in this case. She sustained injuries requiring oral surgery and other dental work. Approximately two weeks after the incident, on February 21, plaintiff submitted notice via first-class mail to the city's mayor and the city clerk. The letter described the date and location of the incident and the nature of the defect and specified that there were no known witnesses to the fall. However, it did not describe the nature of plaintiff's injury. On February 23, a representative of Travelers Indemnity Company, which was defendant's insurer, contacted plaintiff's attorney by phone and received a brief description of plaintiff's injuries. That same day, Travelers sent a letter to plaintiff's attorney requesting medical documentation. Plaintiff's counsel submitted the relevant information in a series of letters dated March 5, March 12, and April 25, 2012. Subsequent negotiations between Travelers and plaintiff's attorney failed to satisfactorily resolve the case, and plaintiff filed suit against defendant on December 17, 2012.

Defendant moved for summary disposition under MCR 2.116(C)(7) because of plaintiff's failures to comply with the notice requirements—specifically, that plaintiff had sent notice via first-class mail rather than certified mail and had not provided information about her injuries to a proper party. The trial court denied this motion in an opinion and order dated May 16, 2013, determining that plaintiff had substantially complied with the notice requirements by serving the notice via first-class mail and providing her medical records to defendant's insurer within the 120-day limit.

However, the Court of Appeals reversed, following the reasoning of *McLean v City of Dearborn*, 302 Mich App 68 (2013). In a very similar factual situation, the *McLean* majority held that providing information regarding the nature of the injuries to the defendant's third-party claim administrator rather than an individual entitled to accept notice on the defendant's behalf under MCL 691.1404(2) rendered the notice deficient. *Id*. at 78-79. The *McLean* panel granted summary disposition in the defendant's favor. *Id*. at 83. The Court of Appeals panel in this case did not address the method of sending the initial notice, but determined that the notice was defective because the information regarding the nature of plaintiff's injuries was sent only to Travelers, an entity that was not entitled to accept process on defendant's behalf.

I disagree with the Court of Appeals' holdings in *McLean* and this case

and find the reasoning of Judge MICHAEL KELLY's *McLean* dissent far more persuasive. As Judge KELLY noted, although process must generally be served upon the mayor, the city clerk, or the city attorney, MCL 600.1925 (2), it can also be served upon authorized agents, MCL 600.1930. See also MCR 2.105(G) and (H). Therefore, the mere fact that the plaintiff in *McLean* had not served process on the mayor, the city clerk, or the city attorney was not enough in itself to render her notice improper. *McLean*, 302 Mich App at 86 (M. J. KELLY, J., dissenting). Examining the facts in the light most favorable to the plaintiff, Judge KELLY concluded that a reasonable fact-finder could have found that the city of Dearborn had contractually delegated the authority to handle civil claims against the city to the third-party administrator and that summary disposition in favor of the defendant was inappropriate. *Id*. at 88-89.

For similar reasons, I believe that summary disposition in favor of defendant was incorrect here. In this case, a mere two days after plaintiff informed the proper individuals of her claim against the city, her attorney was contacted about the claim by a representative from Travelers. Travelers specifically requested more information to assist it in evaluating plaintiff's claim. Plaintiff's counsel was directed to communicate with a Travelers representative. Under these circumstances, a reasonable jury could certainly conclude that Travelers was acting as defendant's agent. I would posit that a reasonable attorney would also reach this conclusion. This is particularly true given that the insurer here contacted plaintiff's counsel and negotiations took place between the insurer and plaintiff's counsel. Not only would an attorney likely infer that the insurer was acting as defendant's agent, but a serious ethical concern arises here—if plaintiff's counsel believed that an individual at Travelers was acting as defendant's legal representation in this matter, it would be standard practice to thenceforth communicate solely with that person. Plaintiff's counsel might have felt unable to send communications—in this case, the medical records—directly to the mayor or the city clerk at the risk of communicating directly with a represented party in violation of MRPC 4.2.

From a practitioner's perspective, the Court of Appeals' result could negatively affect working relationships in the legal community. At its heart, notice should be a constructive concept; when litigants indisputably have actual notice of the relevant information underlying a suit, we need not elevate form over substance by barring suits because of technical defects in notice that have no effect on the parties' actual knowledge. An entity should not be able to escape liability by technicalities when it has actual notice of the claims against it. Notwithstanding questions of agency, I believe that this overarching principle of constructive notice distinguishes this case from *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), another case arising under the GTLA, in which this Court required strict interpretation of notice provisions. The plaintiff in *Rowland* failed to serve *any* notice upon the defendant within the 120 days following her injury. *Id*. at 200-201. In this case, defendant was made aware of plaintiff's claim and the details regarding her injury within 80 days of the underlying incident.

I recognize that this Court reiterated a preference for a strict interpretation of notice provisions in *McCahan v Brennan*, 492 Mich 730 (2012). In *McCahan*, the plaintiff's claim against the University of Michigan required that notice of intent to file a claim be filed with the Clerk of the Court of Claims within six months of the incident giving rise to the cause of action. The *McCahan* plaintiff did not file notice in the Court of Claims, but did provide the university's legal office with information regarding her intent to seek recovery within the six-month notice period. *Id*. at 734. Even though the defendant had actual notice, this Court held that the plaintiff's claim was barred by her failure to comply with the relevant notice provision. *Id*. at 752. First, I believe that this case is distinguishable because Travelers was, or appeared to be, defendant's agent, and service upon an agent is appropriate under MCL 600.1930. However, I also believe that *McCahan* undermines the purpose of notice requirements—to provide a party with actual notice of any claims against it. The defendants in *McCahan* and in this case had actual notice of the claims against them and all the information they needed to prepare a defense. In my view, to bar such claims in spite of actual notice could have an adverse effect on working relationships between lawyers.

For these reasons, I would grant leave to appeal to reconsider our construction of the GTLA's notice requirements.

Leave to Appeal Denied May 8, 2015:

CARR v CARR, No. 151472; Court of Appeals No. 326782.

CZAR-MURRELL v ALDERSGATE APARTMENTS, No. 151501; Court of Appeals No. 326822.

Summary Disposition May 20, 2015:

CHABAD-LUBAVITCH OF MICHIGAN v SCHUCHMAN, No. 149567; reported below: 304 Mich App 1. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because there are no grounds on which to equitably toll the statute of limitations. MCL 600.5827 and MCL 600.5829 govern the accrual of the plaintiffs' claims. The statutory scheme is exclusive, and neither statute contains a provision to toll the period of limitations. See *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378 (2007). The application for leave to appeal as cross-appellants is considered, and it is denied as moot.

BERNSTEIN, J., not participating.

PEOPLE v SHEENA, No. 149691; Court of Appeals No. 309522. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland 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 trial counsel based on counsel's failure to pursue an insanity defense. In all other respects, leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v POOLE, No. 150623; Court of Appeals No. 315982. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reason that no provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material. To the contrary, see MCL 770.16(4)(b)(ii). See also *People v Hernandez-Orta*, 480 Mich 1101 (2008). Furthermore, the law of the case doctrine does not apply because prior orders denying leave to appeal were not rulings on the merits of the issues presented. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000). We remand this case to the Court of Appeals for consideration of the issues raised by the defendant but not addressed by that court during its initial review of this case. We do not retain jurisdiction.

Leave to Appeal Denied May 20, 2015:

HURON MOUNTAIN CLUB v MARQUETTE COUNTY ROAD COMMISSION, No. 148521; reported below: 303 Mich App 312.

PEOPLE v ANES, No. 149053; Court of Appeals No. 311726.

PEOPLE v KATAJA, No. 149161; Court of Appeals No. 317720.

PRICE v PORT HURON HOSPITAL, No. 149717; Court of Appeals No. 311188.

ALONZO v STATE OF MICHIGAN, No. 149830; Court of Appeals No. 320526.

PEOPLE v SOUTHWARD, No. 149924; Court of Appeals No. 320546.

TORRES v TORRES, No. 150163; Court of Appeals No. 314453.

MCLAREN HEALTH CARE CORPORATION v DETROIT MEDICAL CENTER, No. 150182; Court of Appeals No. 320846.

GAY v FANNIE MAE, No. 150200; Court of Appeals No. 315868.

SMITH v REILLY, No. 150201; Court of Appeals No. 313627.

BROOKS TOWNSHIP v HADLEY, No. 150239; Court of Appeals No. 299409.

EVERETT TOWNSHIP v SKOWRONSKI, No. 150241; Court of Appeals No. 299420.

PEOPLE v BAISDEN, No. 150318; Court of Appeals No. 322910.

HANTON v HANTZ FINANCIAL SERVICES, INC, No. 150376; reported below: 306 Mich App 654.

PEOPLE v MARCUS ROBINSON, No. 150470; Court of Appeals No. 314906.

PEOPLE v ERIC MILLER and PEOPLE v JOHN JONES and PEOPLE v ROBERT WATSON and PEOPLE v MORENO TAYLOR and PEOPLE v RUSS, Nos. 150791, 150792, 150793, 150794, and 150795; Court of Appeals Nos. 323544, 323545, 323546, 323547, and 323548.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 22, 2015:

PEOPLE v BRANDON HALL, No. 150677; Court of Appeals No. 321045. The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 168.937 and MCL 168.544c conflict such that the defendant's conduct may only be charged under the latter statute; (2) whether the 'rule of lenity' is relevant in this case; and (3) whether charging the defendant with felony forgery under MCL 168.937 would violate his due process rights. The parties should not submit mere restatements of their application papers.

Application for Leave to Appeal Dismissed on Stipulation May 22, 2015:

In re FILIBECK ESTATE, No. 149671; reported below: 305 Mich App 550.

Reconsideration denied May 22, 2015:

LATHAM v BARTON MALOW COMPANY, Nos. 148928 and 148929; Court of Appeals Nos. 312141 and 313606.

Summary Disposition May 27, 2015:

PEOPLE v PERRY, No. 150147; Court of Appeals No. 322933. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for correction of the judgment of sentence to reflect two first-degree murder convictions. The original and amended judgments of sentence inaccurately reflect four first-degree murder convictions, notwithstanding that only two people were murdered. See *People v Orlewicz*, 293 Mich App 96, 112 (2001) ("convicting a defendant of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim is a violation of double-jeopardy protection"). We further order the trial court to ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JOHN MARSHALL, No. 150165; Court of Appeals No. 313814. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals. The Court of Appeals erred in holding that MRE 803(7) is not applicable under this set of facts, where defendant sought to introduce evidence that there were no recorded reports of an allegation of sexual assault. Because defendant sought to elicit testimony relating to the absence of a "matter . . . of a kind of which a memorandum, report, record, or data compilation [is] regularly made and preserved," MRE 803(7), evidence that no report was ever made was admissible "to prove the nonoccurrence or nonexistence of the matter," *id*. See *United States v Gentry*, 925 F2d 186, 188 (CA 7, 1991) (analyzing

the rule's federal counterpart). The Court of Appeals further erred in holding that the testimony at issue was not relevant under MRE 401. As observed by the Court of Appeals concurring opinion, the evidence at issue was probative of the complainant's credibility; specifically, the complainant's claim that she had reported the abuse to her school teacher. We affirm, however, the Court of Appeals holding that any error was harmless because defendant was permitted to argue that the absence of a report undermined the complainant's credibility. 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.

PEOPLE V ALFARO, Nos. 150437 and 150438; Court of Appeals Nos. 316827 and 316829. Pursuant to MCR 7.302(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 for second-degree criminal sexual conduct (CSC II), and we remand this case to the trial court for resentencing on the defendant's conviction for CSC II. Even assuming, without deciding, that MCL 771.14(2)(e) addresses the duties of the trial court, the probation officer was required to calculate the sentencing guidelines range for CSC II, and the trial court was required to determine the applicable guidelines range. See MCL 777.21(2). MCL 771.14(2)(e) required the probation officer to include in the presentence report in this case both the "sentence grid . . . that contains the recommended minimum sentence range" and the "computation that determines" that range for all convictions for which a consecutive sentence was authorized. Because the acts of criminal sexual conduct in this case occurred in the same transaction, the court was authorized to impose a sentence for CSC II that is consecutive to the sentences for CSC I. MCL 750.520b(3). Because the defendant was being sentenced for a felony occurring after January 1, 1999, and subject to MCL 777.1 *et seq.*, the trial court is required to sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range. MCL 769.34(2); *People v Babcock*, 469 Mich 247 (2003).

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE V OTIS JACKSON, No. 150537; Court of Appeals No. 322858. Pursuant to MCR 7.302(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 KREINER, No. 150641; Court of Appeals No. 309334. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for further consideration. Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration of a victim under 13 years of age). Pursuant to the terms of a proposed plea agreement, she would have pleaded guilty as charged in exchange for a sentence agreement for a ten-year minimum sentence. Defendant rejected the plea offer, but following a post-conviction *Ginther* hearing, see *People v Ginther*, 390

Mich 436 (1973), the trial court ruled that defendant's decision to reject the offer was the result of ineffective assistance on the part of her trial counsel and ordered the prosecutor to re-offer the plea. However, MCL 750.520b(2)(b) provides that the statutorily authorized punishment for the offense to which defendant is to plead guilty under the proposed plea agreement is "imprisonment for life or any term of years, but not less than 25 years." Therefore, the plea agreement calls for a sentence that the trial court is without authority to impose. Given this, on remand, we direct the Court of Appeals to address the appropriate remedy, if any, for defendant under the circumstances of this case. See *Lafler v Cooper*, ___ US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012).

PEOPLE v SHERMAN, No. 150674; Court of Appeals No. 317800. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion suggesting that a "completed larceny" is an element of unlawfully driving away a motor vehicle (UDAA). This Court expressly rejected that conclusion in *People v Cain*, 495 Mich 874 (2013). We otherwise affirm the Court of Appeals holding that defendant's multiple punishments for carjacking and UDAA do not violate his double jeopardy rights, for the reasons set forth in *Cain*. 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.

PEOPLE v LAICH, No. 151006; Court of Appeals No. 324622. Pursuant to MCR 7.302(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 May 27, 2015:

PEOPLE v KILGO, No. 151076; Court of Appeals No. 325582. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether this Court's decision in *People v Cash*, 419 Mich 230 (1984), remains viable; and (2) whether the denial of the ability to assert the defense of reasonable mistake of age or fact violates due process or equal protection principles. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 27, 2015:

PEOPLE v RANDALL HENRY, Nos. 149577 and 149578; reported below: 305 Mich App 127.

BORSOS v MUIRWOOD SQUARE ASSOCIATES, LLC, No. 150175; Court of Appeals No. 315060.

PEW v MICHIGAN STATE UNIVERSITY, No. 150541; reported below: 307 Mich App 328.

PEOPLE v GERALD TURNER, No. 150568; Court of Appeals No. 323388.

Summary Disposition May 28, 2015:

HELD v NORTH SHORE CONDOMINIUM ASSOCIATION, No. 150220; Court of Appeals No. 321786.

Pursuant to MCR 7.302(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 TOWNE, No. 150296; Court of Appeals No. 322820. Pursuant to MCR 7.302(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 28, 2015:

PEOPLE v WILLIAM SMITH, No. 149366; Court of Appeals No. 309422.

GIVIDEN v BRISTOL WEST INSURANCE COMPANY, Nos. 149776 and 149777; reported below: 305 Mich App 639.

PEOPLE v HOLLOWAY, No. 149956; Court of Appeals No. 319539.

PEOPLE v PLASTER, No. 149961; Court of Appeals No. 312897.

PEOPLE v GIRARD, No. 150002; Court of Appeals No. 321006.

PEOPLE v DONNELL WILLIAMS, No. 150005; Court of Appeals No. 321936.

PEOPLE v GRESHAM, No. 150020; Court of Appeals No. 321553.

PEOPLE v SEAMAN, No. 150045; Court of Appeals No. 321676.

MCCORMACK, J., not participating because of her prior contact with the defendant.

PEOPLE v ADAM SCHROEDER, No. 150091; Court of Appeals No. 320845.

PEOPLE v ANDRE DAVIS, No. 150109; Court of Appeals No. 322356

PEOPLE v POSNER, No. 150113; Court of Appeals No. 322286.

PEOPLE v BOOSE, No. 150129; Court of Appeals No. 321413.

PEOPLE v ROBERT ANDERSON, No. 150140; Court of Appeals No. 322500.

THOMPKINS v BROWN, No. 150143; Court of Appeals No. 313554.

PEOPLE v SALTER, No. 150172; Court of Appeals No. 322284.

PEOPLE v TATE, No. 150197; Court of Appeals No. 322970.

PEOPLE v CAMPOS, No. 150199; Court of Appeals No. 315683.

PEOPLE v AARON HAMILTON, No. 150208; Court of Appeals No. 322045.

PEOPLE v EDDIE JAMES, No. 150219; Court of Appeals No. 322128.

PEOPLE v LONGACRE, No. 150232; Court of Appeals No. 322131.

PEOPLE v TOMMIE RICE, No. 150234; Court of Appeals No. 322161.

In re GUARDIANSHIP OF GBH, No. 150260; Court of Appeals No. 322245.

NEWMAN v RIVER ROUGE SCHOOLS and VIRGIS v RIVER ROUGE SCHOOLS, Nos. 150262, 150263, 150264, 150265, 150266, 150267, 150268, and 150269; Court of Appeals Nos. 314033, 316930, 316931, 316933, 316934, 316935, 316936, and 316937.

PEOPLE v DEXTER, No. 150282; Court of Appeals No. 315797.

PEOPLE v ANDRE WOODS, No. 150283; Court of Appeals No. 321994.

PEOPLE v HENCE, No. 150284; Court of Appeals No. 321532.

PEOPLE v MELTON, No. 150311; Court of Appeals No. 322177.

PEOPLE v JOMIAH WASHINGTON, No. 150321; Court of Appeals No. 316428.

PEOPLE v LYNCH, No. 150325; Court of Appeals No. 322357.

SOUTHFIELD PUBLIC SCHOOLS v DEPARTMENT OF EDUCATION, No. 150333; Court of Appeals No. 316856.

PEOPLE v LONGACRE, No. 150336; Court of Appeals No. 323411.

WELLMAN v BOARD OF EDUCATION OF MELVINDALE-NORTHERN ALLEN PARK PUBLIC SCHOOL DISTRICT, No. 150354; Court of Appeals No. 318423.

PEOPLE v CLINTON CRAWFORD, No. 150355; Court of Appeals No. 315576.

PEOPLE v ROLAND STEVENS, No. 150369; reported below: 306 Mich App 620.

In re ESTATE OF CASEY, No. 150372; reported below: 306 Mich App 252.

ROCKMAN v MASAK, No. 150394; Court of Appeals No. 314810.

PEOPLE v BORRERO, No. 150400; Court of Appeals No. 316299.

PEOPLE v KATSAMPES, No. 150482; Court of Appeals No. 322783.

PEOPLE v HAMEED GIBSON, No. 150490; Court of Appeals No. 316311.

PEOPLE v CLINTON SMITH, No. 150493; Court of Appeals No. 323219.

PEOPLE v MICHAEL WILLIAMS and PEOPLE v MICHAEL WILLIAMS, Nos. 150501 and 150502; Court of Appeals Nos. 316429 and 316762.

FILAS v MEEMIC INSURANCE COMPANY, No. 150510; Court of Appeals No. 316822.

AUTUMN PARK CONDOMINIUM ASSOCIATION v MERIDIAN CHARTER TOWNSHIP, No. 150511; Court of Appeals No. 322492.

PEOPLE v LENNOX, No. 150518; Court of Appeals No. 322080.

JONES v BITNER, No. 150526; Court of Appeals No. 318573.

PLASTOW v HIGMAN, Nos. 150542 and 150543; Court of Appeals Nos. 313653 and 313740.

PLASTOW v HIGMAN, Nos. 150550 and 150551; Court of Appeals Nos. 313653 and 313740.

PLASTOW v HIGMAN, Nos. 150553 and 150554; Court of Appeals Nos. 313653 and 313740.

PEOPLE v HOLLMAN, No. 150570; Court of Appeals No. 316571.

PEOPLE v FOREMAN, No. 150578; Court of Appeals No. 315947.

PEOPLE v MURRAY, No. 150579; Court of Appeals No. 316279.

PEOPLE v EDWIN SMITH, No. 150594; Court of Appeals No. 312021.

PEOPLE v LAYNE, No. 150596; Court of Appeals No. 316059.

COREY v WAYNE COUNTY, No. 150597; Court of Appeals No. 324239.

PEOPLE v PHOUANGPHET, No. 150612; Court of Appeals No. 317078.

PEOPLE v BEARD, No. 150613; Court of Appeals No. 324103.

PEOPLE v NEELEY, No. 150634; Court of Appeals No. 316270.

PEOPLE v ROBWRICK SMITH, No. 150648; Court of Appeals No. 316801.

PEOPLE v BORGIA, No. 150650; Court of Appeals No. 316940.

PEOPLE v WENCLASKY, No. 150652; Court of Appeals No. 322662.

AUTO CLUB GROUP INSURANCE COMPANY v STATE FARM INSURANCE COMPANY, No. 150655; Court of Appeals No. 314733.

PEOPLE v MICHAEL ANDREW JONES, No. 150658; Court of Appeals No. 317103.

PEOPLE v JUSTIN YOUNG, No. 150668; Court of Appeals No. 316129.

PEOPLE v MCGLASHEN, No. 150671; Court of Appeals No. 315430.

PEOPLE v MORGAN, No. 150675; Court of Appeals No. 316848.

PEOPLE v GARDNER, No. 150691; Court of Appeals No. 311753.

PEOPLE v CAVIN, No. 150700; Court of Appeals No. 322846.

PEOPLE v DROUGHN, No. 150701; Court of Appeals No. 323853.

PEOPLE v CUTLER, No. 150717; Court of Appeals No. 323991.

GRIEVANCE ADMINISTRATOR v SALUD, No. 150723.

PEOPLE v BOOSE, No. 150729; Court of Appeals No. 323963.

PEOPLE v OZIER, No. 150751; Court of Appeals No. 317217.

ZAMMIT v CITY OF NEW BALTIMORE, No. 150754; Court of Appeals No. 322188.

PEOPLE v BOWENS, No. 150757; Court of Appeals No. 317295.

DIPIERO v BETTER BUSINESS BUREAU OF WEST MICHIGAN, INC, No. 150758; Court of Appeals No. 316308.

PEOPLE v BRANDON, No. 150759; Court of Appeals No. 317568.

GUILD v DEPARTMENT OF CORRECTIONS, No. 150763; Court of Appeals No. 317195.

GRILLO v LUCIDO, No. 150774; Court of Appeals No. 316380.

ESTATE OF MORSE v TITAN INSURANCE COMPANY, No. 150780; Court of Appeals No. 309837.

HUSTED v EATON CORPORATION, No. 150796; Court of Appeals No. 322884.

PEOPLE v DUNBAR, No. 150798; Court of Appeals No. 315747.

PEOPLE v BOBBY HARRIS, No. 150804; Court of Appeals No. 317288.

PEOPLE v FLAKE, No. 150809; Court of Appeals No. 317325.

PEOPLE v ANDREWS, No. 150818; Court of Appeals No. 323275.

HUSTED v EATON CORPORATION, No. 150822; Court of Appeals No. 322865.

PEOPLE v DONTAE PHILLIPS, No. 150835; Court of Appeals No. 318387.

PEOPLE v STEPHEN YOUNG, No. 150838; Court of Appeals No. 317368.

LITTLE v KAPPEN TREE SERVICE, LLC, No. 150839; Court of Appeals No. 314346.

PEOPLE v ANTHONY WILLIAMS, No. 150850; Court of Appeals No. 317677.

PEOPLE v CALVIN SALTERS, No. 150856; Court of Appeals No. 317457.

EICHORN v MARSH, No. 150864; Court of Appeals No. 318281.

PEOPLE v GUYTON, No. 150866; Court of Appeals No. 317970.

PEOPLE v FLEMISTER, No. 150867; Court of Appeals No. 317459.

WYOMING CHIROPRACTIC HEALTH CLINIC, PC v AUTO-OWNERS INSURANCE COMPANY, No. 150868; reported below: 308 Mich App 389.

PEOPLE v THEODORE GRAY, No. 150869; Court of Appeals No. 317129.

PEOPLE v RONALD KENNEDY, No. 150873; Court of Appeals No. 316985.

PEOPLE v MATHIS, No. 150874; Court of Appeals No. 317519.

PEOPLE v LIVINGSTON, No. 150875; Court of Appeals No. 315611.

PEOPLE v TIMOTHY PARKER, No. 150880; Court of Appeals No. 317413.

PEOPLE v SANFORD, No. 150893; Court of Appeals No. 317377.

PEOPLE v BLAHA, No. 150896; Court of Appeals No. 318364.

PEOPLE v RODNEY ROBINSON, No. 150897; Court of Appeals No. 318264.

PEOPLE v TRESVANT, No. 150910; Court of Appeals No. 317654.

PEOPLE v WOUTERS, No. 150912; Court of Appeals No. 324262.

PEOPLE v UPHOLD, No. 150915; Court of Appeals No. 323939.

PEOPLE v STAJDA, No. 150916; Court of Appeals No. 324354.

PEOPLE v ALMERAISI, No. 150917; Court of Appeals No. 317339.

BROWN v MICHIGAN, No. 150924; Court of Appeals No. 323283.

PEOPLE v FOX, No. 150926; Court of Appeals No. 326296.

PEOPLE v RHYON WALKER, No. 150934; Court of Appeals No. 314960.

PEOPLE v FINNIE, No. 150935; Court of Appeals No. 314200.

PEOPLE v CHANCELLOR, No. 150944; Court of Appeals No. 314437.

PEOPLE v NILES JOHNSON, No. 150945; Court of Appeals No. 308843.

JONES v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 150946; Court of Appeals No. 323796.

ROBERTS v 80TH DISTRICT COURT, No. 150947; Court of Appeals No. 317865.

PEOPLE v HUFFMAN, No. 150950; Court of Appeals No. 324729.

PEOPLE v GRAVES, No. 150952; Court of Appeals No. 324531.

PEOPLE v MERCADO, No. 150960; Court of Appeals No. 316152.

PEOPLE v SHORT, No. 150963; Court of Appeals No. 323441.

PEOPLE v SAUCILLO, No. 150971; Court of Appeals No. 324353.

PEOPLE v WOOD, No. 150973; Court of Appeals No. 323874.

PEOPLE v STEDMAN, No. 150985; Court of Appeals No. 324302.

PEOPLE v ALVEN SHARP, No. 150990; Court of Appeals No. 318086.

PEOPLE v FREEMAN, No. 151001; Court of Appeals No. 317324.

PEOPLE v EDMONDS, No. 151004; Court of Appeals No. 318262.

PEOPLE v MCCLURE, No. 151190; Court of Appeals No. 317995.

PEOPLE v SADOWSKI, No. 151207; Court of Appeals No. 318391.

PEOPLE v SIMPSON, No. 151252; Court of Appeals No. 324889.

STAPLETON v OFFICE OF LICENSING AND REGULATORY AFFAIRS, No. 151275; Court of Appeals No. 323947.

Leave to Appeal Before Decision by the Court of Appeals Denied May 28, 2015:

AFFILIATED DIAGNOSTICS OF OAKLAND, LLC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 151113; Court of Appeals No. 326147.

Reconsideration Denied May 28, 2015:

JORDAN v NATIONAL CITY BANK, No. 149327; Court of Appeals No. 309428. Leave to appeal denied at 497 Mich 903.

CLARK v NATIONAL CITY BANK, No. 149329; Court of Appeals No. 309438. Leave to appeal denied at 497 Mich 903.

PEOPLE v WATKINS, No. 149336; Court of Appeals No. 316010. Leave to appeal denied at 497 Mich 903.

FORNER v CONSUMERS ENERGY COMPANY, No. 149433; Court of Appeals No. 307626. Leave to appeal denied at 497 Mich 904.

PEOPLE v MALONE, No. 149646; Court of Appeals No. 312649. Leave to appeal denied at 497 Mich 890.

PEOPLE v ALLEN, No. 149735; Court of Appeals No. 321298. Leave to appeal denied at 497 Mich 953.

HASKELL v TUROWSKI, No. 149854; Court of Appeals No. 314043. Leave to appeal denied at 497 Mich 891.

PEOPLE v WEEKS, No. 149886; Court of Appeals No. 320758. Leave to appeal denied at 497 Mich 954.

PEOPLE v WEEKS, No. 149888; Court of Appeals No. 320759. Leave to appeal denied at 497 Mich 954.

PEOPLE v CUNNINGHAM, No. 149973; Court of Appeals No. 313427. Leave to appeal denied at 497 Mich 954.

FANNIE MAE v WILLIS, No. 149985; Court of Appeals No. 315256. Leave to appeal denied at 497 Mich 949.

NICHOLS v HOWMET CORPORATION, No. 150025. Leave to appeal denied at 497 Mich 949; reported below: 306 Mich App 215.

CREHAN v FLAGSTAR BANK, FSB, No. 150110; Court of Appeals No. 321685. Leave to appeal denied at 497 Mich 906.

CREHAN v FLAGSTAR BANK, FSB, No. 150112; Court of Appeals No. 321686. Leave to appeal denied at 497 Mich 906.

Summary Disposition May 29, 2015:

PEOPLE v WILDING, No. 147675; Court of Appeals No. 309245. On April 2, 2014, the Court heard oral argument on the application for leave to appeal the July 16, 2013 judgment of the Court of Appeals. By order of March 25, 2015, we directed supplemental briefing. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we vacate those parts of the Court of Appeals judgment holding that offense variable 8 (MCL 777.38(1)(a)) and offense variable 10 (MCL 777.40(1)(a)) were scored correctly, and that trial counsel was not ineffective for failing to object to the scoring of those variables. We remand this case to the Livingston Circuit Court for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436 (1973), as to whether the defendant's trial counsel was ineffective for failing to object to the scoring of OVs 8 and 10. 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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 29, 2015:

ABBO v WIRELESS TOYZ FRANCHISE, LLC, No. 149536; Court of Appeals No. 304185. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals erred by reversing the Oakland Circuit Court order granting the defendants' motion for judgment notwithstanding the verdict.

SPIGNER v YARMOUTH COMMONS ASSOCIATION, Nos. 150327 and 150396; Court of Appeals No. 315616. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals erred in interpreting *Hoffner v Lanctoe*, 492 Mich 450 (2012), when it held that the open and obvious doctrine does not preclude the plaintiff's premises liability claim. The parties should not submit mere restatements of their application papers.

Statement Regarding Motion for Disqualification Entered May 29, 2015:

PEOPLE v FLINT, No. 151189; Court of Appeals No. 321213.

MARKMAN, J. Defendant has filed a motion to disqualify because I was a member of the Court of Appeals panel that decided his direct appeal in

1996. *People v Flint*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 185201). I respectfully deny this motion. To begin with, none of the grounds for disqualification set forth in MCR 2.003(C) require my disqualification and I can think of no other grounds that would require this. I am not biased for or against any of the parties or attorneys and I have no personal knowledge of any disputed evidence. Moreover, I do not believe my participation will create any appearance of impropriety. My participation in defendant's direct appeal occurred nearly 19 years ago and involved an entirely different issue than that now presented. The issues then pertained to whether prosecutor had presented sufficient evidence of defendant's intent to sustain his conviction of felony murder and whether the trial court had properly instructed the jury regarding that intent. The issue now, in defendant's fourth motion for relief from judgment, pertains to whether alleged newly-discovered evidence was withheld by the prosecutor. It is an entirely new issue and has in no way been the subject of prejudgment.

Summary Disposition June 3, 2015:

PEOPLE v MCKEEVER, No. 150383; Court of Appeals No. 315771. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the defendant abandoned his claim of ineffective assistance of counsel, we reverse the Court of Appeals order denying the defendant's amended motion to remand for an evidentiary hearing, and we remand this case to the Wayne Circuit Court for an evidentiary hearing. The court shall determine whether trial counsel was ineffective for failing to call Jennifer Craven as a witness at trial, *People v Ginther*, 390 Mich 436 (1973), or whether the court ruled off the record that she could not testify and, if so, what was the basis for such a decision. To the extent that trial counsel failed to respond to the defendant's request for an affidavit on appeal, the defendant cannot be faulted for failing to overcome the presumption that counsel acted reasonably. 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.

PEOPLE v BLACKSHIRE, No. 150861; Court of Appeals No. 317594. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that trial counsel made a strategic decision to allow the Wayne Circuit Court to instruct jurors on the lesser offense of unlawfully driving away an automobile. Trial counsel mentioned the lesser offense during her closing argument in the course of arguing that the prosecutor failed to prove the charged offense of carjacking. The record suggests that trial counsel was actually opposed to the instruction on the lesser offense. We remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). The trial court shall determine whether trial counsel made a deliberate and sound strategic decision to allow jurors to consider the lesser offense of unlawfully driving away an automobile or whether counsel was ineffective for failing to argue that the instruction

on the lesser offense was barred by *People v Cornell,* 466 Mich 335 (2002). We further order the trial 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 at the evidentiary hearing. 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.

PEOPLE V MANCIEL, No. 151093; Court of Appeals No. 312804. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals. On remand, while retaining jurisdiction, the Court of Appeals shall remand the case to the Wayne Circuit Court for clarification of whether the trial court's ruling that the defendant was entitled to a new trial was based on the trial court's determination that the defense witnesses were credible or whether the trial court granted a new trial solely because it felt constrained to do so by this Court's orders in unrelated cases. If the trial court granted a new trial based on the credibility of the defense witnesses, the Court of Appeals shall affirm the trial court's grant of a new trial. If the trial court's decision was based solely on its belief that it was constrained by this Court's orders in unrelated cases, the Court of Appeals shall vacate the trial court's decision granting a new trial and shall review the defendant's previously unaddressed claims. We do not retain jurisdiction.

Leave to Appeal Granted June 3, 2015:

ROCK V CROCKER, No. 150719; reported below: 308 Mich App 155.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 3, 2015:

PEOPLE V WOOTEN, No. 149917; Court of Appeals No. 314315. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the prosecution is permitted, during its case-in-chief, to elicit testimony from a police witness regarding the defendant's pre-arrest silence or failure to come forward to explain a claim of self-defense, see, e.g., *Combs v Coyle*, 205 F3d 269 (CA 6, 2000); *Hall v Vasbinder*, 563 F3d 222 (CA 6, 2009); (2) whether such evidence is admissible as substantive evidence of the defendant's guilt, or as impeachment of the defendant's anticipated defense theory; and (3) if such evidence is inadmissible, whether the trial court clearly erred in finding that the trial prosecutor did not intentionally goad the defense into moving for a mistrial, and whether the trial court erred in granting a mistrial, but allowing the defendant to be retried. The parties should not submit mere restatements of their application papers.

PEOPLE V DUENAZ, No. 150286; reported below: 306 Mich App 85. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether evidence of a child's prior sexual abuse is

"sexual conduct" barred by the rape-shield statute, MCL 750.520j; (2) if so, whether evidence of prior sexual abuse was nevertheless admissible in this instance to preserve the defendant's right of confrontation and to present a defense (see *People v Hackett*, 421 Mich 338 (1984)); and (3) whether any error in excluding evidence of prior sexual abuse in this case was harmless. The parties should not submit mere restatements of their application papers.

The Criminal Law Section of the State Bar of Michigan, 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 3, 2015:

PEOPLE v THANH MANH NGUYEN, No. 149918; reported below: 305 Mich App 740.

PEOPLE v MERCER, No. 150190; Court of Appeals No. 312007.

PEOPLE v TERLISNER, No. 150297; Court of Appeals No. 315670.

PEOPLE v WEBB, No. 150633; Court of Appeals No. 317045.

PEOPLE v BRAUN, No. 150922; Court of Appeals No. 315291.

Summary Disposition June 5, 2015:

In re MCCARTHY, No. 151039; Court of Appeals No. 318855. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for further proceedings, including, within 60 days, a permanency planning hearing conducted pursuant to MCL 712A.19c. At that hearing, the court shall consider whether it is in the child's best interests to appoint a guardianship with the child's grandparents. In determining the best interests of the child, the court may utilize the factors provided in MCL 722.23, including "[t]he reasonable preference of the child . . . ." 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.

YOUNG, C.J. (*concurring*/*dissenting*). In denying this appeal, the Court has made no determination that the family court erred by finding that termination of respondent's parental rights was in the child's best interests. Therefore, I respectfully dissent from that part of the Court's order that presumes to direct the family court's future actions. I see no legitimate basis for this Court to enter an order remanding for a permanency planning hearing to consider whether to appoint a guardianship with the child's grandparents. That *may* be an appropriate consideration, but it is not *our* call to make.

The issue raised, briefed, and argued before this Court had nothing to do with the family court's *posttermination* proceedings. The majority's order in this case is, in my view, disrespectful of the family court as well

as the parties, including the lawyer-guardian ad litem, who might be expected to follow the law and advance the interests of the teenaged child in question. There is no live controversy for us to resolve, and the majority simply has no constitutional basis to intervene in the posttermination proceedings at this time. See *King v Mich State Police Dep't*, 303 Mich App 162, 188 (2013).

The most significant fact undermining the majority's action is that there is no indication in the record before us that the family court has failed in any way to consider a guardianship with the child's grandparents or to hold the statutorily mandated hearings. In fact, we know that (1) the family court has a plan in place for the child that has allowed her to be placed with her grandparents, which has worked well so far as we know, (2) the family court conducted a review hearing on April 27, 2015, (3) the family court has scheduled a hearing for July 27, 2015, for a "permanent custody review," and (4) the family court held a permanency planning hearing in the past.

In sum, there is no basis in law or equity for this Court to intervene to impose its views and direct the future proceedings below, especially when it appears that the family court is meeting its statutory obligations under MCL 712A.19c and is working on a suitable placement plan for the child.

Therefore, I would simply deny leave to appeal and permit the family court to continue to exercise its lawful discretion.

VIVIANO, J., joins the statement of YOUNG, C.J.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 5, 2015:

In re APPLICATION OF CONSUMERS ENERGY COMPANY, No. 150395; reported below: 307 Mich App 32. The parties shall file supplemental briefs within 42 days of the date of this order addressing when the Michigan Department of Environmental Quality's administrative rules requiring generators to purchase NOx allowances were "implemented," as that term is used in MCL 460.6a(8). The parties should not submit mere restatements of their application papers.

PEOPLE V STEPHANIE WHITE, No. 150661; Court of Appeals No. 318654. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether there was sufficient evidence presented at trial to support a determination that the arresting officer was lawfully in the defendant's house when she resisted or obstructed his attempts to arrest her son. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and 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.

PEOPLE v BURKS, No. 150857; reported below: 308 Mich App 256. The parties shall file supplemental briefs within 42 days of the date of the order appointing appellate counsel addressing whether the trial court erred in refusing the defendant's request for a jury instruction on the offense of second-degree child abuse. See *People v Cornell,* 466 Mich 335 (2002); *People v Wilder*, 485 Mich 35 (2010). 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 issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 5, 2015:

MELSON v BOTAS, No. 150068; Court of Appeals No. 315014.

MARKMAN, J. (*dissenting*). Michigan is one of only two states whose highest court has not dispositively addressed the establishment, and the contours, of the tort of intentional infliction of emotional distress (IIED). In *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603 (1985), this Court, in refusing to ratify such a tort, offered the following as partial justification for its decision:

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. [Quotation marks and citation omitted.]

Justice LEVIN, in a lengthy separate opinion, outlined his own concerns and concluded that the tort of IIED would "increase the burden of litigation and randomly provide a fortuitous amount of compensation in a handful of isolated cases . . . ." *Id*. at 612 (opinion by LEVIN, J.). On subsequent occasions, this Court has chosen neither to recognize nor to repudiate the tort. See, e.g., *Patterson v Nichols*, 490 Mich 988 (2012) (vacating *Patterson v Nichols*, 489 Mich 937 (2011)); *Powers v Post-Newsweek Stations*, 483 Mich 986, 987 (2009) (KELLY, C.J., concurring); *Smith v Calvary Christian Church*, 462 Mich 679, 686 n 7 (2000).

In 1966, however, our Court of Appeals approved the tort of IIED. *Frishett v State Farm Mut Auto Ins Co*, 3 Mich App 688, 692-693 (1966). Under that Court's present formulation of the tort, which largely mirrors that of the Restatement Torts, 2d, § 46, a plaintiff may prevail on a claim of IIED if he or she can prove (a) that the defendant engaged in "extreme and outrageous conduct," (b) that the defendant intended to cause the

plaintiff severe emotional distress or was reckless with regard to whether the plaintiff would suffer such distress, (c) that the defendant's actions actually caused emotional distress, and (d) that the emotional distress was severe. *Graham v Ford*, 237 Mich App 670, 674 (1999). Responsibility for delineating the tort has rested exclusively with our Court of Appeals since then.

In my view, the instant case underscores the present need for this Court to clearly and precisely address this tort, and if it is to be preserved, as I believe it ought to be, to carefully define its scope and limits through the exercise of our common-law authority.

The student plaintiff, a 12-year-old learning-disabled pupil in defendant Mary Botas's home economics class, was assertedly the victim of IIED when, after stopping work on a classroom project because his fingers hurt, he received an angry response from Botas, who stated, "Why don't you just go kill yourself?" before she ripped the project from his hands and threatened to lock him in a room. The student and his parents, individually and as next friend of their son, sued defendants for IIED. The trial court granted summary disposition in defendants' favor, reasoning that Botas's conduct had not been "extreme and outrageous," but the Court of Appeals reversed and remanded for trial. *Melson v Botas*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2014 (Docket No. 315014).

The issue here is not the appropriateness or professionalism of Botas's conduct; making such a statement to one's student cannot be defended. However, any disciplinary response to her conduct is a matter between Botas and the school district in which she is employed. The issue in the instant case is whether a responsible legal system should treat her conduct as the basis for a civil lawsuit with the availability of monetary damages and other remedies.

In defining the issue this way, I raise the following questions: Is there anything in Botas's conduct that even remotely suggests that she *intended* either to actually encourage plaintiff to commit suicide or to cause him "severe emotional distress"? Or rather was her outburst an obviously sarcastic and frustrated response, reflecting nothing more than a momentary loss of composure at a student's unwillingness to pursue and complete an assigned project? Was Botas's response better viewed, not as a *successful* effort to inflict "severe emotional distress," but as a *failed* effort to instill some greater sense of perseverance in her student? Do we wish to foster a legal environment in which momentary and passing displays of temper or anger increasingly afford the bases for civil lawsuits? Furthermore, what is the evidence that the student plaintiff actually suffered any "severe emotional distress" at all? It is one thing to establish that a person has suffered a physical or property injury, or even that a mental illness of some sort has been suffered, but what evidence suffices to establish "emotional distress"? Regarding the culpable act of a defendant that forms the basis for an IIED claim, what type of conduct is sufficiently egregious to be characterized as "extreme and outrageous"? Was Botas's conduct here "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community"?

Atkinson v Farley, 171 Mich App 784, 789 (1988) (quotation marks and citation omitted). Can words that allegedly gave rise to "emotional distress" in the first place be undone or mitigated by words of apology? Is "recklessness"—whatever that means in the context of "inflicting" emotional distress—a sufficient state of mind to warrant the imposition of IIED liability? To what extent are the personal vulnerabilities of an individual plaintiff relevant in assessing either the "extreme[ness] and outrageous[ness]" of the defendant's conduct or the plaintiff's own degree of "emotional distress"?

As one legal scholar has observed concerning IIED litigation:

> . . . [A suit for IIED] is much cheaper to bring than a negligence action since there is no need for experts either with respect to causation or extent of injury; [and] the lawsuit is much easier to bring since it does not depend upon the willingness of independent experts, regardless of cost, to verify the existence and extent of suffering by the plaintiff and to assert that it is more probable than not that the defendant's conduct caused plaintiff's injury. In these respects, [IIED] resembles traditional intentional torts. . . .
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> * * *
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> [However, IIED] differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct. Battery, assault, and false imprisonment describe specific forms of behavior; . . . everyone can agree that you cannot have a battery without physical contact . . . .

[But] the term "outrageous [conduct]" is neither value-free nor exacting. . . . The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct. [Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum L Rev 42, 51 (1982).]

And perhaps most significantly, at what point does IIED come into tension with the First Amendment's protection of free speech? See, e.g., *Snyder v Phelps*, 562 US 443 (2011). This Court should exercise a particularly cautious judgment in considering the breadth of the IIED tort in a contemporary culture characterized by relatively quick resort to litigation, frictions and incivilities arising from an increasingly urbanized society, and a growing discussion, particularly on our college campuses, of a supposed right not to be "given offense," in which students are to be protected from unwelcome and uncomfortable attitudes and points of view. These and other trends contribute to a legal environment in which IIED claims are flourishing. Many persons today take offense at many things, and it is reasonable that this Court should reflect upon the types of personal harms that should, and that should not, form the basis for future common-law lawsuits within our state.

Although I believe the IIED tort affords a sound legal protection in particular circumstances, see, e.g., *Haverbush v Powelson*, 217 Mich App 228 (1996) (concluding that there was a question of fact concerning whether the defendant's actions, which included a two-year period of intense stalking, threatening the plaintiff and his fiancée with violence, and leaving an ax and a hatchet on the fiancée's car, would constitute IIED), I do not believe we should maintain a tort that imposes civil liability on as wide a range of flawed, but commonplace, forms of human conduct as is suggested in the instant case. Accordingly, I would grant leave to appeal to assess both the parameters of the IIED tort and its present application. I see no reason why this case does not afford a good and proper vehicle by which to accomplish these ends.

In re SPEARS, No. 151513; Court of Appeals No. 320584.

Leave to Appeal Granted June 10, 2015:

YONO v DEPARTMENT OF TRANSPORTATION, No. 150364; reported below: 306 Mich App 632. The parties shall include among the issues to be briefed: (1) whether a vehicle engages in "travel" under MCL 691.1402(1) when it parks in, including pulls into and out of, a lane of a highway designated for parking; (2) whether the defendant presented evidence of the design of the highway at issue which, if left unrebutted, would establish that the plaintiff fell in an area of the highway not "designed for vehicular travel" under MCL 691.1402(1); (3) if so, whether the plaintiff produced evidence establishing a question of fact regarding the defendant's entitlement to immunity under MCL 691.1402(1); and (4) whether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury, see *Dextrom v Wexford County*, 287 Mich App 406, 430-433 (2010); *Kincaid v Cardwell*, 300 Mich App 513, 523 (2013).

The Michigan County Road Commission Self-Insurance Pool, the County Road Association of Michigan, 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.

ALLARD v ALLARD, No. 150891; reported below: 308 Mich App 536. The parties shall include among the issues to be briefed: (1) whether MCL 552.23 and MCL 552.401 are inapplicable where the parties entered into an antenuptial agreement; and (2) whether the real estate held by the plaintiff's limited liability companies, including the marital home, and any income generated by those properties, could be treated as marital assets and, if so, under what conditions.

The Business Law and Family Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 10, 2015:

PEOPLE v KEYON ROBERTSON, No. 150132; Court of Appeals No. 315870. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). 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 attorney Timothy P. Flynn, 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 whether the Court of Appeals erred by reversing the circuit court's orders granting the defendant's motion to suspend and dismiss the case. The parties should not submit mere restatements of their application papers.

PEOPLE v MARCH, No. 151342; Court of Appeals No. 317697. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the removal of fixtures by a mortgagor from the mortgaged premises after a sheriff's sale but prior to the expiration of the redemption period may subject the mortgagor to criminal liability for larceny; and (2) whether fixtures taken from real property may be the subject of larceny under MCL 750.356(1). 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 10, 2015:

PEOPLE v WILLIAM CLEMENS, No. 150088; Court of Appeals No. 322379.

PEOPLE v SHAWN BRYANT, Nos. 150270 and 150271; Court of Appeals Nos. 306602 and 318765.

PEOPLE v WILDER, No. 150523; reported below: 307 Mich App 671.

PEOPLE v WAGNER, No. 150702; Court of Appeals No. 316316.

PEOPLE v LEFREE, No. 150820; Court of Appeals No. 317502.

In re MCCONNELL, No. 150832; Court of Appeals No. 321878.

In re KMN, Nos. 151383, 151384, 151386, and 151387; reported below: 309 Mich App 274.

Reconsideration Denied June 10, 2015:

PEOPLE v MICHAEL VILLNEFF, No. 149294; Court of Appeals No. 313758. Leave to appeal denied at 497 Mich 856.

Statement of Recusal Entered June 10, 2015:

LEONARD v WAYNE STATE UNIVERSITY and LEONARD v WAYNE STATE UNIVERSITY, Nos. 151507, 151508, and 151525; Court of Appeals Nos. 323569 and 323588.

BERNSTEIN, J. I recuse myself from participating in the decision of these cases. MCR 2.003(C). These cases were pending during the period that I served on the Board of Governors of Wayne State University. The practice of the university's legal affairs department was to fully advise the board of all pending lawsuits and to discuss litigation strategies. Although I cannot presently recall details of these cases, the possibility exists that I may remember information that is outside the record as further consideration is given to them. For that reason, I recuse myself to avoid any appearance of impropriety.

Summary Disposition June 12, 2015:

DILUIGI v RBS CITIZENS NA, No. 150642; Court of Appeals No. 310886. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals erred in holding that a genuine issue of material fact existed regarding notice. To the extent that the Court of Appeals rested its holding on the proposition that MCL 600.3204(4)(a), as amended by 2009 PA 29, requires a borrower to receive actual notice of his or her right to seek a home loan modification, see MCL 600.3205a to MCL 600.3205d [repealed by 2012 PA 521], the Court of Appeals is mistaken. As Judge Riordan's dissenting opinion correctly observes, MCL 600.3205a(3) simply requires that notice be given "by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address." Because it is undisputed that defendants complied with the statutory requirements by providing plaintiffs with both forms of mailed notice, summary disposition in favor of defendants was proper. For these reasons, we reinstate the May 31, 2012 judgment of the St. Clair Circuit Court that granted the defendants' motion for summary disposition.

PEOPLE v CHRISTOPHER JOHNSON, No. 150936; reported below: 309 Mich App ___. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment discussing the admissibility of prior act evidence under MRE 404(b)(1) and the prosecution's alleged failure to comply with MRE 404(b)(2). We agree with the Court of Appeals, however, that to the extent there was any plain error in the admission of this challenged evidence under MRE 404(b), it did not require reversal because the other evidence of the defendant's

guilt was overwhelming. See *People v Carines*, 460 Mich 750, 763-764 (1999). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied June 12, 2015:

In re SMITH, No. 151623; Court of Appeals No. 322685.

Leave to Appeal Before Decision by the Court of Appeals Denied June 17, 2015:

COOPER v COMER, No. 151729; Court of Appeals No. 327737.

Summary Disposition June 19, 2015:

PEOPLE v ERIC MOORE, No. 149907; Court of Appeals No. 315193. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals. The Court of Appeals erred in stating that insanity is not a defense to general intent crimes. The insanity defense statute, MCL 768.21a, does not limit application of the defense to specific intent crimes. Rather, the statute makes clear that insanity is a defense to all crimes, including general intent and strict liability offenses. *Id*. In stating otherwise, the Court of Appeals misinterpreted our decision in *People v Carpenter*, 464 Mich 223 (2001). Relief is not warranted, however, because our review of the record indicates that the evidence which defendant claims was wrongly excluded would not have assisted defendant in proving the defense of insanity by a preponderance of the evidence. See MCL 768.21a(3). 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.

Reconsideration Denied June 19, 2015:

THE RESERVE AT HERITAGE VILLAGE ASSOCIATION v WARREN FINANCIAL ACQUISITION, LLC, No. 149851; Court of Appeals No. 317830. Leave to appeal denied at 497 Mich 1010; reported below: 305 Mich App 92. To the extent that plaintiff-appellant's motion for reconsideration is directed at Justice BERNSTEIN's decision to recuse himself from participating in this Court's April 28, 2015 order, it is considered and it is denied because the "familial relationship" referenced in Justice BERNSTEIN's recusal statement was based on his brother-in-law's business association with several defendants-appellees. The motion for reconsideration, as it pertains to the Court's denial of the application for leave to appeal, is also denied, because it does not appear that the order was entered erroneously. The motion to strike filed by defendants-appellees is denied as moot.

BERNSTEIN, J., participating only in the denial of the motion for reconsideration to the extent it pertains to his recusal.

Leave to Appeal Denied June 26, 2015:

COOPER v COMER, No. 151762; Court of Appeals No. 327737.

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.

Orders Entered October 22, 2014:

PROPOSED AMENDMENTS OF SUBCHAPTER 7.300 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of the series of rules found in Subchapter 7.300 of the Michigan Court Rules, which contains the procedural rules applicable to the Michigan Supreme Court. The changes proposed in this order would clarify procedure and would reflect current practice and provide uniformity in a numbering system that is consistent with the procedural rules found in Subchapter 7.200 (the rules governing procedure in the Court of Appeals). 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 Administrative Matters & Court Rules page.

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.

[Because the revisions would replace the existing series of rules
in Subchapter 7.300 *et seq*., the proposed amendments
are not indicated in underlining or strikeover.]

SUBCHAPTER 7.300. SUPREME COURT.

RULE 7.301. ORGANIZATION AND OPERATION OF SUPREME COURT.

(A) Chief Justice. At the first meeting of the Supreme Court in each odd-numbered year, the justices shall select by majority vote one among them to serve as Chief Justice.

(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 pursuant to an order upon a showing of special cause.

(C) Supreme Court Clerk.

(1) Appointment; General Provisions. The Supreme Court will appoint a clerk who shall keep the clerk's office in Lansing under the direction of the Court. Where the term "clerk" appears in this subchapter

without modification, it means the Supreme Court clerk. The clerk may not practice law other than as clerk while serving as clerk.

(2) Duties. The clerk shall perform the following duties:

(a) Furnish bond before taking office. The bond must be in favor of the people of the state and in the penal sum of $10,000, approved by the Chief Justice and filed with the Secretary of State, and conditioned on the faithful performance of the clerk's official duties. The fee for the bond is a Court expense.

(b) Collect the fees provided for by statute or court rule.

(c) Deposit monthly with the State Treasurer the fees collected, securing and filing a receipt for them.

(d) Provide for the recording of Supreme Court proceedings as the Court directs.

(e) Care for and maintain custody of all records, seals, books, and papers pertaining to the clerk's office and filed or deposited there.

(f) Return the original record as provided in MCR 7.310(B) after an appeal has been decided by the Court.

(D) Deputy Supreme Court Clerks. The Supreme Court may appoint deputy Supreme Court clerks. A deputy clerk shall carry out the duties assigned by the clerk and perform the duties of the clerk if the clerk is absent or unable to act.

(E) Reporter of Decisions. The Supreme Court will appoint a reporter of decisions. The reporter shall

(1) prepare the decisions, including concurring and dissenting opinions, of the Supreme Court for publication;

(2) write a brief statement of the facts of each case and headnotes containing the points made;

(3) publish each opinion in advance sheets as soon as practicable; and

(4) publish bound volumes as soon as practicable after the last opinion included in it 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) Supreme Court Crier. The Supreme Court will appoint a court crier. The court crier shall

(1) have charge of the Supreme Court courtroom and the offices and other rooms assigned to the Supreme Court justices; and

(2) have the power to serve an order, process, or writ issued by the Supreme Court; collect the fee for that service allowed by law to sheriffs; and deposit monthly with the State Treasurer all the fees collected, securing a receipt for them.

RULE 7.303. JURISDICTION OF THE SUPREME COURT.

(A) Mandatory Review. The Supreme Court shall review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223-9.226).

(B) Discretionary Review. The Supreme Court may

(1) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.305);

(2) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);

(3) issue an advisory opinion (see Const 1963, art 3, § 8 and MCR 7.308(B));

(4) respond to a certified question (see MCR 7.308(A));

(5) exercise superintending control over a lower court or tribunal (see MCR 7.306);

(6) exercise other jurisdiction as provided by the constitution or by law.

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A) What to File. To apply for leave to appeal, a party must file

(1) 4 copies of an application for leave to appeal (1 signed) prepared in conformity with MCR 7.212(B) and consisting of the following:

(a) a statement identifying the judgment or order appealed from and the date of its entry;

(b) the questions presented for review related in concise terms to the facts of the case;

(c) a table of contents and index of authorities conforming to MCR 7.212(C)(2) and (3);

(d) a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6);

(e) a concise argument, conforming to MCR 7.212(C)(7), in support of the appellant's position on each of the stated questions and establishing a ground for the application as required by subrule (B); and

(f) a statement of the relief sought.

(2) 4 copies 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 copies of the opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(3) proof that a copy of the application was served on all other parties, and that a notice of the filing of the application was served on the clerks of the Court of Appeals and the trial court or tribunal; and

(4) the fee provided by MCR 7.319(C)(1).

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before a decision of the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from 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 branches of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals,

(a) the decision is clearly erroneous and will cause material injustice, or

(b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

(C) When to File.

(1) Before Court of Appeals Decision. In an appeal before the Court of Appeals decision, the application must be filed within 42 days after

(a) a claim of appeal is filed in the Court of Appeals;

(b) an application for leave to appeal is filed in the Court of Appeals;

(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) After Court of Appeals Decision. 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 appeal; or

(b) the Court of Appeals order denying a timely filed motion for rehearing or reconsideration.

(c) the Court of Appeals order granting a motion to publish an opinion that was originally released as unpublished.

(3) Attorney Discipline Board Decision. In an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board, the application must be filed within 28 days.

(4) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrule (C)(1) or (C)(2), and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage was prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.

(5) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 28 days in termination of parental rights cases, 42 days in other civil cases, and 56 days in criminal cases, after the date of

(a) the Court of Appeals order or opinion remanding the case,

(b) the Court of Appeals order denying a timely filed motion for rehearing of a decision remanding the case, or

(c) the Court of Appeals order or opinion disposing of the case following the remand procedure, in which case an application may be made on all issues raised initially in the Court of Appeals, as well as those related to the remand proceedings.

(6) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless ordered by the Court of Appeals or the Supreme Court.

(7) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D) Answer. Any party may file 4 copies of an answer (1 signed) within 28 days of service of the application. The party must file proof that a copy of the answer was served on all other parties.

(E) Reply. A reply may be filed as provided in MCR 7.212(G).

(F) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a party who filed a pleading 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.

(G) Submission and Argument. Leave applications may be submitted for a decision after the reply brief has been filed or the time for filing such has expired, whichever occurs first. There is no oral argument on an application for leave to appeal unless ordered by the Court under subrule (H)(1).

(H) Decision.

(1) Possible Court Actions. The Court may grant or deny the application, enter a final decision, direct argument on the application, or issue a peremptory order. The clerk shall issue the order entered and provide copies to the parties and to the Court of Appeals clerk.

(2) Appeal Before Court of Appeals Decision. If leave to appeal is granted before a decision of the Court of Appeals, the appeal is thereafter pending in the Supreme Court only, and subchapter 7.300 applies.

(3) Appeal After Court of Appeals Decision. If leave to appeal is denied after a decision of the Court of Appeals, the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms. If leave to appeal is granted, jurisdiction over the case is vested in the Supreme Court, and subchapter 7.300 applies.

(4) Issues on Appeal.

(a) Unless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal.

(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 such additional issues does not extend the time for filing the briefs and appendixes.

(I) Stay of Proceedings. MCR 7.209 applies to appeals to the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(4), it operates to stay proceedings pending disposition of the appeal to the Supreme Court unless otherwise ordered by the Supreme Court or Court of Appeals.

RULE 7.306. ORIGINAL PROCEEDINGS.

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

(1) over a lower court or tribunal 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 copies 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*]."

A complaint that is named differently shall be re-titled by the clerk.

(2) 4 copies 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 was served on the defendant; and

(4) the fee provided by MCR 7.319(C)(1).

Copies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint.

(C) Answer. The defendant must file with the clerk within 21 days of notice of the complaint

(1) 4 copies of an answer and a brief (1 signed) conforming 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) proof that a copy of the answer was served on the plaintiff.

(D) Reply. Four copies of a reply brief (1 signed) may be filed as provided in MCR 7.212(G).

(E) Actions Against Attorney Grievance Commission; Confidentiality. The clerk shall keep the file in an action against the Attorney Grievance Commission or the grievance administrator confidential and not open to the public if it appears that the complaint relates to matters that are

confidential under MCR 9.126. In the answer to a complaint, the grievance administrator shall certify to the clerk whether the matters involved in the action are deemed confidential under MCR 9.126. The protection provided in MCR 9.126 continues unless and until the Court orders otherwise.

(F) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a plaintiff who filed a 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.

(G) Submission and Argument. Original proceedings may be submitted for a decision after the reply brief has been filed or the time for filing the reply brief has expired, whichever occurs first. There is no oral argument on original complaints unless ordered by the Court.

(H) Decision. The Court may set the case for argument as on leave granted, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted.

RULE 7.307. CROSS-APPEAL.

(A) Filing. An application for leave to appeal as cross-appellant may be filed with the clerk within 28 days of service of the application. 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) Alternative arguments; new or different relief. A party is not required to file a cross-appeal to advance alternative arguments in support of the judgment or order appealed. A cross-appeal is required to seek new or different relief than that provided by the judgment or order appealed.

RULE 7.308. CERTIFIED QUESTIONS AND ADVISORY OPINIONS.

(A) Certified Questions

(1) From Michigan Courts.

(a) Whenever a 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 Court.

(b) If any question is not properly stated or if sufficient facts are not given, the Court may require a further and better statement of the question or of the facts.

(c) The Court shall render its decision on a certified question in the ordinary form of an opinion, to be published with other opinions of the Court.

(d) After the decision of the Court has been sent to the court or tribunal, the court or tribunal will proceed with or dispose of the case in accordance with the Court's answer.

(2) From Other Courts.

(a) When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.

(b) A certificate may be prepared by stipulation or at the certifying court's direction, and must contain

(i) the case title;

(ii) a factual statement; and

(iii) the question to be answered.

The presiding judge must sign it, and the clerk of the court must certify it.

(c) With the certificate, the parties shall submit

(i) briefs conforming with MCR 7.312;

(ii) a joint appendix conforming with MCR 7.312(D); and

(iii) a request for oral argument on the title page of the pleading, if oral argument is desired.

(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.

(3) Submission and Argument. Certified questions may be submitted for a decision after receipt of the question. Oral argument of 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.

(B) Advisory Opinion

(1) Form of 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 a letter that includes a copy or verbatim statement of the enacted legislation and identifies the specific questions to be answered by the Court. Four copies of the request (1 signed) and supporting documents are to be filed.

(2) Briefing. The governor, a 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 copies of the brief (1 signed), which must conform as nearly as possible to MCR 7.212(B) and (C).

(3) Submission and Argument. Advisory opinions may be submitted for a decision after the brief in support of the advisory opinion request

has been filed. There is no oral argument on a request for an advisory opinion unless ordered by the Court.

(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 APPEAL.

(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, the Court of Appeals clerk or the lower court clerk shall send to the Supreme Court clerk all papers 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 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 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 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) Stipulations. The parties may stipulate in writing regarding any matter constituting the basis for an application for leave to appeal or regarding any matter relevant to a part of the record on appeal.

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 copies of a motion (1 signed), except as otherwise provided in this rule, stating briefly but distinctly the grounds on which it 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 opposing party; and

(3) the fee provided by MCR 7.319(C)(2) or (3).

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 on Tuesday of each week at least 14 days after they are filed but administrative orders (e.g., to extend time for filing a pleading, to file an amicus brief, to appear and practice, to exceed 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 answer may be filed at any time before an order is entered on the motion.

(D) Motion to Seal File. Except as otherwise provided by statute or court rule, the procedure for sealing a Supreme Court file is governed by MCR 8.119(I). Materials that are subject to a motion to seal a file in whole or in part shall be held under seal pending the Court's disposition of the motion.

(E) Motion for Immediate Consideration or to Expedite Proceedings. A party may move for immediate consideration of a motion or to expedite any proceeding before the Court. The motion or an accompanying affidavit must identify the manner of service of the motion on the other parties and explain why immediate consideration of the motion or expedited scheduling of the proceeding is necessary. If the motion is granted, the Court will schedule an earlier hearing or render an earlier decision on the matter.

(F) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed

(a) 14 copies of a motion (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.

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 7.119(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 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 copies of the motion (1 signed), depending on whether the motion was filed to rehear a calendar case or to rehear a noncalendar case, respectively, as indicated under subrule (F)(1)(a); and

(b) proof that a copy was served on the other parties.

(4) Unless ordered by the Court, there is no oral argument on a motion for rehearing.

(5) The clerk shall refuse to accept for filing a late-filed motion for rehearing or a motion for reconsideration of an order denying a motion for rehearing.

(G) Motion for Reconsideration. To move for reconsideration of a court order, a party must file the items required by subrule (A) within 21 days after the date of certification of the order. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3). The clerk shall refuse to accept for filing a late-filed motion for reconsideration or a motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

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). 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) Citation to Record; Summary of Argument; Length of Brief.

(1) A party's statement of facts or counter-statement of facts shall provide the appendix page numbers of the transcript pages, pleadings, or other documents being cited or referenced.

(2) If the argument of any one issue in a brief exceeds 20 pages, a summary of argument must be included. The summary must be a succinct, accurate, and clear condensation of the argument actually made in the body of the brief and may not be a mere repetition of the headings under which the argument is arranged.

(3) Except by Court order 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]

_____
Plaintiff-[Appellant or Appellee],
v

Docket No. _____

_____
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.

(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 appendix, 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, where applicable, must contain

(a) the relevant docket entries of the lower court or tribunal and the Court of Appeals arranged in a single column;

(b) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order being appealed;

(c) any relevant finding or opinion of the trial court;

(d) any relevant portions of the pleadings or other parts of the record; and

(e) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction.

The items listed in subrules (D)(2)(a)-(e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix, designated as a joint appendix and containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) The stipulation to use a joint appendix may provide that either party may file, as a supplemental appendix, any additional portion of the record not covered by the joint appendix.

(4) Appellee's Appendix. An appendix, entitled "Appellee's Appendix," may be filed. The appellee's appendix must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due within 56 days after the leave to appeal is granted;

(2) the appellee's brief and appendixes, if any, are due within 35 days after the appellant's brief is served on the appellee; and

(3) the reply brief is due within 21 days after the appellee's brief is served on the appellant.

(F) What to File. The parties shall

(1) file 14 copies of a brief (1 signed) and appendixes with the clerk;

(2) serve 2 copies on each attorney who has appeared in the case for a separate party or group of parties and on each party who has appeared in person;

(3) serve 1 copy on the Attorney General in a criminal case or in a case in which the state is a named or interested party; and

(4) file a proof of service with the clerk.

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrules (D) and (E). A party may file a combined brief for the primary appeal and the cross-appeal within the earlier of the filing periods.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subrule (2).

(2) A motion for leave to file an amicus curiae brief is not required if the brief is presented by the Attorney General on behalf of the people of the state of Michigan, the state of Michigan, or an agency or official of the state of Michigan; on behalf of a political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and must be filed within 21 days after the brief of the appellee has been filed or the time for filing the appellee's brief has expired, or at such other time as the Court directs.

(4) An amicus curiae may not participate in oral argument except by Court order.

(I) Supplemental Authority. A party may file a supplemental authority as provided in MCR 7.212(F).

(J) Extending or Shortening Time; Failure to File; Forfeiture of Oral Argument.

(1) The time provided for filing and serving the briefs and appendixes may be shortened or extended by order of the Court on its own initiative or on motion of a party.

(2) If the appellant fails to file the brief and appendix within the time required, the Court may dismiss the case and award costs to the appellee, or affirm the judgment or order appealed.

(3) A party filing a brief late forfeits the right to oral argument.

RULE 7.313. SUPREME COURT CALENDAR.

(A) Definition. A case in which leave to appeal has been granted, or a case initiated in the Supreme Court which the Court determines will be argued at a monthly session, is termed a "calendar case."

(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 will be argued 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) Except on order of the Court, a party who has not specifically requested oral argument on the title page of its brief or has forfeited argument by not timely filing its brief is not entitled to oral argument unless it files a motion for such at least 21 days before the first day of the monthly session. If neither party is entitled to oral argument, the clerk will list the case as submitted on briefs. The Court may direct that a case be submitted on briefs without oral argument even when a party would otherwise be entitled to oral argument.

(C) Arrangement of Calendar. At least 21 days before the first day of the monthly session, the clerk will place cases on the session calendar and arrange the order in which they are to be heard. The cases will be called and heard in that order except as provided in subrule (D).

(D) Rearrangement of Calendar; Adjournment. By stipulation filed with the clerk at least 21 days before the first day of the session, a case may be specially placed on the session calendar, grouped to suit the convenience of the attorneys, placed at the end of the call, or adjourned to a later session. If less than 21 days before the first day of the monthly session, the adjournment of a calendar case to another session will be made only by order upon a showing of good cause with an explanation as to 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 Case. When a calendar case remains undecided at the end of the term in which it was argued, either party may file a supplemental brief. 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 pursuant to special order under MCR 7.305(H)(1) and 7.314(B)(2).

RULE 7.314. CALL AND ARGUMENT OF CASES.

(A) Call; Notice of Argument; Adjournment From Call. The Court, on the first day of each monthly session, will call the cases for argument in the order they stand on the calendar as arranged in accordance with MCR 7.313(C), and proceed from day to day during the session in the same order. A case may not be adjourned after being placed on the call, except on a showing of extreme emergency. A case may be submitted on briefs by stipulation at any time.

(B) Argument.

(1) In a calendar case where both sides are entitled to oral argument, the time allowed for argument is 30 minutes for each side unless the Court orders otherwise. When only one side is scheduled for oral argument, 15 minutes is allowed unless the Court orders otherwise.

(2) In a case being argued on the application under MCR 7.305(H)(1), each side that is entitled to oral argument is allowed 15 minutes to argue unless the Court orders otherwise.

The time for argument may be extended by Court order on motion of a party filed at least 14 days before the session begins or by the Chief Justice during the argument.

RULE 7.315. OPINIONS, ORDERS, and JUDGMENTS.

(A) Opinions of Court. An opinion must be written and bear the authoring justice's name or the label "Per Curiam." Each justice deciding a case must sign an opinion. Except when the Court affirms an action of a lower court or tribunal by an even division of the justices, a decision of the Court must be made by concurrence of a majority of the voting justices.

(B) Filing and Publication. The Court shall file a signed opinion with the clerk, who shall stamp the date of filing on it. The reporter of decisions is responsible for having the opinions printed in a form and under a contract approved by the Court in accordance with MCR 7.301(E).

(C) Orders or Judgments Pursuant to Opinions.

(1) Entry. The clerk shall enter an order or judgment pursuant to an opinion as of the date the opinion is filed with the clerk.

(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 court or tribunal that tried the case with its record, not less than 21 days and not more than 28 days after entry of the order or judgment.

(b) If a motion for rehearing is timely filed, the clerk shall fulfill the responsibilities under subrule (C)(2)(a) promptly after the Court denies the motion or, if the motion is granted, enter a new order or judgment after the Court's opinion on rehearing.

(3) Exceptional Issuance. The Court may direct the clerk to dispense with the time requirement of subrule (C)(2)(a) and issue the order or judgment when its opinion is filed. An order or judgment issued under this subrule does not preclude the filing of a motion for rehearing, but the filing of a motion does not stay execution or enforcement.

(4) Execution or Enforcement. Unless otherwise ordered by the Court, an order or judgment is effective when it is issued under subrule (C)(2)(a) or (b) or subrule (C)(3), and enforcement is to be obtained in the trial court.

(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 certified copy to each party, to the Court of Appeals, and to the lower 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. The Supreme Court may, at any time, in addition to its general powers

(1) exercise any or all of the powers of amendment of the court or tribunal below;

(2) on reasonable notice as it may require, allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause; allow new parties to be added or parties to be dropped; or allow parties to be rearranged as appellants or appellees;

(3) permit the reasons or grounds of appeal to be amended or new grounds to be added;

(4) permit the transcript or record to be amended by correcting errors or adding matters that should have been included;

(5) adjourn the case until further evidence is taken and brought before it;

(6) draw inferences of fact;

(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.

(B) Allowing Nonjurisdictional Act After Expiration of Time. When, under the practice relating to appeals or stay of proceedings, a nonjurisdictional act is required to be done within a designated time, the Court may at any time, on motion and notice, permit the act after the expiration of the period on a showing that there was good cause for the delay or that the delay was not caused by the culpable negligence of the party or attorney. The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C), a late application for leave to cross-appeal under MCR 7.307(A), a late motion for rehearing under MCR 7.311(F), or a late motion for reconsideration under MCR 7.311(G).

(C) Vexatious Proceedings.

(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 any of the proceedings in an appeal was vexatious because

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case 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.

(2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The Court may remand the case to the trial court or tribunal for a determination of actual damages.

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

the time for filing the brief, or if the appellant fails to 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 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 an order dismissing an action under this rule will be sent to the parties and the 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 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) Dismissal for Lack of Jurisdiction. The Court may dismiss an appeal, application, or an original proceeding for lack of jurisdiction at any time.

RULE 7.318. VOLUNTARY DISMISSAL.

The parties may file with the clerk a stipulation agreeing to the 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) Rules Applicable. The procedure for taxation of costs in the Supreme Court is as provided in MCR 7.219.

(B) Expenses Taxable. Unless the Court otherwise orders, a prevailing party may tax only the reasonable costs incurred in the Supreme Court, including an amount not to exceed $2 per original page for the necessary expense of printing the briefs and appendixes required by these rules.

(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) $375 for an application for leave to appeal or an original action;

(2) $150 for a motion for immediate consideration or a motion to expedite

appeal, except that a prosecuting attorney is exempt from paying a fee under this subdivision in an appeal arising out of a criminal proceeding if the defendant is represented by a court-appointed lawyer;

(3) $75 for all other motions;

(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) $5 for certified docket entries;

(6) $1 for certification of a copy presented to the clerk.

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) Violation of Rules. The Supreme Court may impose costs on a party or an attorney when in its discretion the party or attorney should be assessed for violation of these rules.

Staff Comment: These proposed amendments would update the rules regarding practice in the Michigan Supreme Court, and would renumber and reorganize the rules to be consistent with those in the Court of Appeals for the ease of the appellate practitioner and greater judicial efficiency.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MCR 3.211.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.211 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 Administrative Matters & Court Rules page.

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 3.211. JUDGMENTS AND ORDERS.

(A) Each separate subject in a judgment or order must be set forth in a separate paragraph that is prefaced by an appropriate heading.

(B) A judgment of divorce, separate maintenance, or annulment must include

(1) the insurance and dower provisions required by MCL 552.101;

(2) a determination of the rights of the parties in pension, annuity, and retirement benefits, as required by MCL 552.101(4);

(3) a determination of the property rights of the parties, which may include under MCL 600.5070 *et seq.*, the parties' stipulation for binding postjudgment arbitration of identified categories of personal property; and(4)a provision reserving or denying spousal support, if spousal support is not granted; a judgment silent with regard to spousal support reserves it.

(C)-(H) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.211 would provide language to allow the parties to stipulate (in their judgment of divorce, separate maintenance, or annulment) to postjudgment binding arbitration of identified personal property under MCL 600.5070 *et seq*.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENTS OF MCR 3.963, 3.966, AND 3.974.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.963, 3.966, and 3.974 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 Administrative Matters & Court Rules page.

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 3.963. ACQUIRING PHYSICAL CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1) Order to Take Child into Protective Custody. The court may issue a written order, electronically or otherwise, authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, after presentment of a petition or affidavit of facts to the court, the court has reasonable cause to believe that all the following conditions exist, together with specific findings of fact:

(a) [Unchanged.]

(b) The circumstances warrant issuing an order pending ~~the~~a hearing in accordance with:

(i) MCR 3.965 for a child who is not yet under the jurisdiction of the court, or

(ii) MCR 3.974(C) for a child who is already under the jurisdiction of the court pursuant to MCR 3.971 or 3.972.

(c)-(e) [Unchanged.]

(2) [Unchanged.]

(3) The court shall inquire whether a member of the child's immediate or extended family is available to take custody of the child pending a preliminary hearing, or an emergency removal hearing if the court already has jurisdiction over the child pursuant to MCR 3.971 or MCR 3.972, whether there has been a central registry clearance, and whether a criminal history check has been initiated.

(4) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.966. OTHER PLACEMENT REVIEW PROCEEDINGS.

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

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

(2) If the child is removed from the home and disposition is not completed, the ~~progress of the child must be reviewed no later than 182 days from the date the child was removed from the home~~court shall conduct a dispositional hearing in accordance with MCR 3.973.

(B)-(C) [Unchanged.]

RULE 3.974. ~~POST-DISPOSITIONAL~~ PROCEDURES; FOR CHILD AT HOME; PETITION AUTHORIZED.

(A) Review of Child's Progress.

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

(2) Time. If the child was never removed from the home, the progress of the child must be reviewed no later than 182 days from the date the petition was ~~filed~~authorized and no later than 91 days after that for the first year that the child is subject to the jurisdiction of the court. After that first year, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding hearing until the court terminates its jurisdiction. The review shall occur no later than 182 days after the child returns home when the child is no longer in foster care. If the child was removed from the home and subsequently returned home, review hearings shall be held in accordance with MCR 3.975.

(3) Change of Placement. Except as provided in subrule (~~B~~C), the court may not order a change in the placement of a child ~~solely on the basis of a progress review~~without a hearing. If the child ~~over~~for whom the court has ~~retained jurisdiction~~authorized a petition remains at home ~~following the initial dispositional hearing~~ or has otherwise returned home from foster care, and it comes to the court's attention at a review hearing held pursuant to subrule (A)(2), or as otherwise provided in this rule, that the child should be removed from the home, the court ~~must conduct a hearing before it~~ may order the placement of the child. If the court orders the child to be placed out of the home following a review hearing held pursuant to subrule (A)(2), the parent must be present and the court shall comply with the placement provisions in MCR 3.965 (C). If the parent is not present, the court shall proceed under subrule (C) before it may order removal.~~Such a hearing must be conducted in the manner provided in MCR 3.975(E), except as otherwise provided in this subrule for Indian children.~~ If the child is an Indian child, in addition to ~~the~~a hearing ~~prescribed by~~held in accordance with this rule~~subrule~~, the court must also conduct a removal hearing in accordance with MCR 3.967 before it may order the placement of the Indian child.

(B) Hearing on Petition for Out-of-Home Placement.

(1) Preadjudication. If a child for whom a petition has been authorized pursuant to MCR 3.962 or MCR 3.965 is not yet under the jurisdiction of the court and an amended petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition in accordance with MCR 3.965.

(2) Postadjudication. If a child is under the jurisdiction of the court and a supplemental petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921. Unless the child remains in the home, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied. If the court orders the child be placed out of the home, the court shall proceed under subrule (D).

(~~B~~C) Emergency Removal; Protective Custody.

(1) General. If ~~the~~a child, ~~over~~for whom the court has ~~retained jurisdiction~~authorized an original petition, remains at home ~~following the initial dispositional hearing~~ or ~~has otherwise~~ is returned home ~~from foster care~~following a hearing pursuant to the rules in this subchapter, the court may order the child to be taken into protective custody pending an emergency removal hearing pursuant to the conditions listed in MCR 3.963(B)(1) and upon receipt, electronically or otherwise, of a petition or affidavit of fact. If the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical damage or harm to the child.

(2) Notice. The court shall ensure that the parties are given notice of the emergency removal hearing as provided in MCR 3.920 and MCR 3.921.

(3) Emergency Removal Hearing. If the court orders the child to be taken into protective custody pursuant to MCR 3.963, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian.

(a) Preadjudication. If a child for whom a petition has been authorized pursuant to MCR 3.962 or MCR 3.965 is not yet under the jurisdiction of the court, the emergency removal hearing shall be conducted in the manner provided by MCR 3.965.

(b) Postadjudication. If a child is under the jurisdiction of the court, unless the child is returned to the parent pending disposition or~~the~~ dispositional review, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

The parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian.

~~(a) At the emergency removal hearing, t~~The respondent parent, guardian, or legal custodian from whom the child is removed must receive a written statement of the reasons for removal and be advised of the following rights at a hearing to be held pursuant to subrule (D):

(i) to be represented by an attorney at the ~~dispositional review~~ hearing;

(ii) to contest the continuing placement at the ~~dispositional review~~ hearing within 14 days; and

(iii) to use compulsory process to obtain witnesses for the ~~dispositional review~~ hearing.

~~(b) At an emergency removal hearing, the parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian.~~

(~~C~~D)~~Dispositional Review Hearing;~~ Procedure Following Postadjudication Out- of-Home Placement. If the child is in placement pursuant to subrule (B)(2) or (C)(3)(b), the court shall proceed as follows:

(1) If the court has not held a dispositional hearing pursuant to MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.

(2) If the court has already held a dispositional hearing pursuant to MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

Staff Comment: The proposed amendments of MCR 3.963, 3.966, and 3.974 would provide clarity regarding procedures to be followed when an emergency removal of a child has occurred but a dispositional hearing has not been held.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 26, 2014:

PROPOSED AMENDMENT OF MCR 7.211.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.211 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 Administrative Matters & Court Rules page.

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 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a)-(b) [Unchanged.]

(c) In a case tried without a jury, the appellant need not file a motion for remand or a motion for new trial to challenge the great weight of the evidence in order to preserve the issue for appeal.

(d) [Unchanged.]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.211(C)(1)(c) would clarify that an appellant, in a case tried without a jury, is not required to file a motion for remand or a motion for a new trial to challenge the great weight of the evidence to preserve the issue for appeal.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Orders Entered February 4, 2015:

PROPOSED ADOPTION OF NEW MCR 5.731a.

On order of the Court, this is to advise that the Court is considering adoption of Rule 5.731a of the Michigan Court Rules. Before determining whether the proposed new rule 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 Administrative Matters & Court Rules page.

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.

[Because the entire proposed rule is new, there is no underlining.]

RULE 5.731a. CLINICAL CERTIFICATES.

A clinical certificate shall be marked and filed as confidential. Only persons who are determined by the court to have a legitimate interest may be allowed access to the confidential document. In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the respondent, and restriction(s) imposed by state or federal law.

Staff Comment: The proposed rule would require clinical certificates to be marked and filed as confidential and would allow only persons who have been found by the court to have a legitimate interest in the confidential documents to be granted access.

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 June 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-45. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MCR 6.106.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.106 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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 6.106. PRETRIAL RELEASE.

(A) In General. At the defendant's ~~first appearance before a court~~ arraignment on the complaint and warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1) held in custody as provided in subrule (B);

(2) released on personal recognizance or an unsecured appearance bond; or

(3) released conditionally, with or without money bail (ten percent, cash or surety).

(B)-(I) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.106(A) would clarify that a court would determine issues concerning defendant's pretrial release, if any, at the time of defendant's arraignment on the complaint and warrant.

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 June 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered February 18, 2015:

PROPOSED AMENDMENT OF MCR 7.215.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication shall be deemed "unpublished."

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule;

(3) alters, ~~or~~ modifies, or reverses an existing rule of law ~~or extends it to a new factual context~~;

(4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a ~~recently~~ reported decision since November 1, 1990;

(5) involves a legal issue of significant~~continuing~~ public interest;

(6) criticizes existing law; or

(7) ~~creates or~~ resolves a ~~an apparent~~ conflict among unpublished Court of Appeals opinions brought to the Court's attention~~of authority, whether or not the earlier opinion was reported~~; or

(8) [Unchanged.]

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Citation to such opinions in a party's brief is disfavored unless the unpublished opinion directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal. A party who cites an unpublished opinion shall explain why existing published authority is insufficient to resolve the issue and must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) [Unchanged.]

(D)-(J) [Unchanged.]

Staff Comment: The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term "unpublished" as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C) would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

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 June 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MARKMAN, J. (*concurring in part and dissenting in part*). I support publishing for comment the proposed amendments of MCR 7.215(A), which would clarify the term "unpublished," and MCR 7.215(B), which

would revise the standards regarding when an opinion of the Court of Appeals should be published so that our court rule better conforms to the real-world practices and available resources of that Court. However, I would not publish for comment the proposed amendments of MCR 7.215(C), which provide that citing an unpublished opinion is "disfavored" and should only be done when a published opinion is "insufficient" to address the issue on appeal, and would further require an "explanation" of "why existing published authority is insufficient to resolve the issue . . . ." I would not publish this proposal any more than I would publish a proposal disclaiming reliance by our judiciary on the principle of stare decisis. In my judgment, the proposed amendments of MCR 7.215(C) represent a solution in search of a problem and misperceive the nature of the judicial exercise.

The judiciary of our state possesses one principal authority, the exercise of the "judicial power," Const 1963, art 6, § 1, the power to resolve "cases or controversies." *People v Richmond*, 486 Mich 29, 34 (2010). This power can be exercised through a variety of traditional forms—published opinions, unpublished opinions, authored opinions, per curiam opinions, and memorandum opinions. Each of these must conform to the requirements of the law, and each carries the force of law. Concerning the former proposition, this signifies that the substance of each of these forms of opinion will be in accord with the principles and practices of the rule of law in which persons stand equally before the law and in which disparate treatments must be reasonably justified. Concerning the latter proposition, this signifies that each of these forms of opinion will constitute the bona fide law of this state and will contribute case by case to defining the body of law from which the precedents of this state must be identified. That is, while these distinct forms of caselaw may serve different practical purposes of judicial decision-making, each has in common that it constitutes the genuine corpus of this state's law, both being derived from traditional sources of the law—the Constitution, statutes, ordinances, and the common law—and serves in turn as the basis of future law.

An unpublished opinion is not unpublished because it states a second-class, an ersatz, or a quasi- law. Rather, it is unpublished because a Court of Appeals panel has determined pursuant to MCR 7.215(B) that it would be repetitive of an published opinion; that the factual circumstances of a case are relatively unique and unlikely to be replicated; or that, for one reason or another, a case is of limited practical significance. An unpublished opinion, however, is not unpublished because it does not constitute "real" law. If an unpublished opinion constituted something other than "real" law—if, for example, it was derived from something other than a traditional source of the law, or if it would not supply an appropriate basis for the future development of the law—the opinion would simply not constitute a legitimate product of the "judicial power," and thus it should not have been undertaken by a court of law in the first place. Most certainly, an unpublished opinion is not a judicial form by which to "bury" a decision that is in discord with the law of this state.

It is certainly understandable why an unpublished opinion would typically be of less practical citational value than a published opinion, for the former tend to be more succinct, be less detailed in their analyses, be less thorough in their description of factual backgrounds, and pertain to matters of legal dispute about which a more thorough and more helpful published opinion exists. But these merely reflect the practical limitations of the unpublished opinion form. When for whatever serendipitous or other reason an unpublished opinion *does* communicate a legal principle deemed by a litigant to be relevant in a later case, there is, in my judgment, no principled reason why it should not be drawn to the attention of a later court or why it should be "disfavored" from consideration by our court rules. Perhaps by not publishing an opinion, the Court of Appeals erred in its assessment that there was a published opinion that better articulated relevant legal principles; perhaps there were specific facts that served to render the earlier case particularly on-point regarding a later case; or perhaps the sheer passage of time had come to cast unexpected or unanticipated new light on the value of an existing published or unpublished opinion. I do not know why in these or in other appropriate circumstances a party should be constrained from assessing the fullness of the existing law of this state in search of applicable precedents, or why opposing parties (and the courts) should not be required to assess this law by traditional and customary standards.

While I recognize that unpublished Court of Appeals opinions do not, under current rules, constitute binding precedent (that is a matter for another day's discussion), MCR 7.215(C)(1), I see no reason why they should be foreclosed from being invoked as persuasive authority. Indeed, this Court itself has been persuaded by unpublished opinions. See, for example, *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 51 (2012) ("Although *Mago*[1] is an unpublished and therefore non-binding opinion of the Court of Appeals, and, as the dissent points out, the facts in *Mago* are not identical to those in the instant case, we nevertheless find its reasoning persuasive."); *Tomiak v Hamtramck School Dist*, 426 Mich 678, 698-699 (1986) ("We find the reasoning of the Court of Appeals decision in *Purcell v Ferndale School Dist*, unpublished opinion per curiam, decided November 24, 1982 (Docket No. 59505), persuasive . . . .").

It is obvious that one traditional practical limitation on citing unpublished law—the relative inaccessibility of that law—has been significantly ameliorated in recent years and serves as no contemporary justification for the present effort to diminish the use of an unpublished Court of Appeals opinion. Indeed, the fact that those opinions are now so easily accessible probably explains the "unmistakable . . . present trend . . . away from no-citation rules." Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J App Prac & Process 473, 487 (2003). The federal courts are now actually prohibited from restrict-

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[1] *Mago Costr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479).

ing the citation of an unpublished federal opinion. See FR App P 32.1(a). As the advisory committee that supported the adoption of this rule explained:

> "[A] court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court's attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an 'extreme' measure. Another member said that it was 'ludicrous' that an attorney cannot cite a court's prior decisions to the court itself, but can cite those decisions to virtually everyone else in the world, including other courts. Yet another member—a judge—said that judges should not be the only government officials who can shield themselves from being confronted with their past actions." [Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 Wash & Lee L Rev 1429, 1451-1452 (2005), quoting the minutes of the spring 2004 meeting of the Advisory Committee on Appellate Rules (April 13-14, 2004), p 8.]

By discouraging parties from citing an unpublished opinion, this Court will only deprive itself and the Court of Appeals, and those who argue before these Courts, of " 'an important tool in managing the development of a coherent body of caselaw' . . . ." Barnett, 5 J App Prac & Process at 487 (citation omitted). What is to be gained by instructing those who are the custodians of the law in our bench and bar that they should tie one of their hands behind their back in calling to the attention of appellate courts the considered judicial decisions of previous appellate courts? How are the values of equal treatment under the law furthered by a rule that "disfavors" reliance on a class of judicial decisions that have been decided by persons who have taken judicial oaths of office, and who have conformed to the rules and procedures of the judicial process, and who have abided by the requirements of the adversarial process, and who have rendered judgments to the best of their ability in accordance with the requirements of the laws and constitutions of the United States and the state of Michigan? Given the "unmistakable . . . present trend . . . away from no-citation rules," *id.*, and the practical and constitutional rationales for this trend, I do not see what purpose would be served if we, and we alone, move toward a no-citation rule. See *id.* ("Since . . . 2001, six states have switched from banning citation to allowing it; two more states are considering proposals to do the same; and *no state* during this period appears to have switched the other way.") (emphasis added).

In summary, the relatively infrequent citing of an unpublished opinion poses little or no practical burdens on the courts of this state, and its "disfavoring" serves only to further delegitimize a practice that does not warrant that treatment. There is no opinion of the Michigan Supreme Court that is "uncitable," and there should be no such opinion of the Court of Appeals, an institution of equally legitimate judicial standing and one equally entrusted with responsibility for the exercise of the "judicial power" of this state.

Orders Entered March 25, 2015:

PROPOSED AMENDMENT OF MCR 3.613.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.613 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 Administrative Matters & Court Rules page.

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 3.613. CHANGE OF NAME.

(A) [Unchanged.]

(B) Minor's Signature. A ~~petition for~~ written consent to a change of name by a minor ~~need not~~ must be signed by the minor in the presence of the judge.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.613 would provide clarification that the signature of a minor is required on the consent document (not the petition) for the minor's change of name and that the minor must sign the document in the presence of the judge.

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 July 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-11. Your comments and the comments of others

will be posted under the chapter affected by this proposal at Proposed 32 & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MRPC 1.5.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 1.5 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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.]

Alternative A: Would Prohibit "Results Obtained" or "Value Added" Fees in Divorce Cases

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 would 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 postjudgment balances due under support, alimony or other financial orders because such

contracts do not implicate the same policy concerns.

Alternative B: Would Allow "Results Obtained" or "Value Added" Fees in Divorce Cases

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. An attorney and client may consent in writing to an "enhanced fee" in a case, which may take into consideration the results obtained for a client, provided that such a fee is "reasonable" considering all the factors set forth in MRPC 1.5(a) and is agreed to by attorney and client.

(e) [Unchanged.]

Staff Comment: In *In Re Fryhoff,* 495 Mich 890 (2013), the Michigan Supreme Court invited the Attorney Grievance Commission, the State Bar of Michigan Family Law Section and the State Bar of Michigan Standing Committee on Professional Ethics to submit proposed language that would clarify the Michigan Rules of Professional Conduct with regard to whether it should be permissible for an attorney to charge a "results obtained" or "value added" fee in addition to the customary hourly or other fee a client pays for services. The AGC and the SBM's Committee on Professional Ethics submitted similar language that would prohibit the charging of such a fee. The SBM's Family Law Section submitted a proposal that would explicitly allow such a fee to be charged, with the understanding that the fee must still meet the "reasonable" standard for all fees described in MRPC 1.5(a) and with the agreement of the client.

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 July 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-38. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered April 8, 2015:

PROPOSED AMENDMENT OF MCR 6.106.

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.106 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter

also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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 6.106. PRETRIAL RELEASE.

(A) [Unchanged.]

(B) Pretrial Release/Custody Order Under Const 1963, art 1, § 15.

(1)-(4) [Unchanged.]

(5) The court may, in its custody order, limit or prohibit defendant's contact with any other named person or persons if the court determines the limitation or prohibition is necessary to maintain the integrity of the judicial proceedings. If an order under this paragraph is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved.

(6) Nothing in this rule limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals.

(C) [Unchanged.]

(D) Conditional Release. If the court determines that the release described in subrule (C) will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

(1) [Unchanged.]

(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

(a)-(l) [Unchanged.]

(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of ~~each order~~the orders shall take precedence ~~over the other court order~~ until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order of defendant and while defendant remains in custody if the court determines it necessary to maintain the integrity of the judicial proceedings.

(n)-(o) [Unchanged.]

(E)-(I) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.106(B) and (D) would provide clarification that courts are permitted to exercise their inherent power to order conditions that limit or prohibit a pretrial defendant's contact with any named person to be effective immediately, even while defendant remains in custody. These conditions are allowed in a custody order when the protective limitation or prohibition is necessary to maintain the integrity of the judicial proceedings.

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 August 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-15. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MCCORMACK J. (*concurring*). I write to encourage comment on a number of questions raised by this proposed amendment.

(1) Is this amendment necessary, or do judicial officers already possess the inherent authority to impose conditions on pretrial detainees?

(2) Does a court rule providing courts explicit authorization to limit a pretrial detainee's contact with others then require us to similarly specifically authorize other conditions that courts commonly impose on pretrial detainees (for example, that a pretrial detainee may not be considered for eligibility in a jail's work-release program, may be permitted to receive medical treatment off the jail premises, may be permitted to go to a funeral home or attend a funeral, or be required to attend substance abuse therapy meetings while in custody)?

(3) Will a rule explicitly authorizing courts to impose a specific list of conditions on pretrial detainees inadvertently dissuade judicial officers from ordering conditions that are not identified in the rule but might be merited given the unique facts of a particular situation?

(4) Is it a reasonable assumption that at the time of arraignment, when a judicial officer is considering what conditions to impose, the judicial officer will know whether a defendant will immediately post any bond, will be released on bond at a future date, or will remain in custody for the duration of the trial processes? If not, does this practical hurdle matter?

I encourage public comment on these and any other considerations raised by the proposed amendment.

Orders Entered April 29, 2015:

PROPOSED AMENDMENT OF MCR 5.402.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5.402 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 Administrative Matters & Court Rules page.

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 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(4) [Unchanged.]

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

(a) schedule a hearing to be conducted in accordance with MCR 5.404(C) and MCR 5.404(F).

(b) enter an order for an investigation in accordance with MCR 5.404(A)(2). The order shall be on a form approved by the State Court Administrative Office and shall require the guardian to cooperate in the investigation. The court shall mail a copy of the order to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) by first-class mail.

(c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be mailed to the guardian by first-class mail.

Staff Comment: The proposed amendments of MCR 5.402(E)(5)(a) would require a court that discovers a child of an ordered guardianship may be an Indian child to schedule a hearing in accordance with MCR 5.404(C) and MCR 5.404(F); also the amendment of MCR 5.402(E)(5)(b) would require the court to enter an order for investigation in accordance with MCR 5.404(A)(2), and the amendment of MCR 5.402(E)(5)(c) would require notice of the hearing scheduled in subrule (5)(a) to be provided to the persons prescribed.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by August 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or

ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MCR 7.209.

On order of the Court, this is to advise that the Court is considering alternative proposed amendments of Rule 7.209 of the Michigan Court Rules. Before determining whether either of the alternative proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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.]

Alternative A: Would Require a Court to Enter an Order Staying Enforcement on Appeal

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Stay of Execution.

(1) If a court enters an order staying the effect or enforcement of a judgment or order during appeal and the stay order requires a bond to be filed with the court under subsection (E)(1), and if the bond is filed before execution issues, and notice is given to the officer having authority to issue execution, execution is stayed. If the bond is filed after the issuance but before execution, and notice is given to the officer holding it, execution is suspended.

(2)-(4) [Unchanged.]

(I) [Unchanged.]

Alternative B: Would Amend the Rule to Allow a Party to Stay Proceedings Merely by Filing a Bond and Would Provide an Opportunity for Objection by the Opposing Party

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614, 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. Unless determined by law, or except as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1) ~~Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.~~ Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.

(2) An appeal does not stay execution unless:

(a) ~~When the stay is sought before an appeal is filed and a bond is required,~~ the party seeking the stay ~~shall~~ files a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

(i) perform and satisfy the judgment or order stayed if it is not set aside or reversed; and

(ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court~~.~~, or

(b) ~~If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F).~~ The trial court grants a stay with or without bond as justice requires.

(c) When the bond in subsection (E)(2)(a) is filed, the judgment or order shall automatically be stayed pending entry of a final order under subsection (G).

(2)-(4) [Renumbered as (3)-(5), but otherwise unchanged.]

(F) Conditions of ~~Appeal~~Stay Bond.

(1)-(2) [Unchanged.]

(G) Sureties and Filing of Bond; Notice 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 ~~which~~ that entered the order or judgment to be stayed.

(1) Civil Actions. ~~A bond in a civil action need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.~~

(a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay shall file a proposed stay order pursuant to MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.

(b) Objections shall be filed and served within 7 days after service of the notice of bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).

(c) If no timely objections to the bond, surety, or stay order are filed, the trial court shall promptly enter the order staying enforcement of the judgment or order pending all appeals. Unless otherwise ordered, the stay shall continue until jurisdiction is again vested in the trial court or until further order of an appellate court.

(d) Any stay order must be promptly served on all parties in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the trial court.

(e) All hearings under this rule may be held by telephone conference as provided in MCR 2.402.

(f) For good cause shown, the trial court may set the amount of the bond in a greater or lesser amount adequate to protect the interests of the parties.

(g) A bond may be secured under MCL 600.2631.

(2) [Unchanged.]

(H)-(I) [Unchanged.]

Staff Comment: These alternative proposed amendments relate to stay bonds. MCR 7.209 is ambiguous whether filing a stay bond automatically stays enforcement proceedings, or whether a stay of proceedings is wholly within the discretion of the trial court and Court of Appeals. In this administrative file, the Court is publishing for comment two alternative proposals. Alternative A would clarify the rule so that it is clear that only a trial court judge or the Court of Appeals may order a stay of proceedings. Alternative B, modeled loosely on the recent revisions of the circuit court appeals rule (specifically MCR 7.108), would amend the rule to establish the principle that, like appeals to circuit court, filing a bond automatically stays further proceedings in a case, including enforcement of a judgment or order.

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 August 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED ADOPTION OF NEW MCR 3.617.

On order of the Court, this is to advise that the Court is considering adoption of Rule 3.617 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 Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The proposed language below is a new rule.]

RULE 3.617. DELAYED REGISTRATION OF FOREIGN BIRTH.

The entire record for delayed registration of foreign birth pursuant to MCL 333.2830 is confidential.

Staff Comment: This new rule, MCR 3.617, would require adoption files of foreign-born children who are adopted by a parent who is a resident of this state to be retained as confidential records (as are the adoption records that are governed by MCL 710.67 and MCL 710.68).

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 August 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MCR 2.506.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.506 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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 2.506. SUBPOENA; ORDER TO ATTEND.

(A)-(F) [Unchanged.]

(G) Service of Subpoena and Order to Attend; Fees.

(1) A subpoena may be served anywhere in Michigan in the manner provided by MCR 2.105. The fee for attendance and mileage provided by law must be tendered to the person on whom the subpoena is served at the time of service. Tender must be made in cash, by money order, by cashier's check, or by a check drawn on the account of an attorney of record in the action or the attorney's authorized agent.

(2) A subpoena may also be served by mailing to a witness a copy of the subpoena and a postage-paid card acknowledging service and addressed to the party requesting service. The fees for attendance and mileage provided by law are to be given to the witness after the witness appears at the court, and the acknowledgment card must so indicate. If the card is not returned, the subpoena must be served in the manner provided in subrule (G)(1).

(3) A subpoena or order to attend directed to the Michigan Department of Corrections, Michigan Department of Health and Human Services, Michigan State Police Forensic Laboratory, other accredited forensic laboratory, law enforcement, or other governmental agency may be served by electronic transmission, including by facsimile or over a computer network, provided there is a memorandum of understanding between the parties indicating the contact person, the method of transmission, and the e-mail or facsimile number where the subpoena or order to attend should be sent. A confirmation correspondence must be received from the recipient within 48 hours after email or facsimile service is complete, and the confirmation correspondence shall be filed with the court. If no confirmation correspondence is provided within 48 hours after email or facsimile transmission, the subpoena must be served in the manner provided in subrule (G)(1).

(4) [Former subrule "(3)" renumbered as "(4)," but otherwise unchanged.]

(H)-(I) [Unchanged.]

Staff Comment: The proposed revision of MCR 2.506(G)(3) would insert new language that would allow electronic or facsimile transmission of subpoenas to attend when the subpoenas are directed to specific identified departments or agencies and when there is a memorandum of understanding as described by the amendment between the parties; the revision also would require a confirmation to be received within 48 hours after email or facsimile transmission of the subpoena.

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 August 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-40. Your comments and the comments of others

will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered May 27, 2015:

PROPOSED AMENDMENT OF MCR 3.101.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 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 Administrative Matters & Court Rules page.

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 3.101. GARNISHMENT AFTER JUDGMENT.

(A) [Unchanged.]

(B) Postjudgment Garnishments.

(1) Periodic garnishments are garnishments of periodic payments, as provided in this rule.

(a) Unless otherwise ordered by the court, a writ of periodic garnishment served on a garnishee who is obligated to make periodic payments to the defendant is effective until the first to occur of the following events:

(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; or

(ii) ~~the expiration of 182 days after the date the writ was issued;~~

~~(iii)~~ the plaintiff files and serves on the defendant and the garnishee a notice that the amount withheld exceeds the remaining unpaid judgment, interest, and costs, or that the judgment has otherwise been satisfied.

(b) The plaintiff may not obtain the issuance of a second writ of garnishment on a garnishee who is obligated to make periodic payments to the defendant while a prior writ served on that garnishee remains in effect relating to the same judgment. ~~The plaintiff may seek a second writ after the first writ expires under subrule (B)(1)(a).~~

(c) [Unchanged.]

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Writ of Garnishment.

(1)-(4) [Unchanged.]

(5) The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant or as otherwise provided under MCL 600.4012,

(a) without further notice the property or debt held pursuant to the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld until the ~~expiration of the writ~~ judgment is satisfied and in the discretion of the court paid directly to the plaintiff.

(6) [Unchanged.]

(F)-(T) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.101 would eliminate subrule (B)(1)(a)(ii) and make other coordinating changes to reflect statutory revisions in 2015 PA 14 and 15.

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 September 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-07. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.