MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

September 19, 2012, through May 10, 2013

JOHN O. JUROSZEK
REPORTER OF DECISIONS

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2013

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013[1]
STEPHEN J. MARKMAN	2021
DIANE M. HATHAWAY	2017[2]
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021[3]
DAVID F. VIVIANO	2015[4]

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	FREDERICK M. BAKER, Jr.
ANNE-MARIE HYNOUS VOICE	KATHLEEN M. DAWSON
DON W. ATKINS	RUTH E. ZIMMERMAN
JÜRGEN O. SKOPPEK	SAMUEL R. SMITH

ANNE E. ALBERS

State Court Administrator

CHAD C. SCHMUCKER

Clerk: CORBIN R. DAVIS
Reporter of Decisions: JOHN O. JUROSZEK
Crier: DAVID G. PALAZZOLO

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[1] To January 1, 2013.

[2] To January 21, 2013.

[3] From January 1, 2013.

[4] From March 1, 2013.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
CHRISTOPHER M. MURRAY	2015
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

Chief Clerk/Research Director:
LARRY S. ROYSTER

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
3.	DEBORAH ROSS ADAMS	2019
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2019
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	MARTHA M. SNOW	2017[1]
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	AMY PATRICIA HATHAWAY	2019

[1] From December 5, 2012.

		Term Expires January 1 of
	CYNTHIA GRAY HATHAWAY	2017
	MICHAEL M. HATHAWAY	2017
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	JEANNE STEMPIEN	2017
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	MARGARET MARY VanHOUTEN	2015
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	JOHN G. McBAIN, Jr.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2015

		Term Expires January 1 of
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	EDWARD SOSNICK	2013
	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	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2017
	WILLIAM C. MARIETTI	2017
	JOHN C. RUCK	2015[2]
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017

[2] To March 31, 2013.

		Term Expires January 1 of
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	DAVID VIVIANO	2019
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENEFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015

		Term Expires January 1 of
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JANELLE A. LAWLESS	2015
	PAULA J.M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	KATHLEEN BRICKLEY	2019
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2017
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2015
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2019
40.	MICHAEL P. HIGGINS	2015[3]
	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2015[4]
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013[5]
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019

[3] To March 29, 2013.

[4] From April 8, 2013.

[5] To March 1, 2013.

		Term Expires January 1 of
46.	JANET M. ALLEN	2011
	GEORGE J. MERTZ	2015[4]
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017
54.	AMY GIERHART	2019[7]
	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2019

[6] From January 22, 2013.

[7] From December 17, 2012.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8-1.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	CAROL A. HUSUM	2017[1]
8-2.	ROBERT C. KROPF	2015
8-3.	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2013
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017

[1] To February 28, 2013.

		Term Expires January 1 of
14B.	CHARLES POPE	2015
15.	JULIE CREAL	2013
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2017
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2015
22.	SABRINA JOHNSON	2013
23.	GENO SALOMONE	2019
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2017
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2017
26.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER	2017
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2017
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019

		Term Expires January 1 of
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	DEMETRIA BRUE	2015
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	DEAN AUSILIO	2017[2]
	JOHN M. CHMURA	2019
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2017[3]
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015

[2] From December 5, 2012.

[3] To May 21, 2013.

		Term Expires January 1 of
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2017

		Term Expires January 1 of
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013

		Term Expires January 1 of
	DAWN A. KILDA	2015
75.	STEVEN CARRAS	2017
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015[4]
85.	BRENT V. DANIELSON	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

[4] To January 1, 2013.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2014
THEODORE A. METRY	2011
MATTHEW R. RUMORA	2014

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	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	FREDERICK L. WOOD	2013
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa		
Clare/Gladwin	THOMAS P. McLAUGHLIN	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	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Ingham	R. GEORGE ECONOMY	2019

Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2019
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	NANARUTH H. CARPENTER	2017
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
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	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2019
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	JOHN A. HOHMAN, JR.	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	JOHN E. FITZGERALD	2013
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	2015
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
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Sanilac	GREGORY S. ROSS	2015
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015
Washtenaw	DARLENE A. O'BRIEN	2019
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	MARTIN T. MAHER	2015
Wayne	LISA MARIE NEILSON	2017
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

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
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ADMINISTRATIVE ORDER No. 2012-2

CONCURRENT JURISDICTION PLAN FOR THE 33RD CIRCUIT COURT, THE 90TH DISTRICT COURT, AND CHARLEVOIX/EMMET PROBATE DISTRICT

Entered September 19, 2012, effective January 1, 2013 (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 January 1, 2013:

- The 33rd Circuit Court, the 90th District Court, and Charlevoix/Emmet Probate District

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. 2012-3

CONCURRENT JURISDICTION PLAN FOR THE 57TH CIRCUIT COURT, THE 90TH DISTRICT COURT, AND CHARLEVOIX/EMMET PROBATE DISTRICT

Entered September 19, 2012, effective January 1, 2013 (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 January 1, 2013:

- The 57th Circuit Court, the 90th District Court, and Charlevoix/Emmet Probate District
- 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. 2012-4

CONCURRENT JURISDICTION PLAN FOR THE 48TH CIRCUIT COURT, THE 57TH DISTRICT COURT, AND ALLEGAN COUNTY PROBATE COURT

Entered October 24, 2012, effective February 1, 2013 (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 February 1, 2013:

• The 48th Circuit Court, the 57th District Court, and Allegan 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. 2012-5

IMPLEMENTATION OF TRIAL COURT PERFORMANCE MEASURES

Entered December 5, 2012, effective immediately (File No. 2012-15)—REPORTER.

Performance measurement is a critical means to assess the services provided to the public and the processes used to deliver those services. Performance measurement can assist in assessing and recognizing areas within courts that are working well, and those that require attention and improvement.

Trial court performance measures are not a new concept. The National Center for State Courts first issued the 10 CourTools in 2005; in the 1990s, SCAO formed a task force, including judges and court administrators, to study how to measure a court's performance. In 2009, the state court administrator convened the Trial Court Performance Measures Committee, which piloted performance measures and offered recommendations. The committee stressed that all trial courts should embrace performance measures as an opportunity to provide high-quality public service in the most efficient way. Further, because transparency and accountability are integral elements of an efficient and effective judiciary, SCAO's standardized statewide performance measure reports should be readily available to the public.

In an effort to ensure continued improvement in the judiciary, the Court adopts this order.

A. The State Court Administrative Office is directed to:

1. Develop a plan for implementation of performance measures in all trial courts. The initial plan shall be submitted to the Supreme Court for approval, and the plan subsequently shall be periodically reviewed by the Court.

2. Assist trial courts in implementing and posting performance measures.

3. In conjunction with the Trial Court Performance Measures Committee, assess and report on the effectiveness of the performance measures and modify the measures as needed.

B. Trial courts are directed to:

1. Comply with the trial court performance measures plan developed by the State Court Administrative Office.

2. Report performance measure information to the State Court Administrative Office.

C. SCAO's standardized statewide performance measure reports shall be made available to the public on the Internet after approval by the Supreme Court.

Staff Comment: This administrative order authorizes the implementation of performance measures in trial courts.

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

ADMINISTRATIVE ORDER No. 2012-6

CONCURRENT JURISDICTION PLAN FOR THE 37TH CIRCUIT COURT, THE 10TH DISTRICT COURT, AND THE CALHOUN COUNTY PROBATE

Entered December 5, 2012, effective January 1, 2013 (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 January 1, 2013, or as soon thereafter as possible:

• The 37th Circuit Court, the 10th District Court, and the Calhoun 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. 2012-7

ADMINISTRATIVE ORDER ALLOWING STATE COURT ADMINISTRATIVE OFFICE TO AUTHORIZE A JUDICIAL OFFICER'S APPEARANCE BY VIDEO COMMUNICATION EQUIPMENT

Entered December 5, 2012, effective January 1, 2013 (File No. 2012-16)—REPORTER.

The State Court Administrative Office is authorized, until further order of this Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes. Remote participation by judicial officers shall be limited to the following specific situations:

1) judicial assignments;

2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district;

3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district;

4) a multiple district plan in which a district court magistrate would have to travel to a different district.

The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area.

For circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B). The local administrative order must describe how the program will be implemented and the administrative procedures for each type of hearing for which two-way interactive video technology will be used. The State Court Administrative Office shall either approve the proposed local administrative order or return it to the chief judge for amendment in accordance with requirements and guidelines provided by the State Court Administrative Office.

For judicial assignments, the assignment order will allow remote participation by judges as long as the assigned judge is physically present in a courthouse located within the judge's judicial circuit or district. A local administrative order is not required for assignments.

For multiple district plans, the plan will allow remote participation by district court magistrates as long as the magistrate is physically present in a courthouse located within the multiple district area. No separate local administrative order is required.

The State Court Administrative Office shall assist courts in implementing the technology, and shall report periodically to this Court regarding its assessment of the program. Those courts using the technology shall provide statistics and otherwise cooperate with the

State Court Administrative Office in monitoring the use of video communication equipment.

Staff Comment: This administrative order allows the State Court Administrative Office to authorize a judge to preside using videoconferencing equipment in certain types of proceedings.

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

MARILYN KELLY, J. I would decline to adopt this administrative order.

ADMINISTRATIVE ORDER No. 2013-1

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 18TH CIRCUIT COURT, THE 74TH DISTRICT COURT, AND THE BAY COUNTY PROBATE COURT

Entered January 23, 2013, 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 Circuit Court, the 74th District Court, and the Bay 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. 2013-2

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 14TH CIRCUIT COURT, THE 60TH DISTRICT COURT, AND THE MUSKEGON COUNTY PROBATE COURT

Entered January 23, 2013, 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 14th Circuit Court, the 60th District Court, and the Muskegon 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. 2013-3

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 45TH CIRCUIT COURT, THE 3-B DISTRICT COURT, AND THE ST. JOSEPH COUNTY PROBATE COURT

Entered March 20, 2013, 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 45th Circuit Court, the 3-B District Court, and the St. Joseph 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. 2013-4

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 56TH CIRCUIT COURT, THE 56-A DISTRICT COURT, AND THE EATON COUNTY PROBATE COURT

Entered May 1, 2013, 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 56th Circuit Court, the 56-A District Court, and the Eaton 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. 2013-5

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 54TH CIRCUIT COURT, THE 71-B DISTRICT COURT, AND THE TUSCOLA COUNTY PROBATE COURT

Entered May 1, 2013, 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 54th Circuit Court, the 71-B District Court, and the Tuscola 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*.

AMENDED ADMINISTRATIVE ORDER No. 1989-1

AMENDMENT OF ADMINISTRATIVE ORDER NO. 1989-1 CONCERNING FILM OR ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS

Entered December 5, 2012, effective January 1, 2013 (File No. 2011-09)—REPORTER.

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

Film or Electronic Media Coverage of Court Proceedings.

The following guidelines shall apply to film or electronic media coverage of proceedings in Michigan courts:

1. [Unchanged.]

2. Limitations.

(a) In the trial courts.

~~(a)~~(i) Film or electronic media coverage shall be allowed upon request in all court proceedings. Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the

proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage.

~~(b)~~(ii) A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.

~~(c)~~(iii) Film or electronic media coverage of the jurors or the jury selection process shall not be permitted.

~~(d)~~(iv) A trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave.

(b) In the Court of Appeals and the Supreme Court.

(i) Film or electronic media coverage shall be allowed upon request in all court proceedings except for good cause as determined under MCR 8.116(D)(1). Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage.

(ii) A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record, that good cause requires such action or that rules established under this order or additional rules imposed by the judge have been violated. If a court makes such a finding, it must issue an order that states with particularity the reasons for termination, suspension, limitation, or exclusion of film or electronic media coverage.

(iii) If a judge of the Court of Appeals terminates, suspends, limits, or excludes film or electronic media coverage, the person who requested permission to film or otherwise provide for electronic media coverage may appeal that decision to the Chief Judge of the Court of Appeals. If the Chief Judge affirms the judge's decision, the requester may appeal by leave to the Supreme Court.

3.-9. [Unchanged.]

Staff Comment: The amendment of Administrative Order No. 1989-1 adds new language to clarify and expand the standards that allow film or electronic media coverage of court proceedings in the Court of Appeals and the Supreme Court.

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

AMENDED ADMINISTRATIVE ORDER No. 2010-3

EXTENDED DEADLINE FOR E-FILING PROJECT IN OAKLAND CIRCUIT COURT, FAMILY DIVISION

Entered January 23, 2013 (File No. 2002-37)—REPORTER.

On order of the Court, the Sixth Judicial Circuit Court, in consultation with the State Court Administrative Office (SCAO), developed this pilot project to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of Family Division actions in a mandatory electronic filing environment.

Beginning March 16, 2010, or as soon thereafter as is possible and effective until ~~December 31, 2012~~December 31, 2014, or further order of this court, the Sixth Judicial Circuit Court adopts an e-filing pilot program requiring parties to electronically file documents in cases assigned to one or more participating judges. Rules designed to address issues unique to the implementation of this program are attached to and incorporated by reference to this local administrative order. Participation in this pilot program is mandatory for cases with a "DO" case code and assigned to pilot program judge(s), and, effective immediately, will be gradually implemented for cases with a "DM" case code.

The Sixth Judicial Circuit Court will track the participation and effectiveness of this pilot program and report the results to the SCAO.

On further order of the Court, effective immediately, Administrative Order No. 2010-3 is amended as follows.

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

1.-14. [Unchanged.]

15. Expiration. Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until ~~December 31, 2012~~December 31, 2014, or further order of this court.

AMENDED ADMINISTRATIVE ORDER No. 2010-4

EXPANSION OF E-FILING IN THE 13TH CIRCUIT COURT (GRAND TRAVERSE, ANTRIM, AND LEELANAU COUNTIES)

Entered September 19, 2012, effective immediately (File No. 2002-37)—REPORTER.

[Additions to the text are indicated in underlining and deletions are indicated by strikeover.]

On order of the Court, the 13th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin July 1, 2010, or as soon thereafter as is possible, and shall remain in effect until July 1, ~~2015~~2017, or further order of this Court. The 13th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 13th Circuit Court Electronic Document Filing Pilot Project, the 13th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 13th Circuit Court will track the participation and effectiveness of this pilot program and shall report

to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 13th Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Antrim, Grand Traverse and Leelanau County Clerks.

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

(c) "LAO" means all local administrative orders governing the 13th Judicial Court.

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

(e) "Pilot program" means the initiative by the 13th Judicial Circuit Court, the 13th Circuits' Clerks and the Grand Traverse Information Technology Department in conjunction with OnBase Software, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and im-

provements). The 13th Circuit pilot program will begin testing with "C" or "N" type civil cases in Grand Traverse County. The Court plans to expand the pilot program to Antrim and Leelanau Counties. The pilot program is expected to last approximately ~~five~~seven ~~(5)~~(7) years, beginning on July 1, 2010.

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

3. Participation in the Pilot Program

(a) Participation in the pilot program shall be mandatory in all pending "C" or "N" type cases as part of Phase I and additionally in other case types as follows:

Phase II: "A" and "P" case types, including "PH" and "PP," beginning with the effective date of this order.

Phase III: "DC," "DO," "DM," and "DP" case types and all remaining divorce or family support case codes, beginning not less than one month after implementation of Phase II.

Phase IV: "FC," "FH," and all other remaining criminal case codes, beginning not less than six months after implementation of Phase III.

Participation shall be assigned following the filing and service of the initial complaint or other initial filing. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their

documents with the clerk, who will then file the documents electronically. Among the factors that the 13th Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

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

(a) In an effort to facilitate uniform service within the scope of this project, the 13th Circuit Court strongly recommends electronic service.

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

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8 a.m. to 5 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

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

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

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

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

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

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

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

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

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

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered.

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of

filing a judge's copy under MCR 2.119(A)(2). Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

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

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

Type of Filing	*Fee*
EFO (e-filing)	$5
EFS (e-filing with service)	$8
SO (service only)	$5

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

6. Service

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

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

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

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

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

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

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

(d) Proof of Service shall be submitted to the 13th Circuit Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing Service

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

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

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

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

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

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

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

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

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

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

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

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

10. Court Notices, Orders, and Judgments

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

11. Technical Malfunctions

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

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfect-

ing or receiving service of an e-filing, the affected party may petition the 13th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use nonelectronic means to timely file or serve a document. The Court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

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

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

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

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

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

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

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

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

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

or

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information

(v) Proprietary or trade secret information;

(vi) Information regarding an individual's cooperation with the government; and

(vii) Personal information regarding the victim of any criminal activity.

13. Records and Reports: Further, the 13th Circuit Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

(a) Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period, the amount retained by

~~(c)~~ the Court per document and in total for the period, and whether the monies retained by the Court are in a separate account or commingled with other monies.

(c)~~(d)~~ A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

(d)~~(e)~~ A detailed itemization of all cost savings to the Court whether by reduced personnel or otherwise and a statement of whether any cost savings to the Court are reflected in the fee structure charged to the parties.

(e)~~(f)~~ Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

(f)~~(g)~~ A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 1, ~~2015~~2017.

AMENDED ADMINISTRATIVE ORDER No. 2010-6

REVISED E-FILING PILOT PROJECT IN THE 16TH CIRCUIT COURT (MACOMB COUNTY)

Entered January 23, 2013 (File No. 2002-37)—REPORTER.

On order of the Court, the 16th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin on January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until ~~December 31, 2012~~ December 31, 2015, or further order of this Court. The 16th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 16th Circuit Court Electronic Document Filing Pilot Project, the 16th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. The 16th Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

[This administrative order supersedes the order that entered December 28, 2010. Changes are indicated in underlining and overstrike.]

On further order of the Court, effective immediately, Administrative Order No. 2010-6 is amended as follows.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 16th ~~Sixteenth~~ Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

a. "Clerk" means the Macomb County Clerk.

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

c. "LAO" means all local administrative orders governing the 16th ~~Sixteenth~~ Judicial Circuit Court.

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

e. "Pilot program" means the initiative by the 16th ~~Sixteenth~~ Judicial Circuit Court, the Macomb County Clerk/Register of Deeds, and the Macomb County Information Technology Department in conjunction with ~~Vista Solutions Group, LP~~ ImageSoft, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic

filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The Macomb County pilot program will begin testing with two circuit judges with "C" and "N" type civil cases. The 16th Judicial Circuit Court will expand testing into the remaining Civil Division case types, and the Family Division case types for Divorces without Children, Personal Protection Proceedings, and Juvenile Proceedings. The court plans to expand the pilot program to all circuit judges. ~~The pilot program is expected to last approximately two years, beginning on January 1, 2011, and will be implemented in phases as described below.~~

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

g. "TrueCertify" means an electronic document certification tool that allows the Macomb County Clerk's office to create and deliver electronically certified documents, eliminating the need for raised seals. TrueCertify includes an ImageSoft hosted confirmation website (truecertify.com) that stores an encrypted copy of each certified document so that it can be visually verified by the recipient.

h. "TrueFiling" means a web-based efile and service solution provided by ImageSoft where electronic filings may be submitted and delivered to the Courts' OnBase workflow.

3. Participation in the Pilot Program

a. Participation in the pilot program shall be mandatory in all pending "C" or "N" case types assigned to participating circuit judges~~.~~ as part of Phase 1 and

additionally in other case types as follows: ~~Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges. The pilot will be implemented in phases as follows:~~

i. Phase 1: The Macomb County pilot program will begin with two Civil/Criminal Division judges and will encompass case-type codes that begin ~~civil cases wherein the case suffix begins~~ with ~~a~~ "C" or ~~an~~ "N." ~~with two judges.~~

ii. Phase 2: The program will expand to case-type codes AA, AE, AP, AR, AV, AH, AL, AS, AW, PC, PD, PR, PS, and PZ for the above two judges within six months after Phase 1 has begun. ~~Three additional Civil/Criminal Division judges will be added to the pilot within six months after the pilot has begun.~~

iii. Phase 3: The program will expand to the remaining Civil/Criminal Division judges for all civil case-type codes ~~The remaining Civil/Criminal Division judges will be added~~ within three months after Phase 2 has begun.

iv. Phase 4: The program will expand to case-type code DO with all Family Division judges ~~The remaining civil cases will be added to the pilot~~ within three months after Phase 3 has begun ~~upon approval of the Michigan Supreme Court~~.

v. Phase 5: The program will expand to case-type codes PH, PJ, PP, and VP, for all judges within six months after Phase 4 has begun. Case initiation documents will be supported in this Phase for case-type codes PH, PJ, PP, and VP.

vi. Phase 6: The program will expand to case-type codes DJ, DL, EM, JG, NA, PW, TL, and VF for all Family Division judges within six months after Phase 5 has begun.

Until the 16th Circuit Court begins electronic case initiation for specific case-type codes, participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges.

b. This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent a party from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the Clerk, who will then file the documents electronically. Among the factors that the 16th ~~Sixteenth~~ Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel. However, upon submission of proof of incarceration, a self-represented party shall be exempted from e-filing during the period of the individual's incarceration. Application for a waiver from e-filing at the time of case initiation shall be made to the Chief Judge or the Chief Judge's designee.

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

[Please note that where new paragraphs are inserted below, the lettering of former paragraphs has been relettered sequentially, for example, former paragraph "b." is now paragraph "c."]

a. In an effort to facilitate uniform service within the scope of this project, the ~~Sixteenth~~ 16th Circuit Court strongly recommends electronic service. However, service of process for initiating documents shall be made pursuant to MCR 2.105.

b. After the initial process has been served and the defendant has registered as a user with the TrueFiling e-filing system, amendments to the initiating documents may be served electronically subject to the limitations or restrictions otherwise imposed in this order.

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

d. E-filings may be submitted to the Court ~~around the clock~~ at any time (with the exception of periodic maintenance), but shall only be reviewed and accepted for filing by the Macomb County Clerk's Office during normal business hours. E-filings submitted after the close of normal business hours ~~(which is currently 4:30 p.m.)~~ shall be deemed filed on the next business day. The clerk shall process electronic submissions on a first-in, first-out basis. Although the system may be

used on a 24-hour basis, technical support will generally only be available during regular business hours.

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

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

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

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

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

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

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

i. By electronically filing the document, the electronic filer indicates compliance with these rules.

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

a. All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand-delivered.

b. Where a praecipe is required, it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

c. The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the Court, the filing party shall promptly provide a traditional judge's copy to chambers.

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

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

(1) EFO (e-filing only) $5.00

(2) EFS (e-filing with service) $8.00

(3) SO (service only) $5.00

ii. Users who use credit cards for payment may also be responsible for a user fee not to exceed 3 percent.

6. Service

a. All parties shall register with the court ~~provide the court~~ and opposing parties ~~with~~ one e-mail address with the functionality required for the pilot program. All service shall originate from ~~and be perfected upon~~ this registered e-mail address. All parties shall also register this e-mail address with the TrueFiling e-filing system. Additional e-mail addresses for other attorneys or staff persons associated with counsel for the party may be added as registered users. Service shall be perfected

upon a self-represented party or counsel and any additional registered users associated with counsel at the e-mail addresses registered with the TrueFiling e-filing system. Each individual bears the responsibility for the accuracy of the registered e-mail address.

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

c. The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

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

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

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

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

d. Proof of Service shall be submitted to the 16th Circuit Court according to MCR 2.107(D) and these rules.

7. Format and Form of E-filing and Service

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

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

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

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

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

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

a. initiating documents for case-type codes other than PH, PJ, PP, and VP,[1] and

b. documents to be filed under seal (pursuant to court order).

9. Official Court Record; Certified Copies

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

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

c. At the conclusion of the pilot program, if the program does not continue as a pilot project or in some

[1] E-file case initiation for case-type codes PH, PJ, PP, and VP will be supported in Phase 5 of the pilot program and these cases may be initiated through the TrueFiling web application. It is anticipated program participants will be able to access TrueFiling through their own Internet connected device from a remote location, through the Turning Point office located in the court building, or through additional on-site court computer kiosks.

other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

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

10. Court Notices, Orders, and Judgments

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

11. Technical Malfunctions

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

b. If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 16th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical

malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations (Personal Identifiers)

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

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

ii. Names of Minor Children: Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth: Except as required by statute, court rule, or administrative order, an ~~An~~ individual's full birthdate shall not be included in e-filings. Subject to the above limitation, if ~~If~~ an individual's date of birth is otherwise~~must be~~ referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

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

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

vi. Home Addresses: With the exception of a self-represented party, ~~full~~ home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternative address shall be treated as specified above.

b. Parties wishing to file a pleading containing a complete personal data identifier as listed above may:

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

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corre-

sponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

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

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

d. These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the court. Nothing in these rules should be interpreted as authority for counsel or a self-represented litigant to deny discovery to the opposing party.

13. Records and Reports: Further, the 16th Circuit Court shall file an annual report with the Michigan Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

a. Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

b. Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to ~~each vendor~~ ImageSoft, Inc. per document and in total for the subject period, the amount retained by the Court per document and in total for the period, and whether the monies retained by the Court are in a separate account or commingled with other monies.

c. A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

d. A detailed itemization of all cost savings to the Court whether by reduced personnel or otherwise and a statement of whether any cost savings to the Court are reflected in the fee structure charged to the parties.

e. Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after conclusion of the pilot program.

f. A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

~~These rules may be amended upon the recommendation of the participating judges, the approval of the Chief Judge, and authorization by the State Court Administrator.~~ Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the Chief Judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case-type codes or a proposed change in fees, must be submitted to the Michigan Supreme Court for approval.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until December 31, ~~2012~~ 2015.

AMENDED ADMINISTRATIVE ORDER No. 2011-1

EXPANSION OF E-FILING IN THE THIRD CIRCUIT COURT (WAYNE COUNTY)

Entered March 20, 2013, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2011-1, as entered February 1, 2011, and as amended June 28, 2011, and April 4, 2012, is further amended as follows. Changes are indicated in underlining and strikeover.

1. [Unchanged.]

2. [Unchanged.]

3. Participation in the Pilot Program

(a) Participation in the pilot project shall be mandatory in all pending "C~~K~~" type cases: (i.e., CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ); as well as all pending ND, NF, NI, and PZ case types. All judges in the 3rd Circuit Court's Civil Division shall participate. Expansion into the other Civil Division case types will occur as follows: upon the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: ~~CB (business claims), CC (condemnation), CD (employment discrimination), CE (environment), CF (forfeiture claims), CH (housing and real~~

~~estate), CL (labor relations), CP (antitrust, franchising, and trade regulations), CR (corporate receivership), CZ (general civil), and PZ (miscellaneous proceedings, except tax foreclosure cases, which are currently assigned to the chief judge's docket). Two months after the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: ND (property damage, auto negligence), NF (no-fault auto insurance) and NI (personal injury auto negligence).~~ all case types for appeals (case types AA, AE, AP, and AV) except for the AR case type, all case types for administrative review, superintending control and extraordinary writs (case types AH, AL, AS, and AW), all remaining civil damage suits (NH, NI, NM, NO, NP, NS, and NZ); all remaining case types regarding other civil matters (PC, PD, PR, and PS).

(b) [Unchanged.]

4.-15. [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2011-4

EXPANSION OF E-FILING PILOT PROJECT IN THE 20TH CIRCUIT COURT, THE OTTAWA COUNTY PROBATE COURT, AND THE 58TH DISTRICT COURT (OTTAWA COUNTY TRIAL COURTS) TO INCLUDE ADDITIONAL CASE TYPES

Entered January 23, 2013 (File No. 2002-37)—REPORTER.

On order of the Court, the 20th Circuit Court, the Ottawa County Probate Court, and the 58th District Court (hereafter Ottawa County or participating courts) are authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin October 1, 2011, or as soon thereafter as is possible, and shall remain in effect until December 31, 2016, or further order of this Court. The participating courts are aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic filing rules during the pendency of Ottawa County's Electronic Document Filing Pilot Project, the participating courts will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The participating courts will track the participation and effectiveness of this pilot program and shall report

to and provide relevant information as requested by the State Court Administrative Office.

On further order of the Court, effective immediately, Administrative Order No. 2011-4 is amended as follows.

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

1. [Unchanged.]

2. Definitions

a. "Clerk" means the Ottawa County Clerk and clerks of the participating courts.

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

c. "LAO" means all local administrative orders governing the participating courts.

d. "MCR" means the Michigan Court Rules.

e. "Pilot program" means the e-filing initiative of the participating courts, the County Clerk, and the Ottawa County Information Technology Department in conjunction with ImageSoft, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents in the following case types:~~.~~

[The following paragraphs have been assigned sequential numbers and contain revised language from former paragraph "e."]

i. The 20th Circuit pilot program will begin testing with adoption case types AB, AC, AD, AF, AG, AM, AN,

AO, AY, civil case types ND, NF, NH, NI, NM, NO, NP, NS, NZ, CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ, PC, PD, PR, PS, PZ, criminal case types FC and FH, ~~and~~ domestic relations case types DC, DM, DO, DP, DS, DZ, UD, UE, UF, UI, UM, UN, UT, UW~~;~~, and neglect/abuse case type NA.

ii. ~~t~~The Ottawa County Probate Court will begin testing with civil case type CZ~~;~~.

iii. ~~and t~~The 58th District Court will begin testing with general civil case type GC as part of Phase I and additionally in other case types as follows:~~.~~

1. Phase II: Summary proceedings case types, including LT and SP, beginning with the effective date of this order.

2. Phase III: Post disposition collection proceedings in small claims proceedings ("SC") beginning with the effective date of this order.

3. Phase IV: Criminal proceedings case types, including EX, FY, OM, SM, FD, FT, OD, OI, OT, SD, SI, ST, OK, ON, SK, and SN, beginning not less than six months after implementation of Phase II and III.

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

g. "Web-based portal" means a website provided by ImageSoft where electronic filings may be submitted and delivered to the participating courts' OnBase workflow.

3.-11. [Unchanged.]

12. Privacy Considerations

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

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

ii. Names of Minor Children. Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of ~~the~~that child's name may be used.

iii. Dates of Birth. Except as required by statute, court rule, or administrative order, ~~An~~an individual's full birthdate shall not be included in e-filings. Subject to the above limitation, if ~~If~~ an individual's date of birth is otherwise~~must be~~ referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

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

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in e-filing, only the last four digits of that number

should be used and the number specified in substantially the following format X-XXX-XXX-XX1-234.

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

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

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

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

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

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

13.-15. [Unchanged.]

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 19, 2012, effective January 1, 2013 (File No. 2010-14)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover in MCR 6.001; MCR 6.202 is a new rule.]

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

(A) Felony Cases. The rules in subchapters 6.000-6.500 govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction.

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

(C)-(E) [Unchanged.]

RULE 6.202. DISCLOSURE OF FORENSIC LABORATORY REPORT AND CERTIFICATE; APPLICABILITY; ADMISSIBILITY OF REPORT AND CERTIFICATE; EXTENSION OF TIME; ADJOURNMENT.

(A) This rule shall apply to criminal trials in the district and circuit courts.

(B) Disclosure. Upon receipt of a forensic laboratory report and certificate, if applicable, by the examining expert, the prosecutor shall serve a copy of the laboratory report and certificate on the opposing party's attorney or party, if not represented by an attorney, within 14 days after receipt of the laboratory report and certificate. A proof of service of the report and certificate, if applicable, on the opposing party's attorney or party, if not represented by an attorney, shall be filed with the court.

(C) Notice and Demand.

(1) Notice. If a party intends to offer the report described in subsection (B) as evidence at trial, the party's attorney or party, if not represented by an attorney, shall provide the opposing party's attorney or party, if not represented by an attorney, with notice of that fact in writing. If the prosecuting attorney intends to offer the report as evidence at trial, notice to the defendant's attorney or the defendant, if not represented by an attorney, shall be included with the report. If the defendant intends to offer the report as evidence at trial, notice to the prosecuting attorney shall be provided within 14 days after receipt of the report. Except as provided in subrule (C)(2), the report and certification, if applicable, is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.

(2) Demand. Upon receipt of a copy of the laboratory report and certificate, if applicable, the opposing party's attorney or party, if not represented by an attorney, may file a written objection to the use of the laboratory report and certificate. The written objection shall be filed with the court in which the matter is pending, and shall be served on the opposing party's attorney or party, if not represented by an attorney, within 14 days of receipt of the notice. If a written objection is filed, the

report and certificate are not admissible under subrule (C)(1). If no objection is made to the use of the laboratory report and certificate within the time allowed by this section, the report and certificate are admissible in evidence as provided in subrule (C)(1).

(3) For good cause the court shall extend the time period of filing a written objection.

(4) Adjournment. Compliance with this court rule shall be good cause for an adjournment of the trial.

(D) Certification. Except as otherwise provided, the analyst who conducts the analysis on the forensic sample and signs the report shall complete a certificate on which the analyst shall state (i) that he or she is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, (iii) that performing the analysis is part of his or her regular duties, and (iv) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. A report submitted by an analyst who is employed by a laboratory that is accredited by a national or international accreditation entity that substantially meets the certification requirements described above may provide proof of the laboratory's accreditation certificate in lieu of a separate certificate.

Staff Comment: The revision of MCR 6.001 provides a cross reference to MCR 6.202, a new rule adopted in this order. MCR 6.202 incorporates a "notice and demand" procedure into the Michigan Court Rules with regard to forensic reports. Under the rule, a party could seek to admit a forensic report as evidence if notice requirements are met and no objection is filed. If a party objects to admission of the report, the analyst would be required to testify.

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

Adopted October 3, 2012, effective January 1, 2013 (File No. 2011-08)—REPORTER.

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

RULE 2.116. SUMMARY DISPOSITION.

(A)-(B) [Unchanged.]

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(1)-(6) [Unchanged.]

(7) ~~The claim is barred~~ Entry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

(8)-(10) [Unchanged.]

(D)-(J) [Unchanged.]

Staff Comment: Inclusion of the revised language in MCR 2.116(C)(7) clarifies the procedure for bringing a motion for summary disposition on the grounds of a forum selection clause.

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

Adopted October 3, 2012, effective January 1, 2013 (File No. 2011-06)—REPORTER.

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

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) [Unchanged.]

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. On request of the plaintiff supported by an affidavit as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

(a) the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain;

(b) the default was entered because the defendant failed to appear; ~~and~~

(c) the defaulted defendant is not an infant or incompetent person, and~~.~~

(d) the damages amount requested is not greater than the amount stated in the complaint.

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 2.603 clarifies that a court clerk may enter a default judgment if the requested damages are less than the amount claimed in the original complaint, to reflect payments that may have been made or otherwise credited.

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

Adopted October 3, 2012, effective January 1, 2013 (File No. 2012-10)—REPORTER.

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

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A)–(B) [Unchanged.]

(C) Court Jurisdiction; Review Hearings; Lawyer-Guardian ad Litem.

(1) Jurisdiction. The court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. Upon notice by the Department of Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance.

(2) Review Hearings. The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing if it has been one year or less from the date the child was last removed from the home, or within 182 days of the most recent review hearing if it has been more than one year from the date the child was last removed from the home.

(3) Lawyer-Guardian ad Litem. The appointment of the lawyer-guardian ad litem in the child protective proceeding terminates upon entry of the order terminating the court's jurisdiction pursuant to MCL 712A.2(b). At any time after a juvenile guardian is appointed, the court may reappoint the lawyer-guardian ad litem or may appoint a new lawyer-guardian ad litem if the court is satisfied that such action is warranted. A lawyer-guardian ad litem appointed under this subrule is subject to the provisions of MCL 712A.17d.

(D) Court Responsibilities.

(1) Annual Review.

(a) The court shall conduct a review of a juvenile guardianship annually. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary. If the report of the juvenile guardian has not been filed as required by subrule (E)(1), the court shall take appropriate action.

(b) If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667. Notice of the hearing shall be sent to the guardian and the youth as provided in MCR 3.920(D)(1). The court shall issue an order to support its determination and serve the order on the Department of Human Services, the guardian, and the youth.

(2)–(4) [Unchanged.]

(E)–(F) [Unchanged.]

Staff Comment: The amendment of MCR 3.979 implements the judicial action requirements of 2011 PA 225 and 2011 PA 229 by: (1) acknowledging court jurisdiction over guardianships for which the Department of Human Services will continue providing subsidies after the wards reach age 18; and (2) requiring that the supervising courts conduct annual review hearings and make appropriate findings. Adoption of the amendment enables Michigan to receive federal Title IV-E funding for the post-18 guardianship program.

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

Adopted October 3, 2012, effective January 1, 2013 (File No. 2010-03)—REPORTER.

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

RULE 9.113. ANSWER BY RESPONDENT.

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents, or documents related to a refusal to answer under MCR 9.113(B)(1), to the person who filed the request for investigation ~~unless the~~. If the administrator determines that there is cause for not disclosing some or all of the answer or documents supporting the answer, then the administrator need not provide those portions of the answer or the supporting documents to the person who filed the request for investigation.

(B)-(D) [Unchanged.]

Staff Comment: The amendment of MCR 9.113(A) clarifies that the grievance administrator has the discretion to withhold all or part of respondent's answer and any supporting documents from the person who filed the request for investigation.

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

Adopted October 24, 2012, effective immediately (File No. 2011-25)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendment of Rule 3.101 of the Michigan Court Rules 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 <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

[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;

(ii) the expiration of ~~91~~ 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)-(c) [Unchanged.]

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Writ of Garnishment.

(1) The writ of garnishment must have attached or must include a copy of the verified statement requesting issuance of the writ, and must include information that will permit the garnishee to identify the defendant, such as the defendant's address, social security number, employee identification number, federal tax identification number, employer number, or account number, if known.

(2) Upon issuance of the writ, it shall be served upon the garnishee as provided in subrule (F)(1). The writ shall include the date on which it was issued and the last day by which it must be served to be valid, which is ~~91~~ 182 days after it was issued.

(3)-(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,

(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 ~~for as long as 91 days after the issuance~~ until the expiration of the writ and in the discretion of the court paid directly to the plaintiff.

(6) [Unchanged.]

(F)-(T) [Unchanged.]

Staff Comment: The amendments of MCR 3.101 are adopted to reflect recent statutory changes enacted in MCL 600.4012(1) in which the effective period for a periodic garnishment of wages, salary, and other earnings was extended from 91days to 182 days. The amendments of MCR 3.101(B) and (E) change the effective period for *all* periodic garnishments to 182 days. (The amendments do not limit the 182-day effective period to periodic garnishments that only involve wages, salary, and other earnings.)

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this amendment may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-25. Your comments and the comments of others will be posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-3-special-proceedings-and actions.aspx>.

Adopted October 31, 2012, effective January 1, 2013 (File No. 2006-47)—REPORTER.

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

RULE 1.109. ~~PAPER AND TYPE-SIZE STANDARD~~COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; AND ACCESS.

(A) Court Records Defined.

(1) Court records are defined by MCR 8.119 and this subrule. Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

(a) Court records include, but are not limited to:

(i) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,

(ii) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any

system for the purpose of transmitting, accessing, reproducing, or maintaining court records.

(b) For purposes of this subrule:

(i) Documents include, but are not limited to, pleadings, orders, and judgments.

(ii) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

(iii) Data refers to any information entered in the case management system that is not ordinarily reduced to a document, but that is still recorded information.

(iv) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.

(2) Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records.

(B) Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to paper.

(C) Filing Standards.

~~(A)~~(1) All pleadings and other documents ~~papers~~ prepared for filing in the courts of this state must comply with MCR 8.119(C) and be filed on good quality $8\frac{1}{2}$ by 11 inch paper~~;~~ or transmitted through an approved electronic means or created electronically by the court and maintained in a digital image. ~~and t~~The print must be no smaller than ~~12-point type~~ 10 characters per

inch (nonproportional) or 12-point (proportional), except with regard. This requirement does not apply to

(1) forms approved by the State Court Administrative Office, and .

(2) attachments and exhibits, but parties are encouraged to reduce or enlarge such papers to 8½ by 11 inches, if practical All other materials submitted for filing shall be prepared in accordance with this subrule and standards established by the state court administrative office. An attachment or discovery material that is submitted for filing shall be made part of the public case file unless otherwise confidential.

(3) All original documents filed on paper may be reproduced and maintained by the court as a digital image in place of the paper original in accordance with standards and guidelines established by the state court administrative office.

(B)(4) Court clerks A clerk of the court may not accept reject nonconforming papersdocuments as prescribed by MCR 8.119except on written direction of a judge.

(C)(D) [Unchanged from language adopted May 24, 2012, except subrule (C) is now relettered subrule (D).]

(E) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

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

(A)-(F) [Unchanged.]

(G) Filing With Court Defined. The filing of p Pleadings and other papers materials filed with the court as required by these rules must be filed with the clerk of the court in accordance with standards prescribed by MCR 1.109(C), except that the judge to whom the case

is assigned may accept ~~papers~~ materials for filing when circumstances warrant. A judge who does so shall note the filing date on the ~~papers~~materials and immediately transmit them ~~forthwith~~to the clerk. It is the responsibility of the party who presented the ~~papers~~ materials to confirm that they have been filed with the clerk. If the clerk ~~dockets~~ records ~~papers~~ the receipt of materials on a date other than the filing date, the clerk shall ~~note~~record the filing date on the register of actions.

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(A) [Unchanged.]

(B) Preparation**.** Every pleading must be legibly printed in the English language ~~in type no smaller than 12 point~~ and in compliance with MCR 1.109.

(C)-(G) [Unchanged.]

RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.

(A)-(B) [Unchanged.]

(C) Signature.

(1)-(2) [Unchanged.]

(3) An electronic signature is acceptable provided it complies with MCR 1.109(D).

(D)-(F) [Unchanged.]

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A)-(G) [Unchanged.]

(H) Filing and Service of Discovery Materials.

(1) Unless a particular rule requires filing of discovery materials, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If discovery materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion or an accompanying affidavit;

(b) If discovery materials are to be used at trial they must be ~~either filed or~~ made an exhibit pursuant to MCR 2.518 or MCR 3.930;

(c) The court may order discovery materials to be filed.

(2) Copies of discovery materials served under these rules must be served on all parties to the action, unless the court has entered an order under MCR 2.107(F).

(3) On appeal, only discovery materials that were filed or made exhibits are part of the record on appeal.

(4) Removal and destruction of discovery materials are governed by MCR 2.316.

RULE 2.518. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS.

(A) Receipt of Exhibits. Except as otherwise required by statute or court rule, materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court case file management standards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B) Return or Disposal of Exhibits. At the conclusion of a trial or hearing, the court shall direct ~~exhibits should be retrieved by~~ the parties to retrieve the exhibits submitted by ~~submitting~~ them except that any weapons and drugs shall be returned to the

confiscating agency for proper disposition. If the exhibits are not retrieved by the parties as directed, within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(C) or an exhibit submitted pursuant to this rule after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner.

RULE 3.001. APPLICABILITY AND SCOPE.

The rules in this chapter apply in circuit court and in other courts as provided by law or by these rules. Except as otherwise provided in this chapter and law, proceedings under this chapter are governed by Michigan Court Rules.

RULE 3.218. ~~ACCESS TO~~ FRIEND OF THE COURT RECORDS; ACCESS.

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

(1) "records" means paper files, computer files, microfilm, microfiche, audio tape, video tape, ~~and~~ photographs, and includes records as defined in MCR 1.109;

(2)-(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) Generally. Except as modified by MCR 3.801-3.8067, adoption proceedings~~,~~ are governed by ~~the rules generally applicable to civil proceedings~~ Michigan Court Rules.

(B) [Unchanged.]

RULE 3.901. APPLICABILITY OF RULES.

(A) Scope.

(1) The rules in this subchapter, in subchapter 1.100, ~~and~~ in MCR 5.113, and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

(2)-(3) [Unchanged.]

(B) [Unchanged.]

RULE 3.903. DEFINITIONS.

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

(1)-(24) [Unchanged.]

(25) "Records" are as defined in MCR 1.109 and include ~~means the~~ pleadings, motions, authorized petitions, notices, memoranda~~ums~~, briefs, exhibits, available transcripts, findings of the court, registers of action~~s~~, and court orders.

(26)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.930. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS IN JUVENILE PROCEEDINGS.

(A) Receipt of Exhibits. Except as otherwise required by statute or court rule, materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by the Michigan Supreme Court trial court c~~C~~ase f~~F~~ile

mManagement sStandards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B) Return or Disposal of Exhibits. At the conclusion of a trial or hearing, the court shall direct exhibits should be retrieved by the parties who to retrieve the exhibits submitted by them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition. If the exhibits are not retrieved by the parties as directed, within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(C) or an exhibit submitted pursuant to this rule after a hearing or trial and the exhibit material is confidential as provided by MCR 3.903(A)(3) or order of the court pursuant to MCR 8.119(I), the court must continue to maintain the exhibit material in a confidential manner.

RULE 4.001. APPLICABILITY.

Procedure in the district and municipal courts is governed by the rules applicable to other actions. The rules in this chapter apply to the specific types of proceedings within the jurisdiction of the district and municipal courts. Except as otherwise provided in this chapter, proceedings under this chapter are governed by Michigan Court Rules.

RULE 5.101. FORM AND COMMENCEMENT OF ACTION; CONFIDENTIAL RECORDS.

(A)-(C) [Unchanged.]

(D) Records are public except as otherwise indicated in court rule and statute.

RULE 5.113. PAPERS; FORM AND FILING.

(A) Form of Papers Generally.

(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must

(a) comply with MCR 1.109 and be legibly typewritten or printed in ink in the English language, and

(b)-(c) [Unchanged.]

(2) A judge or register ~~shall not receive and file a nonconforming paper~~ may reject nonconforming documents in accordance with MCR 8.119.

(B)-(D) [Unchanged.]

RULE 5.731. CONFIDENTIAL RECORDS.

Records are public except as otherwise indicated in court rule or statute.

RULE 6.007. CONFIDENTIAL RECORDS.

Records are public except as otherwise indicated in court rule or statute.

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(B) [Unchanged.]

(C) Records Kept. All records, as defined in MCR 8.119(F) and regardless of format, that are created and kept by the court reporter or recorder belong to the court, must remain in the physical possession of the court, and are subject to access in accordance with MCR 8.119(H). The court reporter or recorder who takes the testimony on the trial or the hearing of any case shall prefix the record of the testimony of each witness with the full name of the witness and the date and time the testimony was taken. At the conclusion of the trial of the case the reporter or recorder shall secure all of the

records and properly entitle them on the outside, and shall safely keep them in ~~his or her office~~ the court according to the Michigan Trial Court Case File Management Standards. If the court reporter or recorder needs access to the records for purposes of transcribing off-site, the reporter or recorder may take only a reproduction of the original recording, which must be returned to the court upon filing of the transcript.

(D) Transfer of Records; Inspection. If the court reporter or recorder dies, resigns, is removed from office, or leaves the state, ~~his or her~~ records he or she created and kept in each case pursuant to subrule (C) must be transferred to the clerk of the court in which the case was tried. The clerk shall safely keep the records ~~subject to the direction of the court~~ in accordance with the Michigan Trial Court Case File Management Standards and MCR 8.119(F). ~~The records are a part of the record of each case and are subject to inspection in the same manner as other records.~~ On order of the court, a transcript ~~may~~ shall be made from the records and filed as a part of the public record in the case.

(E)-(G) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) Applicability. This rule applies to all ~~actions~~ records in every trial court ~~except that subrule (D)(1) does not apply to civil infractions~~. For purposes of this rule, records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G).

(B) Records Standards. The clerk of the court shall comply with the records standards in this rule, MCR 1.109, and as otherwise prescribed by the Michigan Supreme Court.

(C) Filing of ~~Papers~~Documents and Other Materials**.** The clerk of the court shall endorse on the first page of every document the date on which it is filed. ~~Papers~~ Documents and other materials filed with the ~~clerk of the~~ court as defined in MCR 2.107(G) must comply with Michigan Court Rules and Michigan Supreme Court records standards. The clerk of the court may only reject ~~papers~~ documents ~~which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1)~~that do not meet the following minimum filing requirements:

(1) standards prescribed by MCR 1.109,

(2) legibility and language as prescribed by MCR 2.113(B) and MCR 5.113,

(3) captioning prescribed by MCR 2.113(C)(1) and MCR 5.113,

(4) signature prescribed by MCR 2.114(C) and MCR 5.114, and

(5) the filing fee is not paid at the time of filing, unless waived or suspended by court order.

(D) Records Kept by the Clerk of the Court**.** The clerk of the court ~~of every trial court~~ shall keep the following case records ~~in the form and style the court prescribes and~~ in accordance with the court rules, Michigan Supreme Court records standards and local court plans. ~~A court may adopt a computerized, microfilm, or word-processing system for maintaining records that substantially complies with this subrule.~~ Documents and other materials made confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to subrule (I) that makes a document or other materials in that case confidential applies uniformly to

every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) Indexes and Case Files. Except for civil infractions, ~~T~~the clerk shall keep and maintain records of each case consisting of a numerical index, an alphabetical index, a register of actions, and a case file in such form and style as may be prescribed by the Supreme Court. Each case shall be assigned a case number on receipt of a complaint, petition, or other initiating document. The case number shall comply with MCR 2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under the Juvenile Code as required under MCR 5.113(A)(1)(b)(ii). The case number (and petition number if applicable) shall be recorded on the register of actions, file ~~folder~~, numerical index, and alphabetical index. The records shall include the following characteristics:

(a) Numerical Index. The clerk shall maintain a numerical index as a list of consecutive case numbers on which the date of filing and the names of the parties are recorded. The index may be maintained either as a central index for all cases filed in the court or as separate lists for particular types of cases or particular divisions of the court.

(b) Alphabetical Index. The clerk shall maintain a central alphabetical index or separate alphabetical indexes for particular types of cases or particular divisions of the court on which the date of filing, names of all parties, and the case number are recorded.

(c) Register of Actions. The clerk shall keep a case history of each case, known as a register of actions. The register of actions shall contain both pre- and post-

judgment information. When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:

(i) the offense (if one);

(ii) the judge assigned to the case;

(iii) the fees paid;

(iv) the date and title of each filed ~~document~~ item;

(v) the date process was issued and returned, as well as the date of service;

(vi) the date of each event and type and result of action;

(vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;

(viii) the orders, judgments, and verdicts;

(ix) the judge at adjudication and disposition;

(x) the date of adjudication and disposition; and

(xi) the manner of adjudication and disposition.

Each notation shall be brief, but shall show the nature of each ~~paper~~ item filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(d) Case ~~f~~File. The clerk of the court shall maintain a paper and/or electronic file ~~folder~~ for each action, bearing the case number assigned to it, in which the clerk shall keep all pleadings, process, written opinions and

findings, orders, and judgments filed in the action. Additionally, the clerk shall keep in the file all other ~~documents~~ materials prescribed by court rule, statute, or as ordered by the court to be filed with the clerk of the court. If other records of a case file are maintained separately from the file ~~folder~~, the clerk shall keep them as prescribed by trial court case file management standards.

(2) Calendars. The clerk may maintain calendars of actions. A calendar is a schedule of cases ready for court action that identifies times and places of activity.

(3) Abolished Records.

(a) Journals. Except for recording marriages, journals shall not be maintained.

(b) Dockets. A register of actions replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered on the register of actions.

(E)~~(4)~~ Other Case Records. The clerk or other persons designated by the chief judge of the court shall keep in ~~such~~ the ~~form~~ manner ~~as may be~~ prescribed by these rules ~~court~~, other ~~papers, documents,~~ materials~~,~~ ~~and things~~ filed with or handled by the court for purposes of case processing, including but not limited to wills for safekeeping, case evaluations, exhibit~~s~~ logs, ~~and other discovery materials~~, probation files, and friend of the court records ~~requests for search warrants, marriage records, and administrative activities~~.

(F) Court Recordings, Log Notes, Jury Seating Charts, and Media. Court recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with subrule (H)(2)(b).

(G) Other Court Records. All court records not included in subrules (D), (E), and (F) are considered administrative and fiscal records or nonrecord materials and are not subject to public access under subrule (H). These records are defined in the approved records retention and disposal schedule for trial courts.

~~(E)~~(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk may not permit any case record ~~or paper on file in the clerk's office~~ to be taken from ~~it~~ the court without the order of the court. A court may provide access to the public information in a register of actions through a publicly accessible website; however, all other public information in its case records may be provided through electronic means only upon request. The court may provide access to any case record that is not a document, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(C)(2), in a medium in which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a ~~file, a document~~ case record~~,~~ or information contained in a ~~file or document~~ record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (~~F~~I), any person may inspect ~~pleadings and other papers in the clerk's office~~ that record and may obtain copies as provided in subrule ~~(E)(2) and (E)(3)~~(J).

~~(2) If a person wishes to obtain copies of papers in a file, the clerk shall provide copies upon receipt of the~~

~~reasonable cost of reproduction. If the clerk prefers, the requesting person may be permitted to make copies at personal expense under the direct supervision of the clerk. Except for copies of transcripts or as otherwise directed by statute or court rule, a standard fee may be established for providing copies of papers on file.~~

~~(3) A court is not required to create a new record, except to the extent required by furnishing copies of a file, paper, or record. A court may create a new record or compilation of records pertaining to case files or case-related information on request, provided that the record created or compiled does not disclose information that would otherwise be confidential or restricted by statute, court rule, or an order entered pursuant to subrule (F).~~ In accordance with subrule (J), the court may collect a fee for the cost of this service, including the cost of providing the new record in a particular medium.

~~(4)~~(2) Every court, shall adopt an administrative order pursuant to MCR 8.112(B) to

(a) make reasonable regulations necessary to protect its public records and prevent excessive and unreasonable interference with the discharge of its functions;

(b) establish a policy for whether to provide access for records defined in subrule (F) and if access is to be provided, outline the procedure for accessing those records;

~~(b)~~(c) specify the reasonable cost of reproduction of records provided under subrule ~~(E)(2)~~(J); and

~~(c)~~(d) specify the process for determining costs under subrule ~~(E)(3)~~(J).

~~(F)~~(I) [Relettered, but otherwise unchanged.]

(J) Access and Reproduction Fees.

(1) A court may not charge an access or reproduction fee for a case record that the court is required by law or

court rule to provide without charge to a person or other entity, irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(2) The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403. If a court maintains its public records in electronic format only,

(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.

(b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system.

(3) Reproduction of a case record means the act of producing a copy of that record through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403.

(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce a case record.

(b) If a person wishes to obtain copies of documents in a file, the clerk shall provide copies upon receipt of the actual cost of reproduction.

(c) Except as otherwise directed by statute or court rule, a standard fee may be established, pursuant to (H)(2), for providing copies of documents on file.

(4) A court is not required to create a new record out of its existing records. A new record means the compilation of information into a format that does not currently exist or that cannot be generated electronically using predefined formats available through a court's case management system. Providing access to documents or furnishing copies of documents in an existing file does not constitute creation of a new record, even when the output appears in a format different than the format of the original record or document because the output is the result of predefined formats.

(a) A court may create a new record or compilation of records pertaining to case files or case-related information on request, provided that the record created or compiled does not disclose information that would otherwise be confidential or restricted by statute, court rule, or an order entered pursuant to subrule (I).

(b) A court may charge only for the actual cost of labor and supplies and the actual use of the system to develop, generate, and validate the accuracy of a new record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the information or documents for creating a new record.

(c) If a court creates a new record, the clerk shall provide access to the new record upon receipt of the actual cost of creating the record.

(K) Retention Periods.

For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case records, (3) and nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be destroyed except upon order by the chief judge of

that court. Before destroying records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such by State Archives in the Michigan trial courts approved records retention and disposal schedule. An order of destruction shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, and Archives and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5.

~~(G)~~(L) [Relettered, but otherwise unchanged.]

Staff Comment: The amendments of these rules update the rules making them less "paper" focused and reflecting the use of electronic technology in the way courts process court records. The amendments also clarify and delineate the types of records and other materials maintained by a court, and clarify how access is provided.

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

Entered November 7, 2012 (File No. 2010-25)—REPORTER.

On order of the Court, the proposed amendment of Rule 7.210 of the Michigan Court Rules having been published for comment at 490 Mich 1205-1206 (2011), and an opportunity having been provided for comment and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Entered December 5, 2012, effective immediately (File No. 2011-18)—REPORTER.

By order dated June 20, 2012, this Court amended MCR 6.302, effective immediately, to require a trial court to advise the defendant if a guilty plea will result in a requirement for lifetime electronic monitoring as determined by MCL 750.520b or MCL 750.520c. 491

Mich, adv sht pt 4, xlviii-xlix (2012). At the time the amendment order was issued, the Court stated that it would consider at a future public hearing whether to retain the amendment. Notice and an opportunity for comment at a public hearing having been provided, the amendment of MCR 6.302 is retained.

Entered December 5, 2012 (File No. 2011-14)—REPORTER.

On order of the Court, the proposed amendment of Rule 2.105 of the Michigan Court Rules having been published for comment at 491 Mich 1221-1222 (2012), and an opportunity having been provided for comment and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

MARILYN KELLY, J. I would adopt the proposed amendment.

Adopted February 6, 2013, effective May 1, 2013 (File No. 2012-12)—REPORTER.

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

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D) [Unchanged.]

(E) Retention and Destruction of Court Case Files and Other Court Records. This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).

(1) Destruction Generally; Effect. The court may destroy its case files and other court records only as prescribed by this rule and the approved General Records Retention and Disposal Schedule #16 – Michigan Trial Courts. ~~at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed.~~ Destruction of a file does not negate, rescind, or set aside an adjudication.

(2) Register of Actions, Indexes, and Orders.

The register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; the order of adjudication and the order terminating jurisdiction for each delinquency case; the latest dispositive order for each designated case; and the order appointing a guardian and any order dismissing, terminating, or revoking a guardian for each juvenile guardianship case.

(~~2~~3) Delinquency and Motor Vehicle Code Case Files ~~and Records~~.

(a) ~~The~~ Except as provided in subrule (2), the court ~~must~~ may destroy the diversion ~~record~~ case file of a juvenile ~~within 28 days~~ after the juvenile becomes 17 years of age.

(b) ~~The~~ Except as provided in subrule (2), the court ~~must~~ may destroy all case files of matters heard on the consent calendar ~~within 28 days~~ after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the

consent calendar and a register of actions exists, the register of actions must be maintained permanently as a nonpublic record.

(c) Except as provided by subrules (2), (3)(a), and (3)(b), the court ~~must~~ may destroy the legal records in the case files ~~and records~~ pertaining to a person's juvenile offenses when the person becomes 30 years ~~old~~ of age. The social records in the case files pertaining to a person's juvenile offenses may be destroyed three years after entry of the order terminating jurisdiction of that person or when the person becomes 18 years old, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2). The court must destroy the records in traffic and local ordinance case files opened by issuance of a citation pursuant to the motor vehicle code or a local corresponding ordinance when the person becomes 30 years of age.

(d) If the court destroys its case files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.

(~~3~~4) Child Protective Case Files ~~and Records~~.

~~(a)~~ ~~The~~ Except as provided in subrule (2), the court~~,~~ ~~for any reason,~~ may destroy the legal records in the child protective proceeding case files ~~and records~~ pertaining to a child, ~~other than orders terminating parental rights,~~ 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminat-

ing jurisdiction of that child or when the child become 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2).

~~(b) All orders terminating parental rights to a child must be kept as a permanent record of the court.~~

(5) Personal Protection Proceeding Case Files. The court may destroy the legal and social records in personal protection proceeding case files pertaining to a juvenile respondent three years after the expiration date of the personal protection order or the latest dispositive order on a violation of the personal protection order, or when the juvenile respondent becomes 18 years of age, whichever is later.

(6) Juvenile Guardianship Case Files. The court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian.

(7) Probation Case Files. The court may destroy the records in probation case files pertaining to a juvenile three years after an order terminating jurisdiction or when the juvenile becomes 18 years of age, whichever is later.

(F)-(G) [Unchanged.]

Staff Comment: The amendments of MCR 3.925 clarify the rules and procedures for retention and destruction of various records in juvenile cases.

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

Adopted February 6, 2013, effective May 1, 2013 (File No. 2012-13)—REPORTER.

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

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1)-(2) [Unchanged.]

(3) Continuing Foster Care Pending Determination on Termination of Parental Rights. If the court determines at a permanency planning hearing that the child should not be returned home, it may order the agency to initiate proceedings to terminate parental rights. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. If the court orders the agency to initiate proceedings to terminate parental rights, the order must specify the date, or the time within which the petition must be filed. In either case, the petition must be filed no later than 28 days after the date the permanency planning hearing is concluded. The court is not required to order the agency to initiate proceedings to terminate parental rights if one or more of the following apply:

(a)-(c) [Unchanged.]

<u>If the court does not require the agency to initiate proceedings to terminate parental rights under this provision, the court shall state on the record the reason or reasons for its decision.</u>

(4) [Unchanged.]

Staff Comment: The amendment of MCR 3.976 requires a court to indicate on the record the reason that no petition for termination of parental rights need be filed, thus providing a record to future auditors who review the state's foster care program that the court explicitly chose the option.

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

Adopted February 6, 2013, effective May 1, 2013 (File No. 2012-20)—REPORTER.

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

RULE 3.616. PROCEEDING TO DETERMINE CONTINUATION OF VOLUNTARY FOSTER CARE SERVICES.

(A)-(D) [Unchanged.]

(E) [Unchanged.]

(1)-(2) [Unchanged.]

(3) Service. The Department of Human Services shall serve the petition on

(a) the youth; and

(b) ~~the court that had jurisdiction pursuant to MCL 712A.2(b) during the neglect/abuse proceeding, if different than the court in which the petition is filed; and~~

~~(c)~~ the foster parent or parents, if any.

(F) Judicial Determination. The court shall review the petition, report, and voluntary foster care agreement filed pursuant to subrule (E), and then make a determination whether continuing in voluntary foster care is in the best interests of the youth.

(1) [Unchanged.]

(2) Service. The court shall serve the order on

(a)~~(i)~~ the Department of Human Services;

(b)~~(ii)~~ the youth; and

(c)~~(iii) the court that had jurisdiction pursuant to MCL 712A.2(b), if different than the court in which the petition is filed; and~~

~~(iv)~~ the foster parent or parents, if any.

(G) Confidential File. The Department of Human Services and the youth are entitled to access to the records contained in the file, but otherwise, the file is confidential.

Staff Comment: The amendments of MCR 3.616 provide that the files of adult foster care youth are confidential, but may be accessed by the youth and by DHS. The amendment eliminates the requirement that the petition and order be served on the previous court in which the youth's child protection case was disposed because the case is no longer active. This order also corrects numbering of subsection (F)(2)(i)-(iv) so that the subsections are labeled with letters (a)-(c).

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

Adopted March 20, 2013, effective immediately (File No. 2013-02)—REPORTER.

On order of the Court, the need for immediate action having been found, the following amendments of Rules 3.002, 3.800, 3.802, 3.807, 3.903, 3.905, 3.920, 3.921, 3.935, 3.961, 3.963, 3.965, 3.967, 3.974, 3.977, and 5.402 of the Michigan Court Rules are 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 of public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

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

RULE 3.002. INDIAN CHILDREN.

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., to pro-

ceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from ~~25 USC 1903 and 25 USC 1911(a)~~ MCL 712B.3 and MCL 712B.7 shall apply.

(1) "Active efforts" means actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following:

(a) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.

(b) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.

(c) Conducting or causing to be conducted a diligent search for extended family members for placement.

(d) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.

(e) Completing a comprehensive assessment of the situation of the Indian child's family, including a deter-

mination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

(f) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.

(g) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

(h) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.

(i) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

(j) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively

assisting the Indian child's family or offering active assistance in accessing those resources.

(k) Monitoring client progress and client participation in services.

(*l*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family.

(~~1~~2) [Former "(1)" has been renumbered as "(2)" and is otherwise unchanged.]

(3) "Court" means the family division of circuit court or the probate court.

(4) "Culturally appropriate services" means services that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe. Culturally appropriate services should provide the opportunity to practice the teachings, beliefs, customs, and ceremonies of the Indian child's tribe so those may be incorporated into the Indian child's daily life, as well as services that address the issues that have brought the child and family to the attention of the department that are consistent with the tribe's beliefs about child rearing, child development, and family wellness. Culturally appropriate services may involve tribal representatives, extended family members, tribal elders, spiritual and cultural advisors, tribal social services, individual Indian caregivers, medicine men or women, and natural healers. If the Indian child's tribe establishes a different definition of culturally appropriate services, the court shall follow the tribe's definition.

(5) "Department" means the department of human services or any successor department or agency.

(~~2~~6) "Exclusive jurisdiction" shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe ~~shall~~ retains exclusive jurisdiction, ~~notwithstanding~~ regardless of the residence or domicile ~~of the child~~, or subsequent change in his or her residence or domicile. ~~25 USC 1911[a]~~MCL 712B.7.

(~~3~~7) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term "relative" as that term is defined in MCL 712A.13a(j).

(8) "Foster home or institution" means a child caring institution as that term is defined in section 1 of 1973 PA 116, MCL 722.111.

(9) "Guardian" means a person who has qualified as a guardian of a minor under a parental or spousal nomination or a court order issued under section 19a or 19c of chapter XIIA, section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or sections 600 to 644 of the mental health code, 1974 PA 258, MCL 330.1600 to 330.1644. Guardian may also include a person appointed by a tribal court under tribal code or custom. Guardian does not include a guardian ad litem.

(10) "Guardian ad litem" means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney.

(~~4~~11) "Indian" means any ~~person who is a~~ member of any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians, including any ~~or who is an~~ Alaska ~~N~~native village ~~and a member of a Regional Corporation as defined in 43 USC 1606~~ as defined in section 1602(c) of the Alaska native claims settlement act, 43 USC 1602.

(~~5~~12) "Indian child" means any unmarried person who is under age 18 and is either

(a) a member of an Indian tribe, or

(b) is eligible for membership in an Indian tribe ~~and is the biological child of a member of an~~ as determined by that Indian tribe.

(~~6~~13) "Indian child's tribe" means

(a) the Indian tribe ~~of~~in which an Indian child is a member or eligible for membership, or

(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the ~~more~~ most significant contacts.

(14) "Indian child welfare act" means the Indian child welfare act of 1978, 25 USC 1901 to 1963.

(~~7~~15)"Indian custodian" means any Indian person who has ~~legal~~ custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control ~~has~~have been transferred by the child's parent ~~of such child~~.

(~~8~~16) [Former "(8)" has been renumbered "(16)" and is otherwise unchanged.]

(~~9~~17) [Former "(9)" has been renumbered "(17)" and is otherwise unchanged.]

(18) "Lawyer-guardian ad litem" means an attorney appointed under MCL 712B.21 to represent the child with the powers and duties as set forth in MCL 712A.17d. The provisions of MCL 712A.17d also apply to a lawyer-guardian ad litem appointed for the purposes of MIFPA under each of the following:

(a) MCL 700.5213 and 700.5219,

(b) MCL 722.24, and

(c) MCL 722.630.

(19) "Official tribal representative" means an individual who is designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding. An official tribal representative does not need to be an attorney.

(~~10~~20) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include ~~an unwed~~the putative father ~~whose~~ if paternity has not been acknowledged or established.

(~~11~~21) [Former "(11)" has been renumbered "(21)" and is otherwise unchanged.]

(~~12~~22)[Former "(12)" has been renumbered "(22)" and is otherwise unchanged.]

(~~13~~23) [Former "(13)" has been renumbered "(23)" and is otherwise unchanged.]

(24) "Ward of tribal court" means a child over whom an Indian tribe exercises authority by official action in tribal court or by the governing body of the tribe.

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) Generally. Except as modified by MCR 3.801-3.807, adoption proceedings~~,~~ are governed by Michigan Court Rules.

(B) Interested Parties.

(1) [Unchanged.]

(2) If the court knows or has reason to know the adoptee is an Indian child, in addition to the above, the persons interested are the child's tribe and the Indian custodian, if any, and, if the Indian~~'s~~ child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:

(a)-(c) [Unchanged.]

(d) if the court knows or has reason to know the adoptee is an Indian child, the child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Papers.

(1)-(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child.

If the court knows or has reason to know an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(~~2~~6),

(a)-(b) [Unchanged.]

(4) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 3.807. INDIAN CHILD.

(A) Definitions. If an Indian child, as defined by the ~~Indian Child Welfare Act, 25 USC 1903~~Michigan Indian

Family Preservation Act, MCL 712B.3, is the subject of an adoption proceeding, the definitions in MCR 3.002 shall control.

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child is the subject of an adoption proceeding and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(~~2~~6), the matter shall be dismissed.

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(~~2~~6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. ~~In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal series does not constitute good cause to refuse to transfer the case.~~ When the court makes a good-cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i) The Indian tribe does not have a tribal court.

(ii) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate.

(b) [Unchanged.]

(c) If the tribal court declines transfer, the ~~Indian Child Welfare Act~~Michigan Indian Family Preservation Act applies, as do the provisions of these rules that pertain to an Indian child (see ~~25 USC 1902, 1911[b]~~MCL 712B.3 and MCL 712B.5).

(d) A petition to transfer may be made at any time in accordance with ~~25 USC 1911(b)~~ MCL 712B.7(3).

(3) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding for foster care placement or termination of parental rights pursuant to ~~25 USC 1911(c)~~MCL 712B.7(6).

(C) Record of Tribal Affiliation. Upon application by an Indian individual who has reached the age of 18 and who was the subject of an adoption placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. (25 USC 1917.)

RULE 3.903. DEFINITIONS.

(A)-(E) [Unchanged.]

(F) ~~Indian Child Welfare Act~~ Michigan Indian Family Preservation Act.

If an Indian child, as defined by the ~~Indian Child Welfare Act, 25 USC 1901 *et seq.*,~~ Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*, is the subject of a protective proceeding or is charged with a

status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the definitions in MCR 3.002 shall control.

RULE 3.905. INDIAN CHILDREN; JURISDICTION, NOTICE, TRANSFER, INTERVENTION.

(A) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(~~2~~6), and the matter is not before the state court as a result of emergency removal pursuant to ~~25 USC 1922~~ MCL 712B.7(2), the matter shall be dismissed.

(B) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(~~2~~6), and the matter is before the state court as a result of emergency removal pursuant to ~~25 USC 1922~~ MCL 712B.7(2), and either the tribe notifies the state court that it is exercising its jurisdiction, or the emergency no longer exists, then the state court shall dismiss the matter.

(C) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(~~2~~6), the court shall ensure that the petitioner has given notice of the proceedings to the persons described in MCR 3.921 in accordance with MCR 3.920(C).

(1) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. ~~In determining whether good cause not to transfer exists, the court~~

~~shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. (November 26, 1979). A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.~~ When the court makes a good-cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(a) The Indian tribe does not have a tribal court.

(b) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate.

(2) [Unchanged.]

(3) If the tribal court declines transfer, the ~~Indian Child Welfare Act~~Michigan Indian Family Preservation Act applies to the continued proceeding in state court, as do the provisions of these rules that pertain to an Indian child. See ~~25 USC 1902, 1911(b)~~ MCL 712B.3 and MCL 712B.5.

(4) A petition to transfer may be made at any time in accordance with ~~25 USC 1911(b)~~ MCL 712B.7(3).

(D) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to ~~25 USC 1911(c)~~ MCL 712B.7(6).

RULE 3.920. SERVICE OF PROCESS.

(A)-(B) [Unchanged.]

(C) Notice of Proceeding Concerning Indian Child. If the court knows or has reason to know an Indian child

is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(~~2~~6):

(1)-(2) [Unchanged.]

(D)-(I) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a)-(f) [Unchanged.]

(g) in accordance with the notice provisions of MCR 3.905, if the juvenile is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and if the court knows or has reason to know the juvenile is an Indian child:

(i) the juvenile's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(ii) the juvenile's parents or Indian custodian, and if unknown, the Secretary of the Interior.

(2)-(3) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a)-(g) [Unchanged.]

(h) in accordance with the notice provisions of MCR 3.905, if the court knows or has reason to know the child is an Indian child:

(i)-(ii) [Unchanged.]

(i) [Unchanged.]

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a)-(i) [Unchanged.]

(j) if the court knows or has reason to know the child is an Indian child, the child's tribe,

(k) [Unchanged.]

(*l*) if the court knows or has reason to know the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and

(m) [Unchanged.]

(3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2), except that if the court knows or has reason to know the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1).

(C) Juvenile Guardianships. In a juvenile guardianship, the following persons shall be entitled to notice:

(1)-(7) [Unchanged.]

(8) if the court knows or has reason to know the child is an Indian child ~~if the child is a member of a federally recognized Indian tribe~~, the child's tribe, Indian custodian, or if the tribe is unknown, the Secretary of the Interior;

(9)-(10) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.935. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(4) [Unchanged.]

(5) If the charge is a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of an Indian tribe. If the court knows or has reason to know the child is an Indian child, ~~the juvenile is a member, or if a parent is a member and the juvenile is eligible for membership in the tribe,~~ the court must determine the identity of the tribe and comply with MCR 3.905 before proceeding with the hearing.

(6)-(8) [Unchanged.]

(C)-(F) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information, if known:

(1)-(5) [Unchanged.]

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:

(a) the active efforts, as defined in MCR 3.002, that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(b) documentation, including attempts, to identify the child's tribe.

(7) [Unchanged.]

RULE 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) Taking Custody Without Court Order. An officer may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical damage or harm to the child.

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical damage or harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2)-(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1) [Unchanged.]

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the court knows or has reason to know the child is an Indian child ~~member, or if a parent is a member and the child is eligible for membership in the tribe,~~ the court must determine the identity of the child's tribe~~, notify the tribe,~~ and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony.

(3)-(11) [Unchanged.]

(12) If the court authorizes the filing of the petition, the court:

(a) [Unchanged.]

(b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

(i)-(ii) [Unchanged.]

(iii) an Indian foster family licensed or approved by the department ~~a non-Indian licensing authority~~,

(iv) [Unchanged.]

The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5). If the Indian child's tribe has established ~~by resolution~~ a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in ~~25 USC 1915(b)~~MCL 712B.23(6). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(13) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.967. REMOVAL HEARING FOR INDIAN CHILD.

(A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to ~~25 USC 1912(a)~~MCL 712B.9(2) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 45 days.

(B)-(C) [Unchanged.]

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.

(E) [Unchanged.]

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

(1)-(2) [Unchanged.]

(3) an Indian foster family licensed or approved by the department~~a non-Indian licensing authority~~,

(4) [Unchanged.]

The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5). If the Indian child's tribe has established ~~by resolution~~ a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in ~~25 USC 1915(b)~~MCL 712B.23(6).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

RULE 3.974. POST-DISPOSITIONAL PROCEDURES; CHILD AT HOME.

(A) [Unchanged.]

(B) Emergency Removal; Protective Custody.

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order the child to be taken into protective custody to protect the health, safety, or welfare of the child, pending an emergency removal hearing, except, that 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)-(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(F) [Unchanged.]

(G) Termination of Parental Rights; Indian Child.

In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

(1) [Unchanged.]

(2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified

expert witness, as described in MCL 712B.17, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

(H)-(K) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child, as defined by the ~~Indian Child Welfare Act, 25 USC 1903~~ Michigan Indian Family Preservation Act, MCL 712B.3, is the subject of a guardianship proceeding, the definitions in MCR 3.002 shall control.

(2) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(~~2~~6), the matter shall be dismissed.

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(~~2~~6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C) in accordance with MCR 5.109.

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. ~~In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs Guidelines~~

~~for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.~~ When the court makes a good-cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

(i) The Indian tribe does not have a tribal court.

(ii) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate.

(b) [Unchanged.]

(c) If the tribal court declines transfer, the ~~Indian Child Welfare Act~~ Michigan Indian Family Preservation Act applies, as do the provisions of these rules that pertain to an Indian child (see ~~24 USC 1902, 1911(b)~~MCL 712B.3 and MCL 712B.5).

(d) A petition to transfer may be made at any time in accordance with ~~25 USC 1911(b)~~MCL 712B.7(3).

(4) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to ~~25 USC 1911(c)~~MCL 712B.7(6).

Staff Comment: This proposal incorporates provisions of the newly enacted Michigan Indian Family Preservation Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this amendment may be sent to the

Supreme Court Clerk in writing or electronically by July 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@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 <http://www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>.

Entered March 20, 2013 (File No. 2011-10)—REPORTER.

On order of the Court, the proposed amendment of Rule 7.118 of the Michigan Court Rules having been published for comment at 491 Mich 1215-1218 (2012), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

CAVANAGH, J., would adopt the proposed amendment of the rule.

Adopted May 2, 2013, effective September 1, 2013 (File No. 2010-34)—REPORTER.

On order of the Court notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment is adopted, effective September 1, 2013.

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

RULE 6.419. MOTION FOR DIRECTED VERDICT OF ACQUITTAL.

~~(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initia-~~

~~tive may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.~~

(A) Before Submission to the Jury. After the prosecutor has rested the prosecution's case-in-chief or after the close of all the evidence, the court on the defendant's motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(B) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(B)-(E) [Unchanged in substance, but relettered (C)-(F).]

Staff Comment: New subrules (A) and (B) are modeled on FR Crim P 29. As with the 1994 Amendments to FR Crim P 29, this amendment should remove the dilemma in cases in which the trial court would feel pressured to make an immediate, and possibly erroneous, decision or violate the former version of the rule by reserving judgment on the

motion. The stakes in this area are unusually high because double jeopardy precludes appellate review of a trial court's decision to grant a motion for directed verdict of acquittal before the jury reaches a verdict. See, e.g., *Evans v Michigan*, ___ US ___; 133 S Ct 1069; 185 L Ed 2d 124 (2013). Allowing the court to reserve judgment until after the jury returns a verdict mitigates double jeopardy concerns because "reversal would result in reinstatement of the jury verdict of guilt, not a new trial." *Id.*, 133 S Ct at 1081 n 9, citing *United States v Wilson*, 420 US 332; 95 S Ct 1013; 43 L Ed 2d 232 (1975).

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

AMENDMENTS OF LOCAL COURT RULES

THIRD JUDICIAL CIRCUIT

Approved September 19, 2012, effective January 1, 2013 (File No. 2012-07)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, the following Rule 3.204 of the Local Court Rules of the 3d Judicial Circuit Court is adopted, effective January 1, 2013.

RULE 3.204. PROCEEDINGS AFFECTING CHILDREN.

(A) In any action involving a child custody dispute that falls under the "DC" case type code, the plaintiff/petitioner shall file a completed Third Circuit Court child custody action cover sheet.

(B) In any action seeking registration, enforcement, or modification of another state's or a foreign country's child custody determination, the parties shall use the most recent local Court Uniform Child Custody Jurisdiction and Enforcement Act forms or the most recent equivalent State Court Administrative Office forms.

Staff Comment: These local court rule provisions of the 3d Judicial Circuit Court have been adopted in an effort to better process cases filed with a case-type suffix of "DC." Subrule (A) requires the use of uniform Child Custody Cover Sheets when an action is filed in a child custody dispute. Subrule (B) requires the use of the most recent local Court Uniform Child Custody Jurisdiction and Enforcement Act forms or the equivalent most recent State Court Administrative Office forms in an

action seeking registration, enforcement, or modification of another state's or a foreign country's child custody determination.

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

OAKLAND COUNTY PROBATE COURT

Approved October 24, 2012, effective immediately (File No. 2012-29)—REPORTER.

On order of the Court, Rule 5.503 of the Local Court Rules of the Oakland County Probate Court is rescinded, effective immediately.

AMENDMENT OF MICHIGAN CODE OF JUDICIAL CONDUCT

Adopted May 1, 2013, effective August 1, 2013 (File No. 2005-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Canons 2, 4, 5, and 7 of the Code of Judicial Conduct and amendment of Rule 8.2 of the Michigan Rules of Professional Conduct are adopted, effective September 1, 2013.

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

CANON 2. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.

D. A judge should not appear as a witness in a court proceeding unless subpoenaed.

~~D.~~E. A judge may respond to requests for personal references.

~~E.~~F. A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

G. No judge may accept any contribution of money, directly or indirectly, for a campaign deficit or for expenses associated with judicial office. Requests for payment of membership dues or fees in a judicial association do not constitute solicitation of funds for purposes of this provision.

CANON 4. A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES ~~TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE DMINISTRATION OF JUSTICE~~.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge~~, subject to the proper performance of judicial duties,~~ may engage in the following ~~quasi-judicial~~ activities:

A. Law-Related Activities.

~~A.~~(1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

~~B.~~(2) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

~~C.~~(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge~~ may assist such an organization in raising funds and~~ may participate in the ~~their~~ management and investment of such an organization's funds~~, but should not individually solicit funds~~.

(4) A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

~~CANON 5. A JUDGE SHOULD REGULATE EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES.~~

~~(A)~~B. Avocational Activities. A judge may write, lecture, teach, speak, and consult on nonlegal subjects, appear before public nonlegal bodies, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

~~(B)~~C. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization~~, subject to the following limitations: (1)~~. A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

~~(2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization.~~

D. Fundraising Activities. A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization or any organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or use or permit the use of the prestige of the office for that purpose. A judge may, however, serve as a member of an honorary committee or may join a general appeal on behalf of such an organization. A judge may speak at or receive an award or other recognition in connection with an event of such an organization. A judge may allow his or her name or title to be used in advertising the judge's involvement in an event so long as the judge does not individually solicit funds.

~~C.~~E. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of ~~C~~E(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.

(3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.

(4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C.

(5) For the purposes of this section, "family member residing in the judge's household" means any relative of

a judge by blood or marriage, or a person treated by a judge as a family member, who resides in the judge's household.

(6) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 6.

(7) Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

~~D.~~F. Fiduciary Activities. A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as such fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.

~~E.~~G. Arbitration. A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.

~~F.~~H. Practice of Law. A judge should not practice law for compensation except as otherwise provided by law.

~~G.~~I. Extra-~~J~~judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with

issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 5. APPLICABILITY OF THE CODE OF JUDICIAL CONDUCT TO JUDICIAL CANDIDATES.

All judicial candidates are subject to Canon 1, Canon 2, Canon 4A-4D and Canon 7 of the Code of Judicial Conduct as applicable during a judicial campaign. A successful candidate, whether or not an incumbent, and an unsuccessful candidate who is a judge, are subject to judicial discipline for campaign misconduct. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for judicial campaign misconduct.

CANON 7. A JUDGE OR A CANDIDATE FOR JUDICIAL OFFICE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE.

A.-B. [Unchanged.]

~~C. Fund Raising Other Than for Campaign Purposes Prohibited: Except as provided in 7B(2)(b), (c),~~

~~(1) No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,~~

~~(2) No judge or other person, party, committee, organization, firm, group or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including but not limited to, contribution for a campaign deficit, expenses associated with judicial office, testimonial, honorarium (other than for services, subject to Canon 6) or otherwise.~~

~~D.~~C. ~~Applicability~~Wind up of Law Practice.

(1) ~~A successful candidate, whether or not an incumbent, and an unsuccessful candidate who is a judge, are subject to judicial discipline for campaign misconduct. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for judicial campaign misconduct~~.

~~(2)~~ A successful elected candidate who was not an incumbent has until midnight December 31 following the election to wind up the candidate's law practice, and has until June 30 following the election to resign from organizations and activities, and divest interests that do not qualify under Canon~~s~~ 4 ~~or 5~~.

~~(3)~~(2) Upon notice of appointment to judicial office, a candidate shall wind up the candidate's law practice prior to taking office, and has six months from the date of taking office to resign from organizations and activities and divest interests that do not qualify under Canon~~s~~ 4 ~~or 5~~.

Comment:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

~~When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.~~

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Staff Comment: These amendments reflect an effort to make the judicial canons consistent regarding law-related and nonlaw-related extrajudicial activities in which judges may participate, and to clarify the activities that are allowed or prohibited. The proposal retains the explicit prohibition on a judge individually soliciting funds, and likewise prohibits the use of the prestige of the office for that purpose. The newly-constituted Canon 4, which consolidates previous Canon 4 and Canon 5 into one canon, permits a judge to engage in various specific activities, including serving as a member of an honorary committee or joining a general appeal, speaking at or receiving an award at an organization's event, and allowing the judge's name to be used in support of a fundraising event. The proposal also includes several suggested revisions that were recommended during the public comment period.

In addition to combining Canons 4 and 5 into one canon, the amendments eliminate the language of Canon 7C that prohibited a judge from accepting a testimonial, and move the reformulated language from Canon 7C(2) prohibiting a judge from accepting a contribution of money to Canon 2G. Also, the proposal clarifies Canon 2 so that activities allowed under Canon 4 are not considered a violation of the principle of use of the prestige of office. Further, the amendments clarify that certain canons of the Code of Judicial Conduct (specifically Canons 1, 2, 4[A]-[D] and 7) apply to all candidates for judicial office as part of the new language inserted as Canon 5. Finally, MRPC 8.2 (which applies to lawyers) is amended to reflect that the judicial canons applicable to judicial candidates are set out in new Canon 5.

Nearly all of the current language in Canon 2, 4, 5, and 7 is retained in this proposal. The new language adds explicit provisions to describe the types of activities that are allowed or prohibited for judges which until now had been undefined and therefore the source of confusion.

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

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted May 1, 2013, effective September 1, 2013 (File No. 2005-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Canons 2, 4, 5, and 7 of the Code of Judicial Conduct and amendment of Rule 8.2 of the Michigan Rules of Professional Conduct are adopted, effective September 1, 2013.

[The following amendment adopts a change in Rule 8.2 of the Michigan Rules of Professional Conduct]

RULE 8.2. JUDICIAL AND LEGAL OFFICIALS.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct as provided under Canon 5.

Comment:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

~~When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.~~

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Staff Comment: These amendments reflect an effort to make the judicial canons consistent regarding law-related and nonlaw-related extrajudicial activities in which judges may participate, and to clarify the activities that are allowed or prohibited. The proposal retains the explicit prohibition on a judge individually soliciting funds, and likewise prohibits the use of the prestige of the office for that purpose. The newly-constituted Canon 4, which consolidates previous Canon 4 and Canon 5 into one canon, permits a judge to engage in various specific activities, including serving as a member of an honorary committee or joining a general appeal, speaking at or receiving an award at an organization's event, and allowing the judge's name to be used in support of a fundraising event. The proposal also includes several suggested revisions that were recommended during the public comment period.

In addition to combining Canons 4 and 5 into one canon, the amendments eliminate the language of Canon 7C that prohibited a judge from accepting a testimonial, and move the reformulated language from Canon 7C(2) prohibiting a judge from accepting a contribution of money to Canon 2G. Also, the proposal clarifies Canon 2 so that activities allowed under Canon 4 are not considered a violation of the principle of use of the prestige of office. Further, the amendments clarify that certain canons of the Code of Judicial Conduct (specifically Canons 1, 2, 4[A]-[D] and 7) apply to all candidates for judicial office as part of the new language inserted as Canon 5. Finally, MRPC 8.2 (which applies to

lawyers) is amended to reflect that the judicial canons applicable to judicial candidates are set out in new Canon 5.

Nearly all of the current language in Canon 2, 4, 5, and 7 is retained in this proposal. The new language adds explicit provisions to describe the types of activities that are allowed or prohibited for judges which until now had been undefined and therefore the source of confusion.

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

INVESTITURE CEREMONY FOR THE HONORABLE BRIDGET MARY MCCORMACK

JANUARY 23, 2013

CHIEF JUSTICE YOUNG: Welcome. Good afternoon. And welcome to this investiture of Justice BRIDGET MARY MCCORMACK. I want to make a special welcome to her family and friends. And I understand that in addition to Justice MCCORMACK's husband Steven Croley and their children, Jack, Anna, Matt, and Harry, we have with us her mother Norah McCormack and stepfather Gordon Boals as well as her brother William and other family members, and I welcome you all. And because in my experience teenaged children and brothers are more willing to throw someone under the bus, I invite the children and the brother to my chambers afterwards so I can learn more about my newest colleague.

Now an investiture ceremony is, of course, a joyful event in a new judge's life and for her family and friends. It's a lot like a wake when the honoree is lauded, but where the honoree actually gets to hear the praise. And, indeed, if necessary, make a rebuttal. I for one have been entirely beguiled by our newest colleague. She is endlessly bright, obviously in love with the law, and engaged. So I am grateful to the voters of Michigan for sending her to us. These investiture ceremonies provide an opportunity to take pride in the new judge's achievements, to look forward to what she

will accomplish, and for the new jurist to acknowledge with gratitude the love and support of others who helped her reach this goal. But it's also an event in this Court's life and a profoundly serious one. As we mark the beginning of a new justice's tenure, it is a time for reaffirming our own fidelity to the rule of law and our commitment to serve the people of Michigan. When Justice MCCORMACK raises her right hand to take the oath of office, all of us bear witness to her oath. But we also reflect on its meaning for us, particularly those of us who are judges. We do not often make public promises; these are rare events. When we do take oaths and vows, it is when we are committing to something higher than ourselves—a profession, a marriage, the defense of our country, the Constitution. This is a grand moment for Justice MCCORMACK, but it is also an opportunity for the rest of us who wear black robes to ponder and reaffirm our own commitment to the rule of law that makes our system of ordered liberty possible. So to begin the ceremony, let us stand to reaffirm our fidelity to our country. Harry Croley and Matthew McCormack will lead us in the Pledge of Allegiance.

> I pledge Allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with Liberty and Justice for all.

CHIEF JUSTICE YOUNG: And now I call on Wallace Riley, the President of the Michigan Supreme Court Historical Society. Wally's wife DOROTHY COMSTOCK RILEY, of happy memory, was a Justice and Chief Justice of this Court and founded the Historical Society with Wally. Wally is a veteran of many a Supreme Court investiture and we're pleased to have him serve as the master of ceremonies for the remainder of our program.

MR. RILEY: Thank you. Mr. Chief Justice, Associate Justices of the Michigan Supreme Court, judges and

lawyers, friends and family of Justice MCCORMACK, and ladies and gentlemen. While the weather outside is frightful, the Hall of Justice is plain delightful. So on behalf of the officers and directors of the Michigan Supreme Court Historical Society I want to thank you, thank all of you, this large crowd, for attending today in the Hall of Justice. And our thanks too to the Court for inviting the Society once again to participate in the investiture of Justice BRIDGET MARY MCCORMACK.

It's with great pleasure now to introduce to you Dean Evan Caminker who has been the Dean of the University of Michigan Law School since 2003 and who, having served his sentence as dean with great distinction, will soon be free to return to his calling as a great law professor. Dean Caminker.

DEAN CAMINKER: Thank you very much. Mr. Chief Justice, fellow distinguished members of the Supreme Court, members of the judiciary, fellow lawyers, family, and friends. I am Evan Caminker, the Dean of the University of Michigan Law School, and it's a great pleasure to join all of you today to celebrate the investiture of BRIDGET MCCORMACK—I'm sorry—BRIDGET MARY MCCORMACK. I have spent most of my career studying judicial decision making and I have a great appreciation for the role of this Court in our federal system. The Court articulates our state and nation's most basic legal principles and provides concrete shape to the laws of the land. Bridget, you are joining an august institution with much important work to do. Now jurists on this and other high courts are typically very smart and very self-confident. Such judges may not be easily persuaded to change their views. But Bridget, if you're about to join a group of decision makers who always thinks they're right, wants to win every argument even when the stakes are small, I can't imagine a

better training ground than 15 years of faculty meetings. Now, seriously, I actually do believe that Bridget's experience as a law school professor has prepared her well for a smooth transition from commencement robes to judicial robes. For the past ten years, Bridget has been the Associate Dean for Clinical Affairs, supervising the entire Michigan Law Clinical Program in which the students engage in hands-on lawyering. She's demonstrated her prowess as an unparalleled lawyer, teacher, and leader. Successful clinical teaching requires an understanding of legal theory and a mastery of legal doctrine. It demands exquisite lawyering skills including sensitive and careful reading of statutes and judicial precedents. It requires a keen understanding of how the law works on the ground and how decisions affect the everyday lives of citizens. According to Bridget's students, successful clinical practice also entails endlessly driving a minivan around the entire state. One student described her as a nonstop mom and a carpooling pro. She will certainly bring some very unique skills to this bench. She will also bring a sophisticated understanding of some of the most fundamental values of our legal system. Bridget used to teach a course called Access to Justice. She demonstrated that people with limited financial and other resources frequently lack meaningful input into the political decisions that affect their lives. As a result, sometimes an open courthouse door with a welcoming judge is the only way to ensure that all of our fellow citizens can truly have a voice in self-governance. And over the past few years Bridget has helped develop a new Innocence Clinic to identify and free citizens who have been wrongly convicted and imprisoned, not because their trial was somehow defective, but because they are factually innocent of the crime. Even government leaders, who are fervently tough on crime, must decry errors that leave innocent

people behind bars and the actual perpetrators still roaming the streets. I think we can all admire Bridget's lifelong contributions to preserving the most fundamental values of our judicial system. Indeed, her values strike me as similar to those of THOMAS COOLEY who was a justice of this Court long ago and a founding member of the Michigan Law faculty. Justice COOLEY opined

> We fail to appreciate the dignity of the academic profession, if we look for it either in profundity of learning or forensic triumph. The profession's reason for being must be found in the effective aid it renders justice and in the sense that it gives of public security through its steady support of public order.

I have no doubt that Bridget will do her share to promote justice and preserve order in this state. Finally, we all want to celebrate the many wonderful personal attributes that Bridget will bring to the bench. She is both brilliant and commonsensical. She can persuade and is open to being persuaded. She has a wicked sense of humor too often wielded at my expense. Her new colleagues, consider yourselves warned. She is unceasingly fair-minded in the way she treats both people and ideas. She sets very high standards for herself and has an unbelievable work ethic. A student once described her as the Energizer Bunny with an extra battery pack. She has the strength of character necessary to follow the law, even when doing so is unpopular. And, finally, a student once described her as "the coolest professor at the law school,"—I know I'm going to regret repeating this—"she's even cooler than her husband Steve." This is a bittersweet day for the University of Michigan Law School; the faculty loses a fabulous teacher, lawyer, and leader. And today is bittersweet for me personally as well. I lose a wonderful counselor and a good friend with whom I've worked closely for over ten years. I should

add that Bridget's husband, Steve, was also my first Associate Dean for Academic Affairs before he ran off and started doing some other government thing. Indeed, Steve was the person most directly responsible for recruiting me to join the Michigan faculty. So I feel quite personally connected to their family and I miss their daily presence in the Michigan Law Quadrangle. But while the bitter will bite, the sweet is oh, so sweet. Let me once again quote one of Bridget's students. "This new endeavor is a loss for the law school and all of Bridget's clients, but a huge gain for those seeking to be judged within a truly just system of law." Bridget, I am very excited for you and I am very proud of you. Good luck, Godspeed, and, of course, Go Blue.

MR. RILEY: I'm looking over the crowd because I'm trying to figure out if there is anybody out there who has known Justice MICHAEL CAVANAGH longer than me and I doubt it.

CHIEF JUSTICE YOUNG: I do too.

MR. RILEY: Well, I want to call on Justice CAVANAGH now who is in his 31st year as a Justice of the Michigan Supreme Court. When he completes his current term, which will be next year, he will be tied with Big-Four Justice JAMES V. CAMPBELL as the longest serving justice of the Michigan Supreme Court—quite a record—a record not easily achieved—and certainly not likely to be broken. So Justice Michael, will you say a few words to the crowd?

JUSTICE CAVANAGH: Thank you Wally. May it please the Court and Justice MCCORMACK. I'm very grateful for this opportunity to formally welcome Justice MCCORMACK as the 108th justice to serve this Court. I now have had the privilege of serving with 23 of those justices. Each has brought a distinct background and talent that unquestionably changed the chemistry of

this collegial body. And I'm confident that Justice MCCORMACK's wisdom, her energy, her experience, and her passion will do the same. And I'm sure they will enable her, and hopefully each of us, to strive to avoid that mechanical indifference alluded to by the famous British author G.K. Chesterton when he wrote

> The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strangely they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.

I think each of us needs to be ever mindful lest we fall victim to that indifference. And, echoing the Dean, in naming Justice MCCORMACK as associate dean for clinical affairs, Dean Jeffrey Lehman said "Professor McCormack is an extraordinarily gifted teacher who has earned the admiration and respect of students and colleagues alike. She has a subtle and powerful mind, an astonishing work ethic, and an infectious commitment to her craft." I think everybody here can agree today that this Court is indeed fortunate to have her join us. So Bridget, I'll conclude by wishing you an old Irish toast that says, "May the worst of the days ahead of you be better than the best of the days behind you." Welcome.

MR. RILEY: Before I introduce the next speaker, I want to make a little observation. If you look at the row of judges in front, actually they are two rows, you will see that half of them are women. And you might think oh, isn't that a little surprising, but it isn't surprising because Justice RILEY, Justice WEAVER, Justice BOYLE, and Justice KELLY, were four out of seven—the first

majority women Court in Michigan and the second in the country. So women judges and justices are now with us for the good and for the better and for the future. I now want to call on and next let you hear from Justice MARY BETH KELLY, the 106th justice of the Michigan Supreme Court and the eighth woman to serve on that Court. Justice KELLY.

JUSTICE MARY BETH KELLY: Thank you Mr. Riley. Mr. Chief Justice, Justice MCCORMACK, my fellow justices, judges of the Court of Appeals, Bridget's family, friends all. I want to thank Justice MCCORMACK for the opportunity to talk at her investiture. I met Justice MCCORMACK what does seem like forever ago, one afternoon in Ann Arbor and I've had the good fortune to be her friend since. I'm so happy to welcome her as the ninth woman justice on the Supreme Court. I was asked over and over again during the campaign and since, what is she like—what is Justice MCCORMACK like—what is Bridget like. And over and over again I really come on one word to describe Bridget. She's so authentic. People will agree and people have said, yes, there's no pretext, there's no pretense with Bridget. Even with this investiture, she shared shortly after the election, "I would like an investiture if people just didn't have to say things about me." And it really comes down to, Bridget really defines, she personifies humility. And the virtue of humility is something that in a justice is a good thing. We on the Supreme Court—I think all of us would agree that we want to embody humility, but Bridget really does. There's nothing about her, there's nothing about her life, that could ever be described as bragging. Even it was years before I came to know that her brother and sister, who she often fondly talked about, were in show business, for example, and I asked her once, "What is that like?" The fondest memory which she delighted in, for example, was, "Well, when

Will appears as a guest star on Mary's show and I can watch them on television, they banter back and forth just like it was growing up," she would say. "And I can see on television just the way they were growing up." And it's that delight in her family that really carries through with everything that Bridget does. She does have the scholarship, all the accomplishment in the law; she's brought that to the Court. We as a Court—in these three short weeks that she's shared with us—we are so different. Her wit—she's so incredibly intelligent that that wit comes through. She, as the Chief Justice has said, beguiles us and everyone gets that we as a Court are so much better off with her. Let me just share one example of this humility. I recall a couple of years ago receiving a text from Bridget about a little film that she and Steve were putting together, as she called it, and inviting me to a viewing. Now it sounded like a home movie that they were making—truly—and I thought I was being invited to her home in Douglas to watch a home movie that she and Steve were making—that's what she made it sound like. For those of you without ties to the Saugatuck/Douglas area, of course, this was "Everyday People," a motion picture shown at the Saugatuck Center for the Performing Arts—the 2011 movie—the Michigan documentary movie of the year which Bridget produced and Steven directed. And this speaks to not just her humility, but the fact that she's so accomplished in areas not just in the law but outside the law as well. And she brings this excellence to everything she does. The way that she raises her children, she holds them to high standards. They are accomplished athletes, musicians, scholars, but you only know that if you ask just the right question—because she's not going to brag, that humility comes through in everything she does. So we as a Court are so honored, we're so blessed, to have Bridget with all the scholarship, with all the

excellence, but also with that humility, with that authenticity. Everyone on the Court made me promise that I would say we are all so happy to have her. We as a Court are better off with her. And so Bridget, we welcome you with open arms, with open hearts, as the ninth woman justice, the 108th justice of the Court, we're so thrilled to have you.

MR. RILEY: Madam Justice, if you're going to do a movie about the Court, I hope you'll save me a couple of tickets. You know it's not often that Hollywood comes to Michigan and certainly not today when the temperature hovers near zero. But I'm pleased to present to you now to speak Mr. William McCormack who was described to me as the much younger brother of our new justice and certainly no "frenemy" of this state. He doesn't write opinions like his sister, he simply writes award winning screenplays. You're on.

MR. McCORMACK: Thank you Mr. Riley. May it please the Court. My name is William McCormack and I'm representing the family of BRIDGET MCCORMACK. You may ask yourself why someone who lives in Los Angeles, California and writes romantic comedies for a living is qualified to speak here today. The answer is, he's not. Objection!—sorry, I've always wanted to do that. Other than my beloved mother, I have known Justice MCCORMACK longer than anyone here today because I am her little brother. And in a lot of ways I know her better than anyone and she asked me to speak and now you can't stop me. Bridget had a super power when we were young. She never once argued or lost her composure. This is not to say that there were never disagreements, but she was always able to settle disputes rationally, logically, compassionately, and she did it by listening. How did a young girl instinctively know how to do this? My sister Mary, our middle sibling, and I just settled an

argument last week by wrestling. I'm 39—she won—again. She's very strong. I idolized Bridget when I was little; she was like a superhero to me. The prettiest and smartest girl in our neighborhood. And even as a little kid, I knew she had an innate instinct for right and wrong—mine was less sharp. But I knew that I could rely on Bridget. She was a lamplight in the dark and I aligned myself with her, everyone did. She was a leader and I knew I wanted to be on her team. When the world felt like the Legion of Doom, I knew that I was working for the Hall of Justice. She made the world a better place for her brother and I've watched her make the world a better place for her clients, her students, and her children. And she has done it the old-fashioned way, through hard work, consistency, humility, and a sharp sense of decency. While I was taking break dancing classes at the YMCA, Bridget was mastering Latin. I knew she would go on to do great things in life, that she would work for justice and equality and fairness because it is in her nature—she had to—it was her destiny. Bridget, you have made our family very proud. More importantly, you will make Michigan a better and more just place to live. I know you will seize the opportunity the people have given you. You will not disappoint them. This alleged superpower she had as a kid, it turns out, is the most human power of all, the ability to listen to people with opinions different than yours—to really listen and respect and honor them. And maybe now it is harder than ever to hear people with the cacophony of Twitter and Facebook and the onslaught of media and technology. The world is imperfect and it always will be, but we can try to make it better. There is senseless horrific gun violence that has become common and the whole world screams for an answer. In some places, they still legislate love and tell you you can't marry someone of the same sex allowing fear and

ignorance and archaism to win. Republicans and Democrats continue to spar and a lot of days it seems that party alliances are more important than the pressing everyday problems of ordinary people. There is a lot of work to be done. The state of Michigan, let me tell you, you have a new sister and her name is BRIDGET MARY MCCORMACK. And I can assure you with all my heart and all my confidence you are in good hands. She will fight for your rights without causing more fights. She will listen and you will be heard. Thank you.

MR. RILEY: And now direct from the White House, it's my honor to introduce to you Deputy White House Counsel and Deputy Assistant to President Obama, Steven Croley, or as he will soon be known here in Michigan, Justice MCCORMACK's husband.

MR. CROLEY: Already known as. Thank you Mr. Riley for that and thank all of you here for attending today and thanks to those who supported Bridget along the way. I'd also like to thank our kids, Anna, Jack, Harry, and Matt, for this was a family project and they worked hard to make this day possible. They also made some sacrifices over the past year. As Bridget was often at evening events and I work out of town during the week, there were many times they had to fend for themselves. But they survived, and they showed great poise as campaigners in their own right. Very shortly after the election we went for a family walk. Periodically, Bridget and I enlist our kids to go for a walk with us. And the kids look forward to it just about as much as they look forward to cleaning their rooms. But we insist, and we asked them "what was the biggest thing you learned during the whole campaign season?" They had followed the national election closely too, and for months our house had felt like a 24 hour civic seminar. So we wondered what lesson stood out most for them.

We were struck by the unanimity and speed of their answer. They said the most important thing they learned was, as they put it, "how to mooch a ride home off of other people." So thanks, kids, for learning to mooch a ride home and for your hard work. I was moved by Will's remarks, but I've had a slightly different experience. I have known Bridget to be capable of being argumentative at times, though rarely. And an expression she often uses in those moments is "for the record." She uses that turn of phrase and sometimes it comes out as "just for the record." And so when I hear "for the record," I brace myself because I know some kind of gotcha or zinger is coming. Well, we're on the record today. For those of you who don't know this ceremony is an officially recorded session this Court and it occurred to me that I'll probably never have this chance again to address my spouse literally in a recorded judicial proceeding.

CHIEF JUSTICE YOUNG: Hopefully.

MR. CROLEY: So I wanted to say Bridget, for the record, I love you. Now many claim that two-lawyer marriages are not ideal and I understand that perspective. For an attorney it might be nice to come home and talk about anything else besides the law, but I feel differently. I like coming home and talking about legal issues with my spouse "behind the scenes" as you might say. And you certainly get a view of someone's professional character that way, and it is from that personal perspective that I want to express why I think Bridget will make an exceptional Supreme Court justice. There are many reasons; I'll mention two. First, Bridget will make a great justice because of her work ethic and tenacity. As any lawyer knows much of law is grunt work, and mastering all of the sometimes tedious detail is the difference between competent and exceptional

advocacy. Litigation is 90 percent preparation. Trials require planning for contingencies that never materialize. Oral argument requires preparing answers to many questions that are never asked. Innumerable times I have seen Bridget prepare late into the night or all night to make sure no issue of a case or an argument was forgotten or under-analyzed. She is and always has been a tireless professional. And a quick study—she doesn't just recycle yesterday's lessons. Onto the next topic, onto the next challenge, that is Bridget's attitude whether that requires mastering arts and science or some new municipal code. Great judges too, of course, are those who master the details of the case. Mr. Chief Justice, if you are looking for somebody to take on a tough new assignment and who thrives on hard work, you have such a new colleague in Bridget. Second, Bridget will make a great justice precisely because her career path did not lead inevitably here. The Legal Aid Society is not the fast-track to the high court bench. In fact, she never took any easy path. Instead, she always fought for what is right even when it was not popular, even at professional risk or when the rewards were low. Some of you are aware of the many innocence cases she has successfully litigated. And when you win an innocence case there can be a certain amount of glory that comes with that at the very end. The cases are covered in the press, lawyers groups give you awards, they hold dinners in your honor, and I'm very proud of Bridget for all the recent recognition she has received. Although lately it's this award and that award, and it's starting to get annoying. But more striking and far more impressive is her habit of taking on such cases in the very first place, for when a lawyer agrees to advocate for an underdog, you can't be sure you'll win. The rational expectation is that you won't win—that's what makes an underdog an underdog—they usually lose. Yet in

talking to Bridget about whether to take this case or that case or seek justice for one client or another, she has always been motivated to do what is right, not what is likely successful or that for which she will get credit. Many times—too many times to count—I have heard her talk about how she might well not prevail, but that a would-be client deserved a chance because they had been disserved by the legal system somehow. Often she has taken cases knowing full well that she will be criticized for even accepting them. But she has moral courage, and that is why she will make a great justice. For we expect our judiciary to do what is right even when doing so is not popular, even when it is controversial or will lead to criticism — that is what judges are supposed to do. Of course, no one is entitled to sit on the Michigan Supreme Court. No one deserves such a privilege. Our courts are sacred institutions and their importance transcends those who serve on them. But Mr. Chief Justice and Associate Justices, I would submit to the Court that Bridget's energy, intelligence, persistence, her courage and her fusion with a strong sense of justice are the qualities that will make her an invaluable colleague. I would submit to you and to all of Michigan's citizens that they are very fortunate to have her as this Court's newest member. Thank you.

MR. RILEY: Mr. Chief Justice, are you ready for the robing?

CHIEF JUSTICE YOUNG: I am. You're in the Hall of Justice, come join the Justice League. Probably only the kids understand the reference. Would you raise your right hand. Do you solemnly swear that you will support the Constitution of the United States—

JUSTICE McCORMACK: I solemnly swear that I will support the Constitution of the United States—

CHIEF JUSTICE YOUNG: and the Constitution of this state –

JUSTICE McCORMACK: and the Constitution of this state –

CHIEF JUSTICE YOUNG: and that you will faithfully discharge the duties of the office of Michigan Supreme Court Justice—

JUSTICE McCORMACK: and that I will faithfully discharge the duties of Michigan Supreme Court Justice—

CHIEF JUSTICE YOUNG: according to the best of your ability.

JUSTICE McCORMACK: according to the best of my ability.

CHIEF JUSTICE YOUNG: So help you God.

JUSTICE McCORMACK: So help me God.

CHIEF JUSTICE YOUNG: Congratulations.

JUDGE SHERIGAN: Justice McCormack. It is with great honor that the Women Lawyers Association presents you with this banner in acknowledgment of the great honor the Michigan residents have bestowed upon you. Congratulations.

JUSTICE McCORMACK: Thank you.

MR. RILEY: The presentation of the banner was by Honorable Angela Sherigan on behalf of the Women Lawyers Association of Michigan.

CHIEF JUSTICE YOUNG: Rebuttal.

MR. RILEY: Your turn.

JUSTICE McCORMACK: Is it my turn? I always say that low expectations are the key to life and I think I've just completely messed this up. Thank you very much Mr. Riley, and thank you to the Historical Society for hosting such a nice event. Thank you to my new

colleague and new friend Justice CAVANAGH, my old colleague and old friend Dean Evan Caminker, my new colleague but old friend Justice KELLY, for taking to the podium on my behalf. And to Will, Steve, Anna, Jack, Matt and Harry for all of your participation here today. I'm incredibly moved by this whole ceremony. And I also want to thank the Chief Justice, Justice ZAHRA and Justice MARKMAN for the incredibly warm welcome you have all shown me since I arrived a few weeks ago. I don't want to ruin your reputations so I won't go on and on. It's difficult to express just how honored I am, and how fortunate and grateful I feel today. I am so thankful for the support you have all shown me, my family, my friends, and the many new and lasting friends I have made along the way. I am grateful for your moral support, your hard work, and most of all for the confidence you have placed in me. I will do everything I can not to let you down: I will serve the taxpayers of our state by doing my work quickly and efficiently. I will serve the litigants before this Court by considering their arguments slowly and carefully.

Quite honestly, I never dreamed of being a judge, let alone a justice on the State's highest court. And I never aspired to it either. For years, I enjoyed the practice of law from the other side of the bench, and got great professional and personal satisfaction from advocating for justice for my individual clients, and teaching law students about the power and responsibility that comes with a law degree. For I believe in the power of law, and in the legal system that distinguishes our country from so many other places. After all, a legal document gave birth to our country, written by men who understood, perhaps more than any before or since, that fairness and justice require certain basic legal rules. In my practice as an attorney, I tried to ensure that the legal system's rules were applied to advance the cause of

justice. Of course, anyone familiar with the legal system knows that perfect justice is not achieved in every case. But what is distinct about our system is that, where attorneys do their jobs, and judges do theirs, there justice might be achieved. This observation is one I emphasized for all my students I have taught over the years as well. The opportunity to advance the cause of justice from the bench instead of the well is an honor. I fully recognize that this transition requires a different mindset, a fundamental mental shift on my part, from advocate to arbiter. For a judge must be an advocate not for any party to a case, but for evenhandedness, an advocate for the rule of law itself. That is why we say that justice is blind. Yet blind only to the parties before the court, not to the importance of the role courts play in our system of government, and certainly not indifferent to the consequences of our decisions. But we are not legislators. And the robes we wear do not magically turn us into wise men and women. We are, rather, stewards of the law, whose job it is to administer the law created by our citizens and their elected representatives neutrally.

Much can be said, and much has been written, about this topic and the importance of a judge's philosophy and how the rule of law should inform a judge's deliberation. Far, far too little has been said, however, about an equally important aspect of judicial decision-making, and one I would like to address here. And that is the importance of collegiality and the role of collective decision-making. For the volumes of commentary about judicial philosophy take the judge as an autonomous thinker, as an individual decision-maker who reasons—all by himself or herself—about how to apply the principles of law to the facts of a given case. This image of the judge as an autonomous decision-maker makes perfect sense for judges who, like most, preside in their

courtrooms alone. But the Michigan Supreme Court is, of course, a collegial body. We make our decisions collectively. And like other small collective bodies, the work-product of the Michigan Supreme Court is greater than the sum of the individual contributions of its members. Even when cases generate different opinions from its members, the judgments of the Court are the judgments of no single justice acting alone, and our written opinions reflect, and should reflect, our collective responses to the cases before us. Much like juries or corporate boards or scientific review panels, when our body is working as it should, our decisions will reflect our collective judgments. And so I would like to emphasize my approach to this aspect of judicial decision-making—about my beliefs not about how I, but about how we, approach our work. My new colleagues, my judicial philosophy in this regard will guide me as follows. I will always take your perspectives and reactions to heart. I look forward to your legal insights, and to all the ways you will improve my own reasoning. I promise to be a good listener, to the litigants who appear before us, but no less to you as well. I will approach every case, and every conference with you, with an open mind. I will consider your legal analyses with the seriousness they deserve. And I will not view the written opinions I author as mine alone. No doubt, there will be times we see issues differently. Of course, I am not pretending we will always reason our way to consensus, nor should we. What I am saying is that even when inevitably we disagree, I will not be disagreeable. And most of all, I look forward to the analytical give and take that sound decision-making by a high court requires. For the framers also understood this point. They saw fit to establish a multimember Supreme Court, not a supreme court of one. I look forward, then, to reasoning collectively, to rendering the very best decisions this

body as a body can, so that we might vindicate the confidence the people of the state of Michigan have placed in all of us. Each of you has shown me exactly this kind of collegiality already, in three short weeks, and I thank you for that.

Once again, I am honored by the support of everybody in this room. My deepest thanks to all of you for being here today. I will always be mindful of the fact that I was elected on the nonpartisan section of the ballot. And I will do all I can to earn your confidence through the work we do tomorrow. Thank you.

MR. RILEY: Well, you've just heard from the new kid on the block—inspiring speech, inspiring words—and I think she's right. They're lucky to have her. And, more importantly, thank goodness that she likes to speak on the record. You've got your marching orders. Now, before the Court adjourns, I want to invite you all after the adjournment and the Court closes to join in the foyer for a reception in honor of our newest Justice—Justice MCCORMACK. Thank you. And thank you all for coming.

CHIEF JUSTICE YOUNG: Well, that concludes the proceeding today. I thank you all for coming and I hope this day marks the beginning of a long and happy and fruitful tenure on the Court for our newest justice. This has been so much fun I bet we're going to do it again soon. We're adjourned.

SUPREME COURT CASES

PEOPLE v MACK

Docket No. 143244. Decided December 12, 2012.

Larry J. Mack was convicted in the Isabella Circuit Court of felonious assault, MCL 750.82; three counts of fourth-degree child abuse, MCL 750.136b(7); reckless driving, MCL 257.626; and failure to stop at the scene of an accident, MCL 257.620. The charges stemmed from a car chase in which defendant pursued and, at one point, hit another car containing his fiancée, her three children, and her parents. The Court of Appeals, METER, P.J., and SAAD and WILDER, JJ., affirmed in an unpublished opinion per curiam issued April 21, 2011 (Docket No. 295929), and defendant sought leave to appeal.

In a memorandum opinion signed by Chief Justice YOUNG and Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

MCL 768.27b, which in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permitted by MRE 404(b)(1), does not infringe on the Supreme Court's authority to establish rules of practice and procedure under article 6, § 5 of the 1963 Michigan Constitution for the reasons articulated in *People v Watkins*, 491 Mich 450 (2012), which addressed a very similar issue and controls this case.

Affirmed.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have granted defendant's application for leave to appeal in order to reconsider *Watkins*, which was wrongly decided. The majority's extension of the reasoning used in *Watkins* to this case rendered this case wrongly decided as well. Because MCL 768.27b is a procedural rule that conflicts with MRE 404(b), the Legislature overstepped its constitutional authority under the separation of powers when enacting it.

CONSTITUTIONAL LAW — SUPREME COURT — POWERS RESERVED TO THE SUPREME COURT — RULES OF PRACTICE AND PROCEDURE — EVIDENCE — ADMISSIBILITY.

MCL 768.27b, which in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permit-

ted by MRE 404(b)(1), does not infringe on the Supreme Court's authority to establish rules of practice and procedure under article 6, § 5 of the 1963 Michigan Constitution.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Risa Scully*, Prosecuting Attorney, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

MEMORANDUM OPINION. At issue is whether MCL 768.27b infringes on this Court's authority to establish rules of "practice and procedure" under the Michigan Constitution. The Constitution provides that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5.

MCL 768.27b addresses the admissibility of evidence in domestic-violence cases that a defendant has committed other acts of domestic violence. It provides in part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
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> * * *
>
> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice. [MCL 768.27b.]

The statute thus in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permitted by MRE 404(b)(1), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), this Court addressed an issue very similar to that presented here. The statute at issue in *Watkins*, MCL 768.27a, addresses the admissibility of evidence that a defendant accused of certain sexual offenses against a minor has committed other sexual offenses against a minor. Though that statute also in certain circumstances expanded the admissibility of such evidence beyond the scope permitted by MRE 404(b)(1), we determined that it did not infringe on this Court's authority under Const 1963, art 6, § 5. We hold that the reasoning of *Watkins* fully controls in this case. For the reasons articulated in *Watkins*, we conclude that MCL 768.27b does not infringe on this Court's authority to establish rules of "practice and procedure" under Const 1963, art 6, § 5. Likewise, the dissent's arguments here—the same as those advanced by the dissent in *Watkins*—are unpersuasive for the reasons articulated by the Court in *Watkins*.

In lieu of granting defendant's application for leave to appeal, we affirm the judgment of the Court of Appeals.[1]

YOUNG, C.J., and MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred.

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[1] *People v Mack*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 295929).

MARILYN KELLY, J. (*dissenting*). As noted by the majority, at issue is whether MCL 768.27b infringes on this Court's constitutional authority to establish rules of practice and procedure. Relying on its reasoning in *People v Watkins*,[1] which considered a similar statute, MCL 768.27a, the majority holds that MCL 768.27b does not infringe on this Court's constitutional authority. I disagree. For the reasons stated in my dissenting opinion in *Watkins*, that case was wrongly decided. The majority's extension of the reasoning used in *Watkins* to this case renders this case wrongly decided as well.

Our Constitution provides this Court with the express authority to regulate rules of practice and procedure.[2] As I explained in *Watkins*, statutes like MCL 768.27b infringe on that authority.[3] The majority's conclusion to the contrary, both in *Watkins* and in this case, is imbued with the flawed reasoning of *McDougall v Schanz*.[4] *McDougall* effectively neutered this Court's constitutional authority to regulate rules of practice and procedure.[5] Nonetheless, as in *Watkins*, if *McDougall*'s analysis were faithfully applied here, the majority would recognize that MCL 768.27b is a quintessential procedural rule involving the dispatch of judicial business. Because that statute conflicts with MRE 404(b)

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[1] *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012).

[2] Const 1963, art 6, § 5 provides the judiciary with the authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state."

[3] See *Watkins*, 491 Mich at 499-507 (MARILYN KELLY, J., dissenting).

[4] *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

[5] *McDougall* held that this Court's authority over "practice and procedure" does not include all matters relating to the admission of evidence. *Id*. at 29. Instead, it held that a legislatively created rule of evidence does not violate article 6, § 5 of the 1963 Michigan Constitution unless "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . ." *Id*. at 30 (quotation marks and citations omitted).

and regulates a matter of procedure, the Legislature overstepped its constitutional authority when enacting it. Thus, the statute is unconstitutional and violates the constitutional separation of powers.[6]

For these reasons, I would grant defendant's application for leave to appeal in order to reconsider *Watkins*.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

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[6] Const 1963, art 3, § 2 provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

PEOPLE v ZAJACZKOWSKI

Docket No. 143736. Argued October 10, 2012 (Calendar No. 5). Decided December 19, 2012.

Jason J. Zajaczkowski pleaded guilty in the Kent Circuit Court, James R. Reford, J., to a charge of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*) (victim and defendant related by blood or affinity to the fourth degree). The plea was conditioned on defendant's being permitted to appeal with regard to the issue whether the undisputed facts established that he committed only third-degree criminal sexual conduct, MCL 750.520d(1)(a). The facts indicate that defendant was born in 1977 during the marriage of Walter and Karen Zajaczkowski. Walter and Karen divorced in 1979. The divorce judgment referred to defendant as the minor child of the parties. In 1992, Walter had a child with another woman; that child was the victim in this case. In 2007, when defendant was approximately 30 years old and the victim was 14 years old, the criminal sexual conduct occurred. Subsequent genetic testing indicated that Walter was not defendant's biological father. The Court of Appeals granted defendant's delayed application for leave to appeal. The Court of Appeals affirmed, ruling that because defendant was conceived and born during his mother's marriage to the victim's father, a strong presumption of legitimacy arose that defendant lacked standing to challenge and, as a result, defendant and the victim were related by blood as a matter of law. 293 Mich App 370 (2011). The Supreme Court granted defendant's application for leave to appeal. 490 Mich 1004 (2012).

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

The elements of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*) are (1) a sexual penetration, (2) a victim who is at least 13 but less than 16 years of age, and (3) a relationship by blood or affinity to the fourth degree between the victim and the defendant. In this case, defendant did not dispute that the first two elements were met, and the prosecution conceded in the Court of Appeals that there was no evidence of a relationship by affinity between the victim and the defendant. A

relationship by blood means a relationship between persons arising by descent from a common ancestor or a relationship by birth rather than marriage. The DNA evidence established that the victim's father was not defendant's biological father. Accordingly, defendant was not related to the victim by blood to the fourth degree and the prosecution could not establish the relationship element of the crime. The Court of Appeals erred by applying the civil presumption of legitimacy in this criminal case when nothing in the statutory language indicates that a relationship by blood may be established using that presumption. Defendant was improperly convicted of first-degree criminal sexual conduct.

Conviction of first-degree criminal sexual conduct vacated; case remanded for entry of a conviction of third-degree criminal sexual conduct in accordance with defendant's plea agreement and for resentencing.

CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — RELATIONSHIP BY BLOOD TO THE FOURTH DEGREE.

The elements of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*) are (1) a sexual penetration, (2) a victim who is at least 13 but less than 16 years of age, and (3) a relationship by blood or affinity to the fourth degree between the victim and the defendant; a relationship by blood means a relationship between persons arising by descent from a common ancestor or a relationship by birth rather than marriage; the civil presumption of legitimacy cannot be used to establish a relationship by blood under the statute when DNA evidence establishes that the defendant and the victim are not related by blood.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Ronald D. Ambrose for defendant.

Amicus Curiae:

Katherine L. Root and *Joanne T. Ross* for the Family Law Section of the State Bar of Michigan.

HATHAWAY, J. At issue in this case is whether defendant was properly convicted of first-degree criminal

sexual conduct under MCL 750.520b(1)(b)(*ii*), which requires that defendant be related to the victim "by blood."[1] While it is undisputed that there is no biological relationship between defendant and the victim, the prosecution asserts that the relationship element of the crime has been met based on a civil presumption of legitimacy. To determine whether the prosecution is correct, we must address whether the civil presumption of legitimacy implicated by statutory and caselaw, as well as defendant's lack of standing to challenge his legitimacy under the Paternity Act, MCL 722.711 *et seq*., are relevant to whether a relationship by blood exists for purposes of establishing first-degree criminal sexual conduct.

We conclude that the prosecution cannot establish a blood relationship between defendant and the victim when the undisputed evidence indicates that defendant is not biologically related to the victim. Moreover, the presumption of legitimacy cannot be substituted for a blood relationship in order to fulfill this element of the crime charged. Accordingly, we vacate defendant's conviction for first-degree criminal sexual conduct. We remand this case to the trial court for entry of a conviction of third-degree criminal sexual conduct in accordance with defendant's plea agreement entered on May 5, 2009, and for resentencing and further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In this case, defendant was charged with first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*), which provides that

[1] A relationship by "affinity" would also satisfy the relationship element of the statute; however, the prosecution concedes that there is no relationship by affinity in this case.

> [a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if . . . :
>
> * * *
>
> (b) That other person is at least 13 years but less than 16 years of age and . . . :
>
> * * *
>
> (*ii*) *The actor is related to the victim by blood or affinity to the fourth degree*. [Emphasis added.]

Defendant had sexual intercourse with the victim, who was at least 13 but less than 16 years of age at the time of the incident. The prosecution asserts that defendant is related to the victim because defendant was born during his mother's marriage to the victim's biological father, Walter Zajaczkowski. Defendant's mother and Walter were divorced in 1979. While the divorce judgment identified defendant as their child, a DNA test later revealed that Walter is not actually defendant's biological father.[2] In 1992, Walter fathered a child with another woman. That child is the victim in this case. The prosecution concedes that in light of the DNA test results, defendant is not biologically related to the victim.

Because defendant is not biologically related to the victim, defendant filed a motion in the trial court to dismiss the first-degree criminal sexual conduct charge or to reduce the charge to criminal sexual conduct in the third degree. MCL 750.520d(1)(a) governs third-degree criminal sexual conduct and provides that

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[2] While the instant case was pending in the trial court, Walter's DNA was compared to defendant's DNA, and it was established that Walter is not defendant's biological father.

> [a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if . . . :
>
> (a) That other person is at least 13 years of age and under 16 years of age.

The prosecution opposed defendant's motion, relying on the divorce judgment between defendant's mother and Walter identifying defendant as Walter's child. The prosecution argued that regardless of whether defendant and Walter were related by blood, defendant is legally Walter's son.

Despite the uncontested DNA evidence, the trial court denied defendant's motion.[3] Defendant agreed to plead guilty of first-degree criminal sexual conduct on the condition that he would be permitted to appeal the issue whether the facts establish that he is only guilty of third-degree criminal sexual conduct.[4]

The Court of Appeals granted defendant's application for leave to appeal and affirmed his conviction in a published opinion.[5] On appeal, defendant argued that the relationship element of the statute could not be established because Walter is not his biological father and defendant is not related by blood to Walter's daughter, the victim. While the prosecution conceded that there is no biological relationship between defendant and the victim, the prosecution contended that

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[3] The trial court reasoned that in light of the divorce judgment presented by the prosecution, defendant was Walter's child. Therefore, the trial court concluded that a relationship of affinity existed between the victim and defendant. Again, the prosecution now concedes that there is no relationship by affinity.

[4] Defendant's plea was also conditioned on an agreement that the trial court would use the sentencing guidelines for third-degree criminal sexual conduct with a fourth-offense habitual-offender enhancement. See MCL 769.12.

[5] *People v Zajaczkowski*, 293 Mich App 370; 810 NW2d 627 (2011).

defendant is nevertheless related to the victim as a matter of law because defendant has no standing to challenge the 1979 divorce judgment identifying him as Walter's child. The Court of Appeals agreed with the prosecution, concluding that the absence of a biological relationship does not affect the legal conclusion that defendant and the victim are brother and sister because they share the same *legal* father.

To reach its conclusion that defendant and the victim are related by blood to the fourth degree, the Court of Appeals relied on MCL 552.29, which states that with regard to divorce actions, "[t]he legitimacy of all children begotten before the commencement of any action under this act shall be presumed until the contrary be shown." The Court of Appeals also relied on cases from this Court involving the Paternity Act[6] and the Child Custody Act,[7] which stand for the proposition that a putative biological father lacks standing to even bring an action to establish paternity unless there has been some prior court determination that the child was not the issue of the marriage.[8] The Court of Appeals additionally referred to statutes governing intestate succession that incorporate the presumption of legitimacy and the standing requirement into intestate-succession disputes.[9]

Relying on these statutes and cases, the Court of Appeals reasoned that only defendant's mother and his legal father, Walter, have standing to rebut the presumption that defendant was the legitimate issue of

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[6] MCL 722.711 *et seq*.

[7] MCL 722.21 *et seq*.

[8] See *Barnes v Jeudevine*, 475 Mich 696; 718 NW2d 311 (2006); *In re KH*, 469 Mich 621; 677 NW2d 800 (2004); *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991).

[9] See MCL 700.2114(1)(a); MCL 700.2114(5).

their marriage. Because defendant lacks standing to challenge that he is the legitimate issue of the victim's father, the Court of Appeals concluded that "as a matter of law, defendant and the victim are related by blood—brother and sister sharing the same father."[10] Therefore, the Court of Appeals held that defendant's conviction for first-degree criminal sexual conduct was proper. This Court granted defendant's application for leave to appeal.[11]

II. STANDARD OF REVIEW

This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo.[12]

III. ANALYSIS

The issue before this Court is whether defendant can properly be convicted of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*). The elements that the prosecution is required to prove under this statute are: (1) sexual penetration, (2) a victim who is at least 13 years old but less than 16 years old, and (3) a relationship by blood or affinity to the fourth degree between the victim and the defendant. Defendant does not dispute that the first two elements have been met, and the prosecution conceded in the Court of Appeals that there is no evidence of a relationship by affinity between the victim and defendant. Thus, the only issue we address is whether a relationship by blood to the fourth degree can be established in the face of undis-

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[10] *Zajaczkowski*, 293 Mich App at 377.

[11] *People v Zajaczkowski*, 490 Mich 1004 (2012).

[12] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011); *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 361; 802 NW2d 33 (2011).

puted DNA evidence indicating that defendant is not biologically related to the victim. The Court of Appeals concluded that the relationship element can be established in such a situation. We disagree with this analysis because it is not supported by the plain language of the statute at issue, MCL 750.520b(1)(b)(*ii*).

When interpreting statutes, this Court must "ascertain and give effect to the intent of the Legislature."[13] The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.[14] For a defendant to be convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*) requires that the defendant and the victim be related "by blood or affinity . . . ." Because these terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used.

A relationship by "blood" is defined as "a relationship between persons arising by descent from a common ancestor"[15] or a relationship "by birth rather than by marriage."[16] Moreover, as the Court of Appeals correctly noted, the context in which the term "by blood" is used in the statute indicates that it is meant as an alternative to the term "by affinity." This Court has defined "affinity" as

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is

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[13] *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

[14] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[15] Black's Law Dictionary (8th ed), p 182.

[16] *Random House Webster's College Dictionary* (2001), p 145.

> related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband.[17]

Under the statutory language, the third element of MCL 750.520b(1)(b)(*ii*) can *only* be met if defendant is related to the victim in one of two ways—by blood or by affinity. The conclusive DNA evidence establishes that the victim's father is not defendant's biological father. Defendant and the victim simply do not share a relationship arising by descent from a common ancestor, and they are not related by birth. Accordingly, defendant is not related to the victim by blood to the fourth degree. Therefore, when interpreting the language of the statute in light of its ordinary meaning and the context in which it is used, we conclude that the prosecution cannot establish the relationship element of MCL 750.520b(1)(b)(*ii*).[18]

While the Court of Appeals acknowledged the ordinary meaning of a relationship "by blood or affinity," it then applied the civil presumption concerning the legitimacy of a child in order to conclude that defendant and the victim are related by blood as a matter of law. However, nothing in the language of MCL 750.520b(1)(b)(*ii*) indicates that a relationship by blood can be established through this presumption. In reaching its conclusion, the Court of Appeals went beyond

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[17] *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW 317 (1907).

[18] The prosecution has raised the argument that this interpretation will result in unintended consequences regarding adopted children because if the blood relationship element can only be established through a biological relationship, then a sexual penetration committed by a member of an adoptive family against an adopted minor child may not be punishable under MCL 750.520b(1)(b)(*ii*). While we acknowledge that the prosecution raises valid policy concerns, such policy concerns are best left to the Legislature to address. It is this Court's duty to enforce the clear statutory language that the Legislature has chosen.

the statute's language and changed the ordinary meaning of the statute's terms by adding language that the Legislature did not include.

Given that this case does not involve an action to establish paternity, challenge child custody arrangements, or dispute intestacy issues, we find it unnecessary to stray from this criminal statute's plain and unambiguous language. The question whether the relationship element of the statute can be established does not require a determination of whether defendant is deemed "legitimate" for any of the stated civil-law purposes or contexts in which the presumption of legitimacy has been implicated.[19] Moreover, we decline to conclude as a matter of law that defendant shares a common ancestor with the victim and is thereby related to the victim by blood merely because defendant may be considered the issue of his mother's marriage to the victim's father for legitimacy purposes.[20] Such a conclusion would require this Court to extend the civil pre-

[19] "This presumption vindicates a number of interests, not the least of which include the interest of the child in not having his or her legitimacy called into question, the interest of the state in ensuring that children are properly supported, and the interest of both in assuring the effective operation of intestate succession." *Barnes*, 475 Mich at 715 (MARKMAN, J., dissenting).

[20] However, we do not hold that evidence indicating that a person was born during a marriage may never be admissible in a criminal prosecution to show that the person is the natural child of his legal parents. We acknowledge that when the prosecution alleges that the defendant and the victim are related by blood because they have the same father, evidence that the defendant was born during the marriage of his legal parents would make the existence of a blood relationship between the defendant and the victim more probable. See MRE 401; MRE 402. Thus, while the civil presumption of legitimacy cannot be used in a criminal case to conclusively establish a blood relationship, in the absence of a determinative DNA test, the prosecution may use evidence that a person was born during a marriage as evidence that the defendant is related to the victim by blood to the fourth degree.

sumption of legitimacy to this criminal statute when the Legislature clearly has not done so.

Because the elements of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(*ii*) cannot all be met, we conclude that defendant was not properly convicted of that crime.[21]

IV. CONCLUSION

In light of the undisputed evidence indicating that defendant is not biologically related to the victim, we conclude that the prosecution cannot establish a blood relationship between defendant and the victim. Moreover, the presumption of legitimacy cannot be substituted for a blood relationship in order to establish this element of the crime charged. Accordingly, we vacate defendant's conviction for first-degree criminal sexual conduct. We remand this case to the trial court for entry of a conviction of third-degree criminal sexual conduct in accordance with defendant's plea agreement entered on May 5, 2009, and for resentencing and further proceedings not inconsistent with this opinion.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with HATHAWAY, J.

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[21] Defendant additionally argues that he is entitled to credit against the sentence imposed in this case for the time he spent in jail between his arrest and sentencing. Because defendant was on parole at the time he committed the offense at issue, we agree with the Court of Appeals that his argument fails under this Court's decision in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009).

PEOPLE v BYLSMA

Docket No. 144120. Argued October 11, 2012. Decided December 19, 2012.

Ryan M. Bylsma, a registered primary caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., was charged in the Kent Circuit Court with manufacturing marijuana in violation of MCL 333.7401(1) and (2)(d). Defendant moved to dismiss the charge, asserting that as the registered primary caregiver of two registered qualifying patients, he was allowed to possess 24 marijuana plants and that the remainder of the 88 plants seized by the police from his leased unit in a building belonged to other registered primary caregivers and registered qualifying patients whom defendant had offered to assist in growing and cultivating the plants. The court, George S. Buth, J., denied the motion, holding that the MMMA contains the strict requirement that each set of 12 plants permitted under the MMMA to meet the needs of a specific qualifying patient must be kept in an enclosed, locked facility that can only be accessed by one person, that defendant had failed to comply with that requirement, and that defendant was therefore not entitled to invoke either the immunity provided by § 4(b) of the MMMA, MCL 333.26424(b), or the affirmative defense contained in § 8 of the MMMA, MCL 333.26428. Defendant appealed by leave granted. The Court of Appeals, GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ., affirmed, holding that defendant was not entitled to § 4 immunity because the MMMA did not authorize him to possess the marijuana plants that were being grown and cultivated for registered qualifying patients whom he was not connected to through the Michigan Department of Community Health (MDCH) registration process and that his failure to meet the requirements of § 4 immunity made him ineligible to raise the § 8 defense. 294 Mich App 219 (2011). Defendant 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. 492 Mich 871 (2012).

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

In order to receive immunity under § 4 of the MMMA, a registered primary caregiver may not possess more than 12 marijuana plants for each qualifying patient to whom he or she is connected through the state's registration process. However, a defendant need not establish the elements of § 4 immunity in order establish the elements of a § 8 defense.

1. 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. Section 4(b) of the MMMA limits the amount of marijuana that a registered primary caregiver may possess and still be entitled to § 4 immunity. In particular, § 4(b)(2) limits the number of marijuana plants that a registered primary caregiver may possess to 12 plants for each registered qualifying patient connected to the primary caregiver through the MDCH registration process. Section 4(a) concerns registered qualifying patients and contains similar limitations on the possession of marijuana plants. Thus, the Court of Appeals correctly held that only one of two people may possess a patient's 12 marijuana plants for purposes of immunity under §§ 4(a) and 4(b): the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's plants or the patient's registered primary caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants.

2. The MMMA incorporates the definition of possession of controlled substances used in longstanding Michigan law. The essential inquiry is whether there is a sufficient nexus between the defendant and the contraband, including whether the defendant exercised dominion and control over it. In this case, defendant exercised dominion and control over all the marijuana plants seized from the warehouse space that he leased, given that he was actively engaged in growing all the marijuana in the facility; used his horticultural knowledge and expertise to oversee, care for, and cultivate all the marijuana growing there; and had the ability to remove any or all of the plants given his unimpeded access to the warehouse space. For defendant, who was connected to two qualifying patients through the MDCH's registration process, § 4(b) permitted him to possess no more than 24 plants. Because defendant clearly possessed more plants than allowed under § 4 and possessed plants on behalf of patients with whom he was not connected through the state's registration process, defendant was not entitled to § 4 immunity.

3. Because § 4 limits both the amount of marijuana that any individual may possess and who may possess any marijuana plant, for a patient or caregiver to receive immunity under § 4, the enclosed, locked facility housing marijuana plants required by MCL 333.26423(c) and MCL 333.26424(b)(2) must be such that it allows only one person to possess the marijuana plants enclosed therein: the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's marijuana plants or the patient's registered primary caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants.

4. To establish the elements of the affirmative defense in § 8 of the MMMA, a defendant need not establish the elements of § 4. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) of the MMMA, MCL 333.26427(b), exists, the defendant is entitled to dismissal of criminal charges. In this case, although defendant reserved the right to assert a § 8 defense, he had not done so. Given that defendant had not yet proceeded to trial, he still had the opportunity to assert the defense in a motion to dismiss.

Court of Appeals' judgment affirmed with regard to immunity under § 4 of the MMMA, reversed to the extent that it held that defendant was precluded from asserting a defense under § 8 of the MMMA, and case remanded for further proceedings.

1. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY — POSSESSION OF MARIJUANA PLANTS.

The Michigan Medical Marihuana Act (MMMA) provides an exception to the Public Health Code's prohibition of the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions; § 4(b) of the act, MCL 333.26424(b), limits the amount of marijuana that a registered primary caregiver may possess and still be entitled to immunity under § 4; § 4(b)(2) limits the number of marijuana plants that a registered primary caregiver may possess to 12 plants for each registered qualifying patient connected to the primary caregiver through the state's registration process; § 4(a) of the act, MCL 333.26424(a), concerns registered qualifying patients and contains similar limitations on the possession of marijuana plants; only one of two people may possess a patient's 12 marijuana plants for purposes of immunity under §§ 4(a) and 4(b): the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's plants or the patient's registered primary

caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants.

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — POSSESSION.

The Michigan Medical Marihuana Act incorporates the definition of possession of controlled substances used in longstanding Michigan law; the essential inquiry is whether there is a sufficient nexus between the defendant and the contraband, including whether the defendant exercised dominion and control over it (MCL 333.26421 *et seq*.)

3. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY — MARIJUANA PLANTS — POSSESSION — ENCLOSED, LOCKED FACILITY.

For a patient or caregiver to receive immunity for possession of marijuana plants under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, the plants must be kept in an enclosed, locked facility; the facility must be such that it allows only one person to possess the marijuana plants enclosed therein: the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's marijuana plants or the patient's registered primary caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants (MCL 333.26423[c] and MCL 333.26424[b][2]).

4. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — AFFIRMATIVE DEFENSE.

To establish the elements of the affirmative defense in § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, a defendant need not establish the elements for entitlement to immunity under § 4 of the act, MCL 333.26424; as long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) of the act, MCL 333.26427(b), exists, the defendant is entitled to dismissal of criminal charges.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Gary A. Moore*, Assistant Prosecuting Attorney, for the people.

Bruce Alan Block PLC (by *Bruce A. Block*) for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jennifer Clark*, Assistant Attorney General, for the Attorney General.

Gerald A. Fisher for the Michigan Municipal League and the Public Corporation Law Section of the State Bar of Michigan.

David P. Cahill, *Dennis M. Hayes*, and *Rosemary G. Pánuco* for the Ann Arbor Medical Cannabis Guild, Inc.

YOUNG, C.J. In this prosecution for the manufacture of marijuana in violation of the Public Health Code, MCL 333.7401(1) and (2)(d), we must determine whether § 4 of the Michigan Medical Marihuana Act (MMMA)[1] provides a registered primary caregiver with immunity when growing marijuana collectively with other registered primary caregivers and registered qualifying patients. We hold that § 4 does not contemplate such collective action. As a result, defendant is not entitled to its grant of immunity from arrest, prosecution, or penalty, and we affirm the judgment of the Court of Appeals to the extent that it concluded that defendant was not entitled to § 4 immunity.

The MMMA authorizes "[t]he medical use of marihuana . . . to the extent that it is carried out in accordance with [its] provisions . . . ."[2] In order to receive immunity under § 4, a registered primary caregiver may not possess more than 12 marijuana plants for each qualifying patient to whom he is connected through the state's registration process. We agree with the Court of Appeals that defen-

[1] MCL 333.26424.

[2] MCL 333.26427(a).

dant exercised dominion and control over all the plants in the warehouse space that he leased, not merely the plants in which he claimed an ownership interest. Section 4 does not allow the collective action that defendant has undertaken because only one of two people may possess marijuana plants pursuant to §§ 4(a) and 4(b): a registered qualifying patient or the primary caregiver with whom the qualifying patient is connected through the registration process of the Michigan Department of Community Health (MDCH). Because defendant possessed more plants than § 4 allows and he possessed plants on behalf of patients with whom he was *not* connected through the MDCH's registration process, defendant is not entitled to § 4 immunity.

In addition to immunity under § 4, the MMMA created a second protection for primary caregivers of medical marijuana patients: an affirmative defense from prosecution under § 8.[3] The Court of Appeals erred when it concluded that defendant was not entitled to assert the § 8 affirmative defense solely because he did not satisfy the possession limits of § 4. Rather, in *People v Kolanek*, we held that a defendant need not establish the elements of § 4 immunity in order to establish the elements of the § 8 defense.[4] Accordingly, we reverse the Court of Appeals' judgment to the extent that it conflicts with *Kolanek*. However, it would be premature for this Court to determine whether defendant has in fact satisfied the elements of the § 8 defense because he has not formally asserted the § 8 defense in a motion to dismiss. Instead, he has simply reserved the right to raise a § 8 defense at a later time. Accordingly, we remand this case to the Kent Circuit Court for further proceedings consistent with this opinion and with *Kolanek*.

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[3] MCL 333.26428.

[4] *People v Kolanek*, 491 Mich 382, 403; 817 NW2d 528 (2012).

I. FACTS AND PROCEDURAL HISTORY

Pursuant to § 6 of the MMMA, a qualifying patient and his primary caregiver, if any, can apply to the MDCH for a registry identification card.[5] Defendant Ryan Bylsma did so and, at all relevant times for the purposes of this appeal, was registered with the MDCH as the primary caregiver for two registered qualifying medical marijuana patients. He leased commercial warehouse space in Grand Rapids and equipped that space both to grow marijuana for his two patients and to allow him to assist other qualifying patients and primary caregivers in growing marijuana.[6] A single lock secured the warehouse space, which was divided into three separate booths. The booths were latched but not locked, and defendant moved plants between the booths depending on the growing conditions that each plant required. Defendant spent 5 to 7 days each week at the warehouse space, where he oversaw and cared for the plants' growth. Sometimes, defendant's brother would help defendant care for and cultivate the plants. Defendant had access to the warehouse space at all times, although defense counsel acknowledged that two others also had access to the space.

In September 2011, a Grand Rapids city inspector forced entry into defendant's warehouse space after he noticed illegal electrical lines running along water lines.[7] The inspector notified Grand Rapids police of the marijuana that was growing there. The police executed a search warrant and seized approximately 86 to 88

[5] MCL 333.26426.

[6] Defendant received specialized training in growing and cultivating marijuana in California.

[7] Defendant has filed a separate pretrial motion to suppress this entry and subsequent seizure. However, that motion to suppress is not part of his appeal in this Court, which involves only his motion to dismiss.

plants.[8] Defendant claims ownership of 24 of the seized plants and asserts that the remaining plants belong to the other qualifying patients and registered caregivers whom he was assisting.

Defendant was charged with manufacturing marijuana in violation of the Public Health Code, MCL 333.7401(1) and (2)(d), subject to an enhanced sentence under MCL 333.7413 for a subsequent controlled substances offense.[9] Defendant moved to dismiss the charges under the MMMA's grant of immunity in § 4, claiming that he possessed 24 of the seized plants, that other registered qualifying patients and registered primary caregivers owned the remaining plants, and that all of them used the warehouse space as a common enclosed, locked facility. Defendant also reserved the right to raise the affirmative defense provided by § 8 of the MMMA. After conducting an evidentiary hearing, the Kent Circuit Court denied defendant's motion to dismiss, holding that § 4 of the MMMA requires each registered qualifying patient's plants to be "kept in an enclosed, locked facility that can only be accessed by one individual . . . ." Furthermore, the court held that because defendant had not complied with § 4, he was not entitled to raise an affirmative defense under § 8.

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[8] Although the evidentiary hearing testimony and Court of Appeals' decision reflect that the police seized 88 marijuana plants, there is other evidence in the record indicating the seizure of only 86 plants. Because this appeal does not turn on the difference between 86 and 88 plants, we need not be concerned with this outstanding factual question.

[9] The record indicates that defendant was convicted of a misdemeanor offense for using marijuana in 2005. In order to become a primary caregiver under the MMMA, a person must "[have] never been convicted of a felony involving illegal drugs." MCL 333.26423(g).

The Court of Appeals affirmed the circuit court's decision.[10] The panel determined that defendant possessed all the seized marijuana plants because "[h]e knew of the presence and character of the plants and he exercised dominion and control over them."[11] The panel explained that § 4 immunity only permits a registered primary caregiver to possess up to 12 plants for each qualifying patient to whom he is connected through the MDCH's registration process. The panel concluded that defendant was not entitled to § 4 immunity because the MMMA did not authorize him "to possess the marijuana plants that were being grown and cultivated for registered qualifying patients that he was not connected to through the MDCH's registration process[.]"[12] Finally, the panel held that defendant's failure to meet the requirements of § 4 immunity made him ineligible to raise the § 8 defense.[13]

This Court ordered oral argument on defendant's application for leave to appeal, asking that the parties address the following:

> (1) whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits qualifying patients and registered primary caregivers to possess and cultivate marijuana in a collective or cooperative and (2) whether, under the circumstances of this case, the defendant was entitled to immunity from prosecution for manufacturing marijuana under § 4 of the MMMA, MCL 333.26424, or entitled to dismissal of the manufacturing charge under the affirmative defense in § 8 of the act, MCL 333.26428.[14]

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[10] *People v Bylsma*, 294 Mich App 219; 816 NW2d 426 (2011).

[11] *Id.* at 230.

[12] *Id.* at 233. Because the issue whether § 4 requires each patient's 12 plants to be in a separate enclosed, locked facility was irrelevant to defendant's possession of those plants, the panel declined to reach the circuit court's resolution of that issue.

[13] *Id*. at 236.

[14] *People v Bylsma*, 492 Mich 871 (2012).

II. STANDARD OF REVIEW

We review for an abuse of discretion a circuit court's ruling on a motion to dismiss[15] but review de novo the circuit court's rulings on underlying questions regarding the interpretation of the MMMA,[16] which the people enacted by initiative in November 2008.[17] "[T]he intent of the electors governs" the interpretation of voter-initiated statutes,[18] just as the intent of the Legislature governs the interpretation of legislatively enacted statutes.[19] A statute's plain language provides " 'the most reliable evidence of . . . intent . . . .' "[20] "If the statutory language is unambiguous, . . . '[n]o further judicial construction is required or permitted' " because we must conclude that the electors " 'intended the meaning clearly expressed.' "[21]

A trial court's findings of fact may not be set aside unless they are clearly erroneous.[22] A ruling is clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[23]

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[15] See *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

[16] *Kolanek*, 491 Mich at 393.

[17] See Const 1963, art 2, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . .").

[18] *Kolanek*, 491 Mich at 405.

[19] *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[20] *Sun Valley Foods*, 460 Mich at 236, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[21] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012), quoting *Sun Valley Foods*, 460 Mich at 236 (alteration in original).

[22] MCR 2.613(C); *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988).

[23] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

III. ANALYSIS

A. THE MMMA

Michigan voters approved the MMMA in November 2008. As a result, 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.[24] This Court first interpreted the MMMA in *Kolanek* and emphasized that the MMMA exists only as an exception to, and not a displacement of, the Public Health Code:

> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]."[25]

In contrast to some other states' medical marijuana provisions, the MMMA does not explicitly provide for collective growing operations such as defendant's.[26] Nevertheless, defendant claims that his actions fall within the immunity provision contained in § 4 of the MMMA or, alternatively, within the affirmative-defense provision contained in § 8.

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[24] MCL 333.26427(a).

[25] *Kolanek*, 491 Mich at 394, quoting MCL 333.26427(a) (alteration in original).

[26] For instance, California specifically contemplates that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identifications cards" may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes . . . ." Cal Health & Safety Code 11362.775. Colorado goes one step further and specifically allows medical marijuana dispensaries to engage in common growing operations. Colo Rev Stat 12-43.3-403(2).

In *Kolanek*, we established the relationship between these two separate protections from prosecution for offenses involving marijuana. Because "the plain language of § 8 does not require compliance with the requirements of § 4," a defendant who is unable to satisfy the requirements of § 4 may nevertheless assert the § 8 affirmative defense.[27] Accordingly, we must examine these provisions independently.

Sections 4(a) and 4(b) contain parallel immunity provisions that apply, respectively, to registered qualifying patients and to registered primary caregivers. Defendant claims that § 4(b) entitles him to immunity as a registered primary caregiver.[28] Section 4(b) provides:

> A primary caregiver who has been issued and possesses a registry identification card 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 assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, *provided that the primary caregiver possesses an amount of marihuana that does not exceed*:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient *who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient*, *12 marihuana plants kept in an enclosed, locked facility*; and

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[27] *Kolanek*, 491 Mich at 401.

[28] Defendant does not claim to be a registered qualifying patient. Accordingly, he is not eligible for immunity under MCL 333.26424(a), which applies only to "[a] qualifying patient who has been issued and possesses a registry identification card . . . ."

> (3) any incidental amount of seeds, stalks, and unusable roots.[29]

The plain language of § 4(b) limits the amount of marijuana that a registered primary caregiver can possess and still be entitled to § 4 immunity. In particular, § 4(b)(2) limits the number of marijuana plants that a registered primary caregiver may possess to 12 plants for each registered qualifying patient connected to the primary caregiver through the MDCH's registration process. Specifically, a caregiver may possess those plants *only* if the registered qualifying patient "has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient . . . ."[30]

Section 4(a) applies to registered qualifying patients and contains similar limitations on the possession of marijuana plants: a registered qualifying patient may possess up to "12 marihuana plants kept in an enclosed, locked facility," but only if "the qualifying patient has *not* specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient . . . ."[31] Thus, the Court of Appeals correctly held that only one of two people may possess a patient's 12 marijuana plants for the purposes of immunity under §§ 4(a) and 4(b): "either the registered qualifying patient himself or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, or the qualifying patient's registered primary caregiver, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marijuana plants."[32]

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[29] MCL 333.26424(b) (emphasis added).

[30] MCL 333.26424(b)(2).

[31] MCL 333.26424(a) (emphasis added).

[32] *Bylsma*, 294 Mich App at 232.

Section 4(d) reiterates these limitations in articulating a presumption of "medical use":

> There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the . . . primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana *that does not exceed the amount allowed under this act*. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.[33]

In this case, application of § 4 turns on the amount of marijuana that defendant possessed. Sections 4(b)(2) and 4(d) limit defendant to 12 plants for each of the two patients with whom he is connected through the MDCH's registration process, a total of 24 plants. Defendant claims that he is entitled to § 4 immunity and that he possessed only the 24 plants that he is allowed to possess under the MMMA. The prosecution asserts that defendant possessed all the plants in the warehouse space, thereby exceeding the limitations established in § 4. In order to evaluate these claims, we must determine what constitutes "possession" within the meaning of the MMMA.

B. POSSESSION

Although possession of marijuana is one of nine activities that constitute the "medical use" of marijuana under § 3(e) of the MMMA,[34] the MMMA does not

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[33] MCL 333.26424(d) (emphasis added).

[34] Section 3(e), MCL 333.26423(e), defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia

itself define "possession." When a statute does not define a term at issue,

> [a]ll words and phrases shall be construed and understood 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.[35]

Longstanding Michigan law *has* provided a specific meaning regarding possession of controlled substances, and we hold that the MMMA incorporates this settled Michigan law regarding possession: a person possesses marijuana when he exercises dominion and control over it.

In *People v Wolfe*, this Court articulated basic principles regarding the possession of controlled substances:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. *People v Harper*, 365 Mich 494, 506-507; 113 NW2d 808 (1962), cert den 371 US 930 (1962); see also *People v Mumford*, 60 Mich App 279, 282-283; 230 NW2d 395 (1975). Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. *Id.* See also *People v Germaine*, 234 Mich 623, 627; 208 NW 705 (1926). Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Id.* See also *People v Williams*, 188 Mich App 54, 57; 469 NW2d 4 (1991).[36]

Furthermore, "a person's presence, by itself, at a loca-

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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."

[35] MCL 8.3a.

[36] *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992).

tion where drugs are found is insufficient to prove constructive possession."[37] Rather, the essential inquiry into possession is whether there is "a sufficient nexus between the defendant and the contraband,"[38] including whether " 'the defendant exercised a dominion and control over the substance.' "[39] In this case, the Court of Appeals held that this traditional definition of possession applies to the MMMA, and we agree with this holding.

Defendant claims that this Court should not apply caselaw regarding possession of controlled substances to MMMA cases because the possession of marijuana is no longer illegal per se under state law. However, we explained in *Kolanek* that "[t]he MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan."[40] Indeed, marijuana remains a schedule 1 controlled substance under the Public Health Code,[41] which defendant is charged with violating. The MMMA's limited exceptions for the medical use of marijuana do not provide a basis for this Court to redefine what constitutes the possession of marijuana; instead, these limited exceptions show that the drafters and voters intended that the MMMA to exist within the traditional framework regarding possession of marijuana and other controlled substances. Therefore, we reaffirm the traditional definition of possession as it relates to controlled substances and conclude that a person possesses controlled substances when he has dominion and control over them.

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[37] *Id.* at 520.

[38] *Id.* at 521.

[39] *Id.*, quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986).

[40] *Kolanek*, 491 Mich at 394

[41] MCL 333.7212(1)(c).

C. APPLICATION

In determining whether defendant possessed all the marijuana in the warehouse space that he leased, we must consider whether "a sufficient nexus" exists between the defendant and the marijuana, including whether he exercised " 'dominion and control' " over it.[42] The facts of this case leave no doubt that defendant exercised dominion and control over all the marijuana plants seized from the warehouse space that he leased. The Court of Appeals explained:

> Defendant admitted that he leased Unit 15E for the purpose of growing marijuana plants, and he was at Unit 15E five to seven days a week. The 88 plants were distributed among three grow booths, and although the grow booths were latched, defendant testified that they were not locked. There was no evidence that defendant was denied access to any of the marijuana plants. Under the circumstances, defendant clearly possessed all 88 marijuana plants. He knew of the presence and character of the plants and he exercised dominion and control over them.[43]

We agree with the Court of Appeals' conclusion that these circumstances establish defendant's possession of all the seized marijuana plants. Defendant was actively engaged in growing all the marijuana in the facility and used his horticultural knowledge and expertise to oversee, care for, and cultivate all the marijuana growing there. He had the ability to remove any or all of the plants, given his unimpeded access to the warehouse space.

As stated, § 4(b) allows defendant to possess up to 12 marijuana plants for each qualifying patient to whom he is connected through the MDCH's registration pro-

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[42] *Wolfe*, 440 Mich at 521, quoting *Disla*, 805 F2d at 1350.

[43] *Bylsma*, 294 Mich App at 230. Whether police seized 86 or 88 plants is wholly immaterial when § 4(b) of the MMMA allows defendant to possess no more than 24 plants.

cess. For defendant, who was connected to two qualifying patients through the MDCH's registration process, § 4(b) permitted him to possess no more than 24 plants. He clearly exceeded this amount by possessing all the marijuana in the warehouse space.

Defendant's possession of marijuana that purportedly belonged to registered patients with whom defendant was *not* connected through the MDCH's registration process further illustrates both why defendant is not entitled to immunity under § 4 and why § 4 does not contemplate the collective growing operation that defendant undertook. When considered together, §§ 4(a) and 4(b) only allow one of two people to possess a patient's 12 marijuana plants: "either the registered qualifying patient himself or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, or the qualifying patient's registered primary caregiver, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marijuana plants."[44] Defendant admitted that most of the plants in his warehouse space were for patients other than those with whom he was connected through the MDCH's registration process. By growing marijuana for those other patients, defendant possessed more plants than he was permitted to possess under § 4 of the MMMA.

Nevertheless, defendant asserts that the definition of "enclosed, locked facility" in § 3(c) of the MMMA allows multiple patients and caregivers to combine their marijuana into a single enclosed, locked facility as long as only registered qualifying patients and registered primary caregivers are allowed access to the enclosed,

[44] *Bylsma*, 294 Mich App at 232.

locked facility.[45] As stated, however, § 4 limits both the *amount* of marijuana that any individual registered qualifying patient or registered primary caregiver may possess and *who* may possess any marijuana plant. Thus, for a patient or caregiver to receive immunity under § 4, the "enclosed, locked facility" housing marijuana plants must be such that it allows only one person to possess the marijuana plants enclosed therein—"either the registered qualifying patient himself or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, or the qualifying patient's registered primary caregiver, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marijuana plants."[46]

Defendant also claims that § 8 entitles him to dismissal of the charges. While defendant's motion to dismiss expressly reserved his right to raise a § 8 defense, defendant has not yet formally done so and, moreover, the lower courts' subsequent rulings barred him from raising a defense under § 8 of the MMMA. We reverse in part the lower courts' rulings that defendant is necessarily barred even from raising a § 8 defense solely because he failed to satisfy the elements of § 4 immunity. In making their rulings, the lower courts did not have the benefit of this Court's decision in *Kolanek*, which held:

> [T]o establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4. Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative

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[45] Section 3(c) of the MMMA, MCL 333.26423(c), defines "enclosed, locked facility" as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient."

[46] *Bylsma*, 294 Mich App at 232.

> defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) [of the MMMA, MCL 333.26427(b)] exists, that defendant is entitled to the dismissal of criminal charges.[47]

Accordingly, pursuant to *Kolanek*, and contrary to the lower courts' rulings, defendant need not satisfy the possession limits contained in § 4(b) in order to satisfy the elements of the § 8 affirmative defense.

Both parties ask this Court to rule on the substantive merits of defendant's § 8 defense. However, in *Kolanek*, we also stated that the MMMA requires a defendant to follow a particular procedure in asserting the § 8 affirmative defense:

> Section 8(b) provides that a person "*may* assert [this defense] in a motion to dismiss, and the charges *shall be dismissed following an evidentiary hearing* where the person shows the elements listed in subsection (a)." [MCL 333.26428(b).] This scheme makes clear that the burden of proof rests with the defendant, that the defendant "may" move to dismiss the charges by asserting the defense in a motion to dismiss, and that dismissal "shall" follow an evidentiary hearing. This last requirement is significant because it indicates that the § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing.[48]

In this case, defendant's motion to dismiss only asserted a claim for § 4 immunity, and the subsequent evidentiary hearing focused on the elements of § 4 immunity. Although defendant reserved the right to assert the § 8 affirmative defense, he has not yet asserted the defense in a motion to dismiss, as *Kolanek* requires. Because defendant has not yet proceeded to trial, he still has the opportunity to assert the defense in

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[47] *Kolanek*, 491 Mich at 403.

[48] *Id.* at 410-411 (first alteration in original).

a motion to dismiss. As a consequence, it would be premature for this Court to decide whether he satisfies the substantive elements of the § 8 defense.

IV. CONCLUSION

We affirm the judgment of the Court of Appeals in part, reverse it in part, and remand this case to the Kent Circuit Court for further proceedings. The Court of Appeals correctly held that defendant is not entitled to immunity under § 4(b) of the MMMA, MCL 333.26424(b). Section 4(b) allows a registered primary caregiver to possess up to 12 plants for each qualifying patient with whom he is connected through the state's registration process. A person possesses a controlled substance when he has the ability to exercise dominion and control over that controlled substance, and the Court of Appeals correctly determined that defendant exercised dominion and control over a quantity of marijuana plants in excess of that allowed pursuant to § 4(b).

We reverse the judgment of the Court of Appeals to the extent that it held, contrary to our decision in *Kolanek*, that defendant is necessarily precluded from asserting an affirmative defense pursuant to § 8 of the MMMA, MCL 333.26428, solely because he fails to satisfy the elements of § 4 immunity. Rather, § 8 contains independent elements that do not turn on the requirements of § 4 immunity. Because defendant has not yet asserted the § 8 affirmative defense in a motion to dismiss, as *Kolanek* requires, it is premature for us to decide whether he is entitled to the defense. Rather, we remand this case to the Kent Circuit Court for further proceedings consistent with this opinion and with *Kolanek*.

CAVANAGH, MARILYN KELLY, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

PEOPLE v TRAKHTENBERG

Docket No. 143386. Argued October 10, 2012 (Calendar No. 2). Decided December 21, 2012.

Jacob Trakhtenberg was convicted of three counts of second-degree criminal sexual conduct after a bench trial in the Oakland Circuit Court, Deborah G. Tyner, J. The charges stemmed from allegations of sexual contact made by defendant's then 8-year-old daughter. The Court of Appeals, ZAHRA, P.J., and BANDSTRA and OWENS, JJ., affirmed defendant's convictions in an unpublished opinion per curiam, issued March 27, 2007 (Docket No. 268416). The Supreme Court denied defendant's application for leave to appeal. 480 Mich 856 (2007). Defendant then moved for relief from the judgment under subchapter 6.500 of the Michigan Court Rules, asserting that he was entitled to a new trial because he was denied the effective assistance of trial and appellate counsel and, alternatively, that newly discovered evidence warranted a new trial. The trial court, Daniel P. O'Brien, J., denied the motion. The Court of Appeals denied defendant's application for leave to appeal in an unpublished order, entered March 20, 2009 (Docket No. 290336). In lieu of granting leave to appeal, the Supreme Court retained jurisdiction and remanded the case to the Court of Appeals for consideration as on leave granted and ordered the Court of Appeals to remand the case to the trial court to conduct an evidentiary hearing in order to evaluate defendant's claims. 485 Mich 1132 (2010). Meanwhile, defendant had also brought a malpractice claim against his trial counsel in the Oakland Circuit Court. The court, Shalina D. Kumar, J., granted summary disposition in favor of defendant's trial counsel. The Court of Appeals, MURRAY, P.J., and MARKEY and BORRELLO, JJ., affirmed that decision. *Trakhtenberg v McKelvey*, unpublished opinion per curiam, issued October 27, 2009 (Docket No. 285247). Defendant sought leave to appeal in the Supreme Court, which ordered that the application be held in abeyance pending resolution of the criminal case. *Trakhtenberg v McKelvey*, 780 NW2d 828 (Mich, 2010). Following the evidentiary hearing on remand in the criminal case, the trial court, Daniel P. O'Brien, J., ruled that defense counsel had been ineffective and that defendant was entitled to a new trial. The Court of Appeals, DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.,

reversed in an unpublished opinion per curiam, issued May 19, 2011 (Docket No. 290336). The Court of Appeals reasoned, in part, that collateral estoppel precluded it from reviewing the performance of defendant's trial counsel because in the malpractice case the Court of Appeals had held that defendant's trial counsel's performance fell within the "attorney judgment" rule. The Supreme Court granted defendant's application for leave to appeal. 490 Mich 927 (2011).

In an opinion by Justice CAVANAGH, joined by Justices MARILYN KELLY, MARKMAN, and MARY BETH KELLY, the Supreme Court *held*:

Collateral estoppel may not be applied on the basis of a prior civil judgment holding that defense counsel's performance did not amount to malpractice in order to preclude review of a criminal defendant's claim of ineffective assistance of counsel.

1. Generally, the proponent of the application of collateral estoppel must show that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel. In determining whether the party opposing collateral estoppel had a full and fair opportunity to adjudicate his or her claim, a court must take into consideration the choice of forum and the incentive to litigate. Cross-over estoppel occurs when the application of collateral estoppel crosses over the line between civil and criminal proceedings. Although some cases have suggested that collateral estoppel may be applied when an issue adjudicated in a prior civil proceeding is claimed to be precluded in a subsequent criminal proceeding, those cases were distinguishable because, in this case, it was the prosecution and not defendant that sought to apply the doctrine. In this case, the Court of Appeals erred by applying collateral estoppel because defendant did not have a full and fair opportunity to litigate his claim in the malpractice proceeding. Defendant's interests when pursuing the malpractice claim differed from his interests in asserting his constitutional right to the effective assistance of counsel. In the civil case, defendant sought monetary gain, and in the criminal case he sought protection of his liberty. Because he had a different and, most likely, stronger incentive to litigate counsel's errors in the criminal proceeding, the prior malpractice case did not afford defendant a full and fair opportunity to litigate his claim of ineffective assistance of counsel.

2. Both the Michigan and United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. In order to obtain a new trial, a defendant must show

that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. But a court cannot insulate review of counsel's performance by calling it trial strategy. The court must determine whether defense counsel made the strategic choices after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In this case, defense counsel failed to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to the defense, including her failure to identify the factual predicate of each of the five charged counts of criminal sexual conduct, her failure to consult with key witnesses, and her failure to sufficiently develop the defense presented at trial. Accordingly, her representation fell below an objective standard of reasonableness. Defendant was unfairly prejudiced by counsel's deficient performance. The key evidence against defendant was the complainant's testimony. Therefore, the reliability of defendant's convictions was undermined by defense counsel's failure to introduce impeachment evidence and evidence that corroborated defendant's testimony that defense counsel was unaware of because she decided to forgo those investigations. Had the impeachment evidence and the evidence that corroborated defendant's testimony been introduced, there was a reasonable probability that the result of the trial would have been different.

Court of Appeals' judgment reversed; case remanded to the trial court for a new trial.

Chief Justice YOUNG, joined by Justice ZAHRA, dissenting, agreed that collateral estoppel did not bar review of defendant's claims of error, but disagreed with the majority's analysis of that issue and disagreed with the majority's conclusion that defendant did not receive effective assistance of counsel. Accordingly, he would have affirmed the result reached by the Court of Appeals. Instead of examining defendant's interests in litigating his malpractice claim as the majority did, Chief Justice YOUNG would have considered the elements required to apply collateral estoppel. In this case, the first element necessary to apply collateral estoppel was not satisfied because defendant's claim of ineffective assistance of counsel was not actually litigated and determined by a valid and final judgment in the malpractice action. A party asserting malpractice

must establish that, but for the negligence, the outcome of the case would have been favorable to the plaintiff. However, a criminal defendant may be entitled to a new trial on the basis of ineffective assistance of counsel even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Because a legal malpractice action requires a higher threshold of prejudice than a claim of ineffective assistance of counsel, a defendant can establish ineffective assistance of counsel even if he or she cannot establish legal malpractice. Nonetheless, the result reached by the Court of Appeals should have been affirmed because defendant failed to establish that counsel's performance was outside the wide range of professionally competent assistance leading to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The lower courts did not err by determining that defense counsel's trial strategy was objectively reasonable, and the Court of Appeals correctly reversed as an abuse of discretion the trial court's decision to grant defendant a new trial, the sole basis for which was that counsel did not proffer a defense focusing on the character of the complainant's mother. Moreover, even if counsel was deficient for failing to conduct particular investigations, adequately impeach the complainant, or introduce potentially corroborative testimony, defendant could not satisfy the prejudice requirement for a claim of ineffective assistance of counsel.

Justice HATHAWAY did not participate because of a professional relationship with a member of a law firm involved in the matter.

1. ESTOPPEL — COLLATERAL ESTOPPEL — ELEMENTS — FULL AND FAIR OPPORTUNITY TO ADJUDICATE THE CLAIM — CROSS-OVER ESTOPPEL — MALPRACTICE — INEFFECTIVE ASSISTANCE OF COUNSEL.

Generally, the proponent of the application of collateral estoppel must show that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel; in determining whether the party opposing collateral estoppel had a full and fair opportunity to adjudicate his or her claim, a court must take into consideration the choice of forum and the incentive to litigate; collateral estoppel may not be applied in a subsequent criminal proceeding on the basis of a prior civil judgment holding that defense counsel's performance did not amount to malpractice in order to preclude review of a criminal defendant's claim of ineffective assistance of counsel.

2. CONSTITUTIONAL LAW — EFFECTIVE ASSISTANCE OF COUNSEL — ELEMENTS — OBJECTIVE STANDARD OF REASONABLENESS — TRIAL STRATEGY — LIMITATIONS ON INVESTIGATION.

Both the Michigan and United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense; in order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different; in examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy, but a court cannot insulate review of counsel's performance by calling it trial strategy; the court must determine whether defense counsel made the strategic choices after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation (US Const, Am VI; Const 1963, art 1, § 20).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

Robyn B. Frankel for defendant.

CAVANAGH, J. This case requires us to determine whether collateral estoppel may be applied to preclude review of a criminal defendant's claim of ineffective assistance of counsel when a prior civil judgment held that defense counsel's performance did not amount to malpractice. We hold that collateral estoppel may not be applied in these circumstances because defendant did not have a full and fair opportunity to litigate his ineffective-assistance-of-counsel claim, contrary to the requirements of the doctrine itself.

Given our conclusion that collateral estoppel is inapplicable, we must also determine whether defendant

was deprived of his right to the effective assistance of counsel under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We hold that defense counsel's performance was constitutionally deficient because she failed to exercise reasonable professional judgment when she decided to forgo any investigation of the case before settling on a defense strategy. That deficiency prejudiced defendant by undermining the reliability of the outcome of his trial, which rested solely on the credibility of the complainant and defendant. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for a new trial.

I. FACTS AND PROCEEDINGS

Defendant was charged with five counts of second-degree criminal sexual conduct (CSC-II) for allegedly touching the genitals of his eight-year-old daughter and forcing her to touch his genitals. During the bench trial, the complainant testified that defendant touched her three or four times (once or twice while she was in defendant's bed at night) and would lower her hand to his genitals. Lilya Tetarly, the complainant's mother and defendant's ex-wife, testified that in 2004 the complainant developed yeast infections. On direct examination, Tetarly denied asking defendant to treat the yeast infections with ointment and stated that the complainant became upset when she had to go to defendant's home. Defense counsel did not cross-examine Tetarly. As the only defense witness, defendant testified that he never forced the complainant to touch his genitals and that he touched the complainant's genitals six times to apply medication at Tetarly's insistence after a heated argument over whether it was appropriate for him to apply the ointment. Defendant

was convicted of three counts of CSC-II. Two counts were based on evidence that defendant touched the complainant and one count was based on evidence that defendant forced her to touch his genitals. After the parties' closing arguments, the trial court commented that "very little's clear to me in this case, starting with what the allegations are that go to each count."

On direct appeal, defendant argued that defense counsel was ineffective for failing to impeach Tetarly with evidence of bias pertaining to their divorce four years earlier. Defendant argued that Tetarly had attempted to hit him with her car, which was supported by a police report, and assaulted him while he was driving, which resulted in Tetarly's arrest on domestic violence charges. The Court of Appeals denied defendant's motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973),[1] and held that defense counsel was not ineffective for failing to impeach Tetarly because the record lacked evidence to show that she was still upset over the divorce. *People v Trakhtenberg*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268416). Defendant applied for leave to appeal in this Court, which was denied. *People v Trakhtenberg*, 480 Mich 856 (2007).

Defendant subsequently filed a legal malpractice claim against defense counsel, which the trial court dismissed upon defense counsel's motion for summary disposition. The Court of Appeals affirmed, holding that defense counsel's performance fell within the "attorney

[1] The Court also denied defendant's subsequent motion to hold the appeal in abeyance to give defendant more time to verify additional grounds for bias—namely, that Tetarly had previously made false allegations that defendant's prior wife sexually abused defendant's son from that marriage in order for defendant to gain an advantage in the then pending custody dispute over defendant's son, HT.

judgment rule." *Trakhtenberg v McKelvy*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 285247).[2] See, also, *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). Meanwhile, in his criminal case, defendant filed a motion for relief from judgment under MCR 6.508(D)(3), claiming that he was entitled to a new trial because he was denied the effective assistance of trial and appellate counsel and, alternatively, that newly discovered evidence warranted a new trial. The trial court denied the motion under MCR 6.508(D)(3)(b), and the Court of Appeals denied defendant leave to appeal. *People v Trakhtenberg*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 290336). In lieu of granting leave to appeal, this Court retained jurisdiction and remanded the case to the Court of Appeals for consideration as on leave granted, and the Court of Appeals was ordered to remand the case to the trial court to conduct a *Ginther* hearing in order to evaluate defendant's claims. *People v Trakhtenberg*, 485 Mich 1132 (2010).

During the course of the *Ginther* hearing, voluminous testimony was taken. Tetarly admitted that she was dissatisfied with the divorce judgment and had made negative comments about defendant in front of the complainant. And, for the first time, Tetarly disclosed that before reporting the complainant's allegations of abuse to the authorities, she brought the complainant to a youth pastor. Tetarly stated that she then brought the complainant to CARE House, which provides intervention and treatment services for child victims of abuse, where Amy Allen, a CARE House

[2] Defendant sought leave to appeal in this Court. We ordered that the application be held in abeyance pending a decision in this criminal case. *Trakhtenberg v McKelvy*, 780 NW2d 828 (Mich, 2010).

employee, performed a forensic interview, during which the complainant alleged the abuse. The responding detective's police report states that the detective asked Tetarly to directly ask the complainant whether defendant had ever touched her "private parts" with his fingers. That questioning eventually led to the complainant's second formal allegation of abuse.

Allen, who was unaware that the complainant had spoken to others about the abuse, testified that it is important to know whether the child has spoken to anyone else in order to conduct a proper forensic interview because, as a result of repeated interviewing, a child might start to mistakenly believe that something happened to him or her. Additionally, Dr. Katherine Okla, a clinical psychologist specializing in sexual abuse, noted her concern regarding the complainant's knowledge of her mother's hatred of defendant and explained that Tetarly's leading and suggestive questions and the repeated questioning of the complainant (especially in a therapeutic rather than forensic setting) could have tainted the child's recollection of the events surrounding the alleged abuse. Defendant testified that he had requested that defense counsel consult with numerous witnesses including Allen and HT, who was defendant's son.

Defense counsel testified that her defense theory was two-fold: she would (1) impeach the complainant's trial testimony with an inconsistent statement regarding the number of times defendant made her touch him and (2) show that defendant lacked the requisite intent of sexual gratification to be convicted of CSC-II.[3] Addition-

[3] MCL 750.520a(q) defines "sexual contact," in relevant part, as the "intentional touching 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, [or] done for a sexual purpose . . . ."

ally, she advised defendant to waive his preliminary examination, and she did not demand discovery, obtain Allen's notes, or interview any witnesses because she felt that any further information was irrelevant to the defense theories. Defense counsel testified that she was unaware of the complainant's continued therapy, her feelings toward defendant, her testimony in the civil trial that defendant applied medication to her vagina, and her meeting with a youth pastor.

Following the hearing, the trial court ruled that defense counsel was ineffective and defendant was entitled to a new trial. The Court of Appeals reversed, reasoning, in part, that collateral estoppel precluded the Court from reviewing the performance of defense counsel because in defendant's legal malpractice case, the Court had held that defense counsel's performance fell within the "attorney judgment rule." The Court further held that counsel was not ineffective on the basis of the claims of error left for its review. *People v Trakhtenberg*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 290336). Defendant sought leave to appeal in this Court, which we granted. *People v Trakhtenberg*, 490 Mich 927 (2011).

II. STANDARD OF REVIEW

This Court reviews de novo the application of a legal doctrine, including collateral estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

III. ANALYSIS

A. COLLATERAL ESTOPPEL

Generally, the proponent of the application of collateral estoppel must show "that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes*, 481 Mich at 585.[4] When the application of collateral estoppel "crosses over" the line between a criminal and a civil proceeding, it has aptly been termed "cross-over estoppel."[5] Several Court of Appeals opinions have held that a criminal defense attorney may rely on the doctrine of collateral estoppel in order to avoid malpractice liability when a full and fair determination was made in a previous criminal action that the same client had received effective assistance of counsel. See, e.g., *Barrow v Pritchard*, 235 Mich App 478, 484-485; 597 NW2d 853 (1999). Yet we must hesitate to apply collateral estoppel in the reverse situation—when the government seeks to apply collateral estoppel to preclude a *criminal* defendant's claim of ineffective assistance of counsel in light of a prior *civil* judgment that defense counsel did not commit malpractice.

The prosecution argues that this Court approved the application of collateral estoppel in the civil-to-criminal context in *People v Gates*, 434 Mich 146; 452 NW2d 627 (1990). *Gates* stated that "[c]ases involving 'cross-over estoppel,' where an issue adjudicated in a civil proceed-

[4] While the dissent is critical of the majority's analysis, we believe that our analysis is analytically sound and well supported.

[5] See Brenner, *"Crossing-over:" The issue-preclusive effects of a civil/criminal adjudication upon a proceeding of the opposite character*, 7 N Ill U L Rev 141 (1987).

ing is claimed to be precluded in a subsequent criminal proceeding, or vice versa, are relatively recent and rare." *Id.* at 155. And further, the United States Supreme Court has stated that "the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character." *Yates v United States*, 354 US 298, 335; 77 S Ct 1064; 1 L Ed 2d 1356 (1957), overruled on other grounds by *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978). It is unnecessary to discuss the relevant holdings of these cases, however, because the prosecution and the Court of Appeals have ignored a fundamental aspect of this case that distinguishes it from *Gates* and *Yates*. In this case, defendant is not the proponent of the application of collateral estoppel; to the contrary, the prosecution asked the Court to apply the doctrine to estop the Court's full review of defendant's claim that he received ineffective assistance of counsel.[6]

In the present case, we must consider the goal of the doctrine of collateral estoppel along with the elements of the doctrine to determine whether the Court of Appeals erred when it precluded review of many of defendant's allegations concerning the ways in which defense counsel erred. The doctrine of collateral estoppel has compelling underpinnings because it "relieve[s]

[6] Similarly, the Court of Appeals erred when it characterized the application of collateral estoppel as "defensive." In determining whether defendant's constitutional right to the effective assistance of counsel was denied, there cannot be an "offense" and a "defense," as the traditional application of collateral estoppel presumes. The prosecution is not in a position where it must somehow "defend" itself; rather, if we must fit this case into the traditional framework of collateral estoppel, it is clear that defendant is put on the defensive. It is true that, ultimately, defendant is challenging his conviction and asking for a new trial, yet he does not do so by attacking the prosecution. He is merely protecting his constitutional right to an effective attorney.

parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980), citing *Montana v United States*, 440 US 147, 153-154; 99 S Ct 970; 59 L Ed 2d 210 (1979). Further, collateral estoppel "also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 US at 96, citing *Younger v Harris*, 401 US 37, 43-45; 91 S Ct 746; 27 L Ed 2d 669 (1971). That said, collateral estoppel "must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a *full and fair* adjudication of the issues involved in their claims." *Storey v Meijer, Inc*, 431 Mich 368, 372; 429 NW2d 169 (1988) (emphasis added). In determining whether the party opposing collateral estoppel has had a "full and fair" opportunity to adjudicate his or her claim, a court must take into consideration the

> choice of forum and incentive to litigate . . . . [A]s so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity. [*Blonder-Tongue Laboratories, Inc v Univ of Illinois Foundation*, 402 US 313, 333-334; 91 S Ct 1434; 28 L Ed 2d 788 (1971).]

See, also, *Storey*, 431 Mich at 373 (stating that "[t]he extent to which the doctrine is applied is also dependent upon the nature of the forum in which the initial determination was rendered").

We hold that the Court of Appeals erred when it applied collateral estoppel to preclude its review of defendant's ineffective-assistance-of-counsel claim be-

cause defendant did not have a full and fair opportunity to litigate his claim in the malpractice proceeding. Considering the nature of the forum in which defendant's allegations concerning counsel's errors were initially rejected, it is clear that defendant's interest when pursuing his civil malpractice claim differed from his interest in asserting his constitutional right to effective counsel in the criminal proceeding. Indeed, defendant sought monetary gain in the malpractice case, whereas in his criminal case he seeks protection of a constitutional right and his liberty. Accordingly, because defendant has a different and most likely stronger incentive to litigate counsel's errors in the criminal proceeding, the prior civil litigation concerning counsel's alleged claims of error did not afford defendant a full and fair opportunity to litigate his ineffective-assistance-of-counsel claim.

Because we conclude that the Court of Appeals erred when it applied collateral estoppel, which precluded a full review of defense counsel's alleged errors, we must now decide the merits of defendant's ineffective-assistance-of-counsel claim on the basis of a full review of the evidence revealed at the evidentiary hearing.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *Armstrong*, 490 Mich at 290; see, also, *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994)

(adopting the federal constitutional standard for an ineffective-assistance-of-counsel claim as set forth in *Strickland*).

1. DEFENSE COUNSEL'S PERFORMANCE

In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. *Strickland*, 466 US at 689. Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation," and any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-691. Counsel always retains the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. In this case, the trial court and the Court of Appeals erred by failing to recognize that defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct any investigation of the case in the first instance.[7] Accordingly, no purported limitation on her investigation of the case can be justified as reasonable trial

[7] Instead, the trial court framed defense counsel's error as a decision to pursue the " 'no sex gratification/denial' defense and not the " 'sinister or bad mom defense' " (referring to defense counsel's failure to impeach Tetarly). The Court of Appeals reversed the trial court's ruling that counsel was ineffective for failing to pursue the impeachment defense in part because this decision was part of a reasonable trial strategy. The trial court's erroneous focus on whether these "defenses" were properly pursued led the Court of Appeals to justify defense counsel's decision to pursue only one defense as a matter of trial tactics, which are not reviewable in hindsight.

strategy.[8] We hold that because defense counsel failed to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to the defense, her representation fell below an objective standard of reasonableness.

First, defense counsel failed to identify the factual predicate of each of the five charged counts of CSC-II. Although the charging documents lacked specific factual allegations, defense counsel advised defendant to waive his preliminary examination and she failed to file a motion for a bill of particulars. As a result, in *this* case defense counsel was left without a competent understanding of the prosecution's theories of guilt. In fact, Jerome Sabbota, an expert in criminal trial practice and defending cases involving allegations of criminal sexual conduct, testified at defendant's evidentiary hearing that without either a preliminary examination or a bill of particulars, there was no way to develop a defense in this case.

Second, defense counsel failed to consult with key witnesses who would have revealed weaknesses of the prosecution's case. Particularly, counsel failed to interview Allen, despite the fact that the prosecution in-

[8] Contrary to the dissent's view, our conclusion in this case that defense counsel's performance was constitutionally deficient does not equate with judging counsel's strategy in hindsight. The dissent is correct that *Strickland* counsels against a hindsight review of defense counsel's choices and that reviewing courts should "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 US at 689. However, the dissent misinterprets our characterization of defense counsel's errors in this case. We do not hold that counsel's performance was objectively unreasonable because her chosen strategy was unsuccessful or that another strategy would have been more successful. Rather, we hold that defense counsel may not use trial strategy to insulate trial decisions if counsel cannot provide a reasonable basis for the chosen strategy, particularly where, as here, the strategy is chosen before conducting any reasonable investigation.

cluded her on its witness list. Moreover, given the exposure the complainant had to multiple interviews and leading questions, a reasonable attorney would have consulted an expert, such as Okla, to testify regarding the propriety of how the complainant made her allegations. Yet the only expert defense counsel consulted was John Neumann, an expert in sex offender evaluation.[9] Perhaps most importantly, defense counsel stated at the *Ginther* hearing that she chose not to consult any witnesses or obtain additional evidence *before* she decided to pursue a defense strategy for which she concluded that no further investigation was necessary.

Lastly, defense counsel's unreasonably inadequate investigation contributed to her failure to sufficiently develop the defense that was actually presented at trial. This case turned solely on credibility—the ultimate question at trial was whether the complainant's allegations of sexual abuse were truthful or, conversely, if her allegations were the result of improper motivations and interviewing techniques. Counsel's failure to cross-examine Tetarly and adequately impeach the complainant was a result of counsel's unreasonable decision to forgo any investigation in the case. In fact, counsel admitted that had she discovered the pertinent information, she would have (1) impeached the complainant with her additional inconsistent statements regarding the number of times defendant allegedly forced her to

[9] As the United States Court of Appeals for the Second Circuit has explained, 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 . . . .' " *Eze v Senkowski*, 321 F3d 110, 128 (CA 2, 2003), quoting *Pavel v Hollins*, 261 F3d 210, 225-226 (CA 2, 2001) (emphasis added).

touch him, (2) impeached the complainant and Tetarly regarding the complainant's impression that defendant did not love her, and (3) consulted experts and Allen regarding proper forensic-interviewing protocol. Also, counsel failed to employ reasonable professional judgment when deciding not to interview HT, who was also listed on the prosecution's witness list. HT was intimately familiar with the relationship between defendant and the complainant. Thus, an attorney exercising reasonable professional judgment would have at least spoken to HT in an attempt to determine if he could provide testimonial evidence that might have corroborated defendant's testimony.

Therefore, we hold that defense counsel's performance was constitutionally deficient because a sound defense strategy cannot follow an incomplete investigation of the case when the decision to forgo further investigation was not supported by reasonable professional judgment. We must now turn to the question whether defendant was prejudiced by the deficiency.[10]

2. PREJUDICE[11]

In addition to proving that defense counsel's representation was constitutionally deficient, defendant

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[10] Additionally, to the extent that defendant cannot show that he was entitled to a new trial in light of newly discovered evidence under *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), because he or defense counsel could, "using reasonable diligence, have discovered and produced the evidence at trial," defense counsel was further ineffective for not having employed such reasonable diligence. (Citation and quotation marks omitted.)

[11] Although the trial court did not expressly find that defendant was prejudiced by defense counsel's errors and the Court of Appeals failed to reach this issue, in the interests of judicial economy, we find it necessary to consider this issue in the present appeal. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994), and MCR 7.316(A).

must show that "but for counsel's deficient performance, a different result would have been reasonably probable." *Armstrong*, 490 Mich at 290, citing *Strickland*, 466 US at 694-696. A defendant may meet this burden "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."[12] *Strickland*, 466 US at 694. And "[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." *Brown v Smith*, 551 F3d 424, 434-435 (CA 6, 2008), citing *Strickland*, 466 US at 696.

In the present case, the key evidence that the prosecution asserted against defendant was the complainant's testimony; therefore, the reliability of defendant's convictions was undermined by defense counsel's failure to introduce impeachment evidence and evidence that corroborated defendant's testimony. The defense strategy not to present the trier of fact with vital evidence was the result of counsel's failure to employ

[12] The dissent admits in its discussion concerning whether collateral estoppel was properly applied in this case that defendant's burden to show that he was prejudiced by defense counsel's errors is less than the preponderance-of-the-evidence standard. However, the dissent nonetheless appears to hold defendant to a higher burden by concluding that, despite the fact that this case was decided solely on the credibility of defendant and the complainant and the trier of fact was deprived of a substantial amount of relevant information, there was not *at least* a reasonable likelihood that the outcome of the trial would have been different but for counsel's deficient performance. Indeed, defendant's trial concluded in less than one hour, whereas it took the trial court more than five days to collect testimony during defendant's *Ginther* hearing. Additionally, we note that our holding today does not resolve the question of guilt or innocence. Rather, we hold only that defendant is entitled to a new trial so that his guilt or innocence may be properly determined, as required by the Michigan and United States Constitutions.

reasonable professional judgment, which limited counsel's knowledge of the existence and importance of that evidence.

Regarding the impeachment evidence, while it is true that defense counsel cross-examined the complainant, the omissions in that cross-examination, coupled with defense counsel's failure to cross-examine Tetarly, deprived the trier of fact of the necessary and available evidence that discredited the complainant's allegations. Similarly, in *Armstrong*, 490 Mich at 292, this Court held that, although the complainant was cross-examined by defense counsel, "a reasonable probability exists that this additional attack on the complainant's credibility [the introduction of cell phone records] would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt."[13] Had counsel exercised reasonable judgment when investigating the case, she would have been able to impeach the complainant's testimony with the complainant's additional inconsistent statements and with expert testimony that discredited the propriety of the complainant's accusations. Further, defense counsel's failure to impeach Tetarly left the record completely devoid of any motivation that Tetarly may have had to distort and encourage the complainant's allegations. Without this evidence, "in a case that essentially boil[s] down to whether the complainant's allegations of [criminal sexual conduct] [are] true," we have no doubt that the

[13] It is true that the additional impeachment evidence available to the defense counsel in *Armstrong* was documentary evidence and, in this case, the additional evidence was testimonial. But here, defense counsel's cross-examination of the complainant was, without justification, substantially less discrediting than the defense counsel's cross-examination of the complainant in *Armstrong*. This increased the need for the introduction of *any* available impeachment evidence, even if it was testimonial.

reliability of defendant's convictions is adequately called into question. *Id*. at 293.

Likewise, defense counsel's failure to corroborate the defense that defendant did not have the intent of sexual gratification compounded the prejudicial effect of defense counsel's failure to impeach the complainant's testimony. She did not ask the complainant if defendant had previously applied ointment to her for medical purposes. If she had, presumably, the complainant would have answered in the affirmative, given that she testified accordingly in a later civil proceeding. Likewise, defense counsel did not consult with HT, who likely would have offered testimony that corroborated defendant's testimony.[14] Instead, counsel relied solely on defendant's testimony that he did not possess the requisite intent.

Therefore, if defense counsel had exercised reasonable professional judgment, she would have discovered and presented impeachment evidence and evidence that corroborated defendant's testimony, and there is a reasonable probability that the result of the trial would have been different. Thus, defendant has shown that he was unfairly prejudiced by defense counsel's errors.

IV. CONCLUSION

We conclude that collateral estoppel cannot be applied to preclude the review of a criminal defendant's claim of ineffective assistance of counsel simply because a previous civil proceeding determined that defense counsel had not committed malpractice. Application of collateral estoppel on that basis fails to satisfy the element of the doctrine

[14] During the course of Tetarly's corresponding civil case against defendant, HT was asked if defendant "ever act[ed] in a sexual manner to [the complainant]." HT responded, "No."

requiring that a defendant previously have had an opportunity to fully and fairly litigate his or her ineffective-assistance-of-counsel claim.

Furthermore, defense counsel's performance in this case was constitutionally inadequate and rendered defendant's trial unfair and unreliable. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for a new trial.

MARILYN KELLY, MARKMAN, and MARY BETH KELLY, JJ., concurred with CAVANAGH, J.

YOUNG, C.J. (*dissenting*). I respectfully dissent from the Court's decision to grant defendant a new trial on his motion for relief from judgment. While I agree with the majority that collateral estoppel does not bar defendant's claims of error, I cannot adopt the majority's amorphous analysis on that issue and instead would simply hold that the prosecution has not satisfied the elements required to apply collateral estoppel against defendant. Moreover, in applying *Strickland v Washington* to the facts of this case, I do not believe defendant is entitled to relief because he has not shown that counsel's performance was "outside the wide range of professionally competent assistance" leading to "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[1] Thus, I would affirm the result reached by the Court of Appeals.

I. COLLATERAL ESTOPPEL

The Court of Appeals determined that the collateral estoppel doctrine barred substantive consideration of

[1] *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

many of defendant's ineffective assistance of counsel claims.[2] While I agree with the majority that the Court of Appeals erred by applying collateral estoppel to bar many of defendant's claims, I do not adopt the majority's analysis to reach this conclusion. Instead of examining defendant's interests in litigating his legal malpractice and ineffective assistance of counsel claims, I would consider the elements required to apply collateral estoppel, which lead inexorably to the conclusion that defendant is not precluded from alleging ineffective assistance of counsel in a motion for relief from judgment. Accordingly, I would decide the issue on this basis alone.

In *Monat v State Farm Insurance Co*, this Court articulated the elements of collateral estoppel:

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel."[3]

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[2] The Court of Appeals first concluded that the circuit court erred by granting defendant a new trial because the circuit court's analysis was complete as a matter of law once it concluded that his counsel's trial strategy was reasonable. Nevertheless, it went on to examine potential alternative bases for affirming the circuit court's decision, and it ended up rejecting many of defendant's ineffective assistance of counsel claims on the basis of collateral estoppel. Because it was sufficient to resolve defendant's appeal on the basis of its conclusion that trial counsel's strategy was reasonable, the Court of Appeals' decision to apply collateral estoppel was not essential to its holding.

[3] *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988) (alteration in original). *Monat* also held that the third element, mutuality of estoppel, is unnecessary when the party *asserting* estoppel claims that the opposing party is bound by a previous adverse ruling: "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity

In this case, the first element of collateral estoppel is not satisfied because defendant's ineffective assistance of counsel claim was *not* "actually litigated and determined by a valid and final judgment" in his legal malpractice action. A party asserting legal malpractice "must establish that, but for the negligence, the outcome of the case would have been favorable to the plaintiff."[4] However, *Strickland* specifically indicates that a criminal defendant may be entitled to a new trial on the basis of ineffective assistance of counsel "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."[5] Because a legal malpractice action requires a *higher* threshold of prejudice than an ineffective assistance of counsel claim, a defendant can establish ineffective assistance of counsel even if he cannot establish legal malpractice. As a result, the Court of Appeals erred by concluding that defendant's ineffective assistance of counsel claim was "actually litigated and determined by a valid and final judgment," and we need not even consider defendant's interests in undertaking his legal malpractice and ineffective assistance of counsel claims as the majority does.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Nevertheless, when examining defendant's substantive claims, I do not believe defendant is entitled to a

with a party, to the earlier litigation." *Monat*, 469 Mich at 689 (quotation marks and citation omitted). Accordingly, because the prosecution seeks to apply collateral estoppel against defendant, *Monat* does not require mutuality of estoppel and the fact that the prosecutor was not a party in defendant's legal malpractice claim does not itself bar application of collateral estoppel.

[4] *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996).

[5] *Strickland*, 466 US at 694.

new trial on the basis of his motion for relief from judgment.[6] The Sixth Amendment of the United States Constitution, incorporated to the states through the Fourteenth Amendment,[7] guarantees a criminal defendant "the right . . . to have the Assistance of Counsel for his defence."[8] *Strickland* requires a defendant to "identify the acts or omissions of counsel that are . . . outside the wide range of professionally competent assistance."[9] This review of counsel's performance is "highly deferential,"[10] must proceed under "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must consider whether the challenged action (or failure to act) " 'might be considered sound trial strategy.' "[11] Only when a criminal defendant has shown counsel's performance to be objectively unreasonable can we consider the effect of counsel's performance: a criminal defendant is only entitled to a new trial if he can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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[6] Because defendant is seeking relief pursuant to subchapter 6.500 of the Michigan Court Rules, we review for an abuse of discretion the circuit court's decision to grant this relief. See *People v Osaghae (On Reconsideration)*, 460 Mich 529, 534; 596 NW2d 911 (1999). However, we review de novo any underlying questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[7] *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932).

[8] US Const, Am VI. The Michigan Constitution also provides a right to the effective assistance of counsel, see Const 1963, art 1, § 20, although it "does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel," *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994).

[9] *Strickland*, 466 US at 690.

[10] *Id.* at 689.

[11] *Id.*, quoting *Michel v Louisiana*, 350 US 91, 101; 76 S Ct 158; 100 L Ed 83 (1955).

would have been different."[12] *Strickland* also provides that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[13]

The majority claims that counsel was ineffective because she did not conduct a preliminary examination or file for a bill of particulars to determine the nature of the charges against defendant. Counsel testified that she did not conduct a preliminary examination because she did not want to preserve the testimony of certain unfavorable witnesses. Further, while the charging documents lacked specific factual allegations beyond the offenses charged, counsel testified at defendant's *Ginther*[14] hearing that she had police and Family Independence Agency reports from which she could determine the factual allegations supporting the charges against defendant. Counsel also testified that she believed the imprecision in the charging documents would confuse the trier of fact and redound to defendant's benefit. The majority fails to consider that the decision to forgo a preliminary examination or bill of particulars can itself be a reasonable trial strategy under the circumstances of this case, when counsel had information regarding the nature of the charges from documents in her possession.

That in hindsight a strategy was not *completely* successful does not render it unreasonable and does not render counsel's assistance ineffective. *Strickland* itself implores reviewing courts to undertake "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct

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[12] *Strickland*, 466 US at 694.

[13] *Id.* at 691.

[14] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

from counsel's perspective at the time."[15] In this case, when looking to what strategy counsel developed or could have developed at the time she was preparing for trial, we must consider that *any* strategy must account for defendant's admissions that he touched his daughter's genitals at least seven times—six times, he claims, to administer ointment, and once to determine the extent of the pain that his daughter complained of. As a result of these admissions, trial counsel could not prepare the defense that *none* of the touchings occurred. Rather, counsel had to argue that the times that defendant applied the ointment were not for a sexual purpose. Defendant vehemently denied that he ever touched the complainant's hand to his penis, and trial counsel's strategy with regard to that issue was to impeach the complainant's credibility and explain that defendant put the complainant's hand to his stomach to show her an old-world remedy to relieve stomach pain.

Both the circuit court and the Court of Appeals determined that this trial strategy was objectively reasonable, and they did not err by doing so. Nevertheless, the circuit court held that counsel was ineffective for failing to present the alternative defense that the complainant's mother, Liliya Tetarly, fabricated the allegations. While this defense is not necessarily inconsistent with counsel's chosen defense, counsel provided a reasonable explanation at the *Ginther* hearing regarding why she did not choose to present it: she was afraid that basing a defense on Tetarly's relationship with defendant would open the door to information that would reflect badly on defendant, including details about the

[15] *Strickland*, 466 US at 689; see also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), quoting *Strickland*, 466 US at 689.

acrimonious divorce between defendant and Tetarly.[16] The Court of Appeals correctly reversed as an abuse of discretion the circuit court's decision to grant defendant a new trial, the sole basis for which was that counsel did not proffer a defense focusing on Tetarly's character.

Furthermore, the circuit court abused its discretion when it granted defendant a new trial without inquiring into the potential prejudice resulting from counsel's actions because *Strickland* requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[17] Even if counsel was deficient for failing to interview CARE House employees or consult with an expert about forensic interviewing techniques, the unrebutted evidence indicates that the complainant's initial revelation was not a product of *any* questioning; rather, both the complainant and her mother have testified that the complainant made the revelation spontaneously. While defendant's expert at the *Ginther* hearing, Dr. Katherine Okla, testified that she had concerns about the interview techniques that led to the complainant's *subsequent* disclosures involving defendant's touching of her genitals, defendant *admitted* that he had touched the complainant's genitals. Thus, I cannot conclude that there is a reasonably likely probability of a different result

[16] The majority explains that counsel failed to investigate allegations of sexual abuse that Tetarly made in the past against defendant's other ex-wife. However, the record below only indicates that she reported what defendant's son (a toddler at the time) said and did. While the ex-wife was not convicted of abuse, it is not apparent from the record that these allegations are false—or intentionally false—claims of abuse that would implicate Tetarly's general character for truthfulness.

[17] *Strickland*, 466 US at 694.

occurring but for counsel's failure to interview CARE House employees or consult with an expert.

Moreover, while the majority argues that counsel did not adequately impeach the complainant, counsel's cross-examination of the complainant at trial highlighted inconsistencies regarding the number of times that the complainant claimed that defendant touched her hand to his genitals. Indeed, at one point, the circuit court cut counsel off and acknowledged that the complainant could not explain the inconsistencies between her testimony and a police report.[18] The circuit court determined that three of the five charged counts of second-degree criminal sexual conduct arose out of allegations that defendant touched the complainant's hand to his genitals, and it convicted defendant of one of those three counts. I cannot conclude that further cross-examination of complainant emphasizing any inconsistencies in the complainant's previous statements would have resulted in a reasonably likely chance of acquittal on the single remaining count relating to the touching of defendant's genitals given the circuit court's statement that the complainant's vivid description of defendant's genitals was "not something that a child would fabricate."

The circuit court also found defendant's testimony about administering the medication not to be credible, "mainly because of the major inconsistency in regard to the rebuttal witness's testimony that he was never asked to apply the ointment" and because the complainant's "yeast infections did not occur around the time in

[18] While the majority puts much stock in potential expert testimony to impeach the complainant's testimony, the same experts might also have *bolstered* her credibility by helping to explain the inconsistencies that defense counsel sought to highlight. For instance, CARE House employee Amy Allen testified at defendant's civil trial that it is not unusual for a sexual abuse victim to give conflicting reports about the abuse.

which allegedly these incidents occurred . . . .” Nothing in any postconviction testimony undermines Tetarly’s claim that the complainant did not suffer from yeast infections at the time of the allegations, and defendant has not offered any proof to undermine that claim. As a result, defendant has not shown a reasonably probable chance of a different outcome at trial on the charges involving defendant’s touching of the complainant’s genitals. Tetarly always maintained that she did not ask defendant to apply any medication, and she reiterated at the *Ginther* hearing that she never provided defendant with medication to place on the complainant’s genital area. Indeed, this testimony that defendant was not allowed to apply ointment is rendered *more* credible by Tetarly’s testimony that defendant poured cologne on complainant’s genital area in February 2004. This testimony went unrebutted during both the bench trial and the *Ginther* hearing. Moreover, the complainant’s testimony at a subsequent civil proceeding corroborates Tetarly’s testimony that only Tetarly would apply ointment for the complainant’s yeast infections and that defendant once poured cologne on the complainant’s genital area.[19]

Defendant also claims that testimony by his son, HT, would have corroborated defendant’s claim that Tetarly insisted that defendant apply the ointment to the complainant’s genital area and that, after several minutes of heated argument, he yielded to her request. Nevertheless, defendant offers no proof on this claim beyond his bald assertion that HT was actually present for the conversation that defendant described. In fact, HT was deposed during the civil litigation against

[19] Although the majority observes that the complainant testified otherwise at the civil proceeding, the complainant quickly retracted that statement and reiterated that only her mother would apply the ointment.

defendant, but he did not testify regarding this alleged conversation. Instead, HT testified that defendant often yelled at the complainant to return to her room when, at night, she would appear at his bedroom. This is consistent, however, with the complainant's testimony at the civil trial that sometimes defendant would yell at her to return to her room, although she also testified that sometimes he would tell her to join him in his bed. The lack of an offer of proof regarding whether HT could corroborate defendant's testimony about the ointment sharply contrasts with the situation resulting in a new trial in *People v Armstrong*,[20] in which the defendant offered documentary proof that contradicted specific testimony by the complainant at trial. Accordingly, I cannot say that this potential corroborative testimony is sufficiently concrete to satisfy *Strickland*'s prejudice requirement.[21]

III. CONCLUSION

For all these reasons, I would affirm the Court of Appeals' ruling that defendant is not entitled to a new trial, although I would vacate its conclusion that collateral estoppel bars substantive consideration of defendant's ineffective assistance of counsel claims. Defendant is not entitled to a new trial pursuant to his

[20] *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011).

[21] In addition to his ineffective assistance of counsel claims, defendant also claimed that newly discovered evidence requires a new trial. The lower courts correctly rejected defendant's argument. In particular, the Court of Appeals explained that most of defendant's claimed newly discovered evidence could have been discovered at the time of trial. In analyzing the evidence that *actually* constituted newly discovered evidence—the results of defendant's polygraph examination and the complainant's subsequent writings—the Court of Appeals correctly determined that a different result is not probable upon retrial. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

motion for relief from judgment because he has not satisfied the elements of *Strickland*—that counsel's performance was "outside the wide range of professionally competent assistance" leading to "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[22]

ZAHRA, J., concurred with YOUNG, C.J.

HATHAWAY, J., did not participate because of a professional relationship with a member of a law firm involved in the matter.

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[22] *Strickland*, 466 US at 690, 694.

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (MATTISON v SOCIAL SECURITY COMMISSIONER)

Docket No. 144385. Argued November 15, 2012. Decided December 21, 2012.

Pamela Mattison, on behalf of her twin children, brought an action in the United States District Court for the Western District of Michigan against the Social Security Commissioner, seeking social security survivors' benefits for the children after the Social Security Administration denied her application for benefits and she was unable to obtain relief through administrative appeals. The twins were conceived by in vitro fertilization after their father, Jeffery Mattison, had died. The parties stipulated that the determinative issue was whether plaintiff's twins could inherit from Jeffery under Michigan intestacy law as his children. The district court entered an order approving a magistrate's recommendation to ask the Michigan Supreme Court to resolve the question. In accordance with MCR 7.305(B), the district court certified the following question to the Supreme Court:

> Whether M.M. and M.M. [plaintiff's twins], conceived after the death of Jeffery Mattison via artificial insemination using his sperm, can inherit from Jeffery Mattison as his children under Michigan intestacy law.

The Supreme Court ordered and heard oral argument on whether to answer the certified question. 493 Mich 853 (2012).

In an opinion by Justice MARILYN KELLY, joined by Justices MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Children who are born after the death of a parent and who were not in gestation at the time of the parent's death may not inherit from that parent under Michigan intestacy law.

1. The Social Security Act authorizes disbursement of survivors' benefits for children who were dependent on a deceased worker before his or her death. To be eligible, an applicant must demonstrate that he or she (1) is the child of the deceased wage

earner and (2) was dependent on that person at the time of that person's death. Under 42 USC 416(h)(2)(A), in determining whether an applicant is the child of a deceased individual, the Social Security Commissioner must apply the law that would be applied in determining the devolution of intestate personal property by the courts of the state in which the insured individual was domiciled at the time of his or her death. In this case, Jeffery was domiciled in Michigan when he died, so Michigan's intestacy law is controlling.

2. Under the relevant Michigan statutory provisions, there are two groups of people relevant to this case who could have acquired intestate inheritance rights: (1) descendants alive at the moment of the decedent's death who lived more than 120 hours immediately following the decedent's death and (2) descendants in gestation at the time of the decedent's death who lived 120 hours after birth. Because plaintiff's eggs were not fertilized and the embryos not transferred until after Jeffery's death, plaintiff's twins could not inherit from Jeffery by intestate succession under Michigan law. Plaintiff's twins were not in gestation at Jeffery's death, so no inheritance rights vested in them at that time pursuant to MCL 700.2108, and because the twins were not living at the time of his death, they had no inheritance rights as his heirs under MCL 700.2104.

3. MCL 700.2114(1)(a) creates a presumption that a child is the natural issue of both spouses if born or conceived during the marriage. Included within that presumption are children conceived by a married woman with the consent of her husband following the use of assisted reproductive technology. The statute, however, does not allow the twins to inherit from Jeffery because the twins were not conceived or born during plaintiff and Jeffery's marriage given that the marriage legally terminated upon Jeffery's death. Because nothing in the relevant statutory provisions contemplates intestate succession rights for plaintiff's twins, they did not survive Jeffery as his heirs in the eyes of the law.

Certified question answered in the negative; case returned to the district court for further proceedings.

Justice MARILYN KELLY, joined by Justice CAVANAGH, concurring, stated that although the Supreme Court's decision was accurate and required by the law, it was lamentable. The facts established that Jeffery had intended that any children conceived by in vitro fertilization using his sperm be entitled to the same rights as naturally conceived children, without regard to when they were conceived. Given the increasing prevalence of assisted reproductive technology, the situation was likely to reoccur. The Legislature is capable of

providing for after-conceived children to inherit from a parent by intestate succession and should specifically address the issue.

Chief Justice YOUNG, dissenting, would have declined to answer the certified question because the Michigan Supreme Court lacks the constitutional authority to issue advisory opinions other than as described in 1963 Const, art 3, § 8. While this position did not garner majority support, certified questions should be accepted and answered sparingly and only when the Michigan legal issue is both unclear and pivotal to the federal case that prompted the request for the certified question. There is nothing remotely unclear or debatable regarding the ability of after-born children to take as heirs under Michigan's intestacy laws—the children must be "in gestation" under MCL 700.2108 at the time of the decedent's death. Therefore, the district court should have been easily able to determine for itself the answer to its certified question without the assistance of the Supreme Court.

PARENT AND CHILD — DECEASED PARENTS — INTESTATE INHERITANCE — AFTER-BORN CHILDREN — ASSISTED REPRODUCTIVE TECHNOLOGY.

Children who are born after the death of a parent and who were not in gestation at the time of the parent's death may not inherit from that parent under Michigan intestacy law (MCL 700.1101 *et seq*.).

Victor L. Bland for Pamela Mattison.

Patrick A. Miles, Jr., United States Attorney, and *Helen L. Gilbert* and *Ryan D. Cobb*, Assistant United States Attorneys, for the Social Security Commissioner.

MARILYN KELLY, J. Plaintiff, Pamela Mattison, gave birth to twins who were conceived by artificial insemination after their father, Jeffery Mattison, had died. She sought social security survivors' benefits for the children based on Jeffery's earnings. The Social Security Administration denied her application, and an administrative law judge affirmed that decision. Plaintiff then filed an action in the United States District Court for the Western District of Michigan challenging the decision. That court has asked us to rule on the determinative issue, which is whether the children can inherit from Jeffery under

Michigan intestacy law. Only if they can inherit would they be entitled to social security survivors' benefits.

The district court certified the question to this Court in accordance with MCR 7.305(B) in these words:

> Whether M.M. and M.M. [plaintiff's twins], conceived after the death of Jeffery Mattison via artificial insemination using his sperm, can inherit from Jeffery Mattison as his children under Michigan intestacy law.

Having heard oral argument, we grant the district court's request to answer the question. We hold that, under Michigan intestacy law, plaintiff's children cannot inherit from Jeffery. We return the matter to the district court for further proceedings as that court deems appropriate.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff and Jeffery Mattison were married in 1995. In 1997, plaintiff became pregnant with the aid of artificial insemination and gave birth to a daughter. Plaintiff and Jeffery wanted more children but were unable to conceive naturally because of Jeffery's medical conditions, which included lupus, diabetes, high blood pressure, and kidney failure.

Because chemotherapy treatment for lupus would damage Jeffery's sperm, he interrupted his chemotherapy treatment and deposited his semen into a sperm bank, where it was frozen and stored. Soon after the birth of his daughter, Jeffery executed a general durable power of attorney that appointed plaintiff as his attorney-in-fact. Included among the powers given to her was the authority to "take any and all action necessary pertaining to any sperm or embryos [Jeffery] may have stored including their implantation or termination." In October 2000, plaintiff and Jeffery began an in vitro fertilization program in which plaintiff received

daily hormone injections. These were necessary to allow her eggs to be harvested.

Jeffery died unexpectedly on January 18, 2001, in Michigan. Plaintiff continued the in vitro fertilization program after his death and underwent egg retrieval on January 28, 2001. Those eggs were inseminated with Jeffery's sperm and transplanted into plaintiff on January 30, 2001. As a result of the transplantation process, plaintiff gave birth to twins on October 8, 2001.

On October 23, 2001, plaintiff filed an application for social security survivors' benefits based on Jeffery's earnings records on behalf of her twins. The Social Security Administration denied the application and later denied reconsideration. Plaintiff then requested a hearing on the matter. The presiding administrative law judge decided that plaintiff's twins were not entitled to social security survivors' benefits because they could not inherit from Jeffery under Michigan intestacy law. The Social Security Administration Appeals Council denied plaintiff's request for review of the administrative law judge's decision.

In August 2005, plaintiff filed suit in the United States District Court for the Western District of Michigan, challenging the denial of benefits. The parties stipulated that the determinative issue is whether plaintiff's twins can inherit from Jeffery under Michigan intestacy law as his children. The district court entered an order approving a magistrate's recommendation to ask this Court to resolve the question. For reasons unknown, the question was not filed in this Court until nearly five years later.

We granted oral argument on whether to answer the question certified to us.[1]

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[1] *In re Certified Question from the United States Dist Court for the Western Dist of Mich*, 493 Mich 853 (2012).

II. ANALYSIS

A. LEGAL BACKGROUND

The Social Security Act authorizes disbursement of survivors' benefits for children who were dependent on a deceased worker before his or her death.[2] As the United States Supreme Court has noted, the purpose of providing survivors' benefits is to protect children from a loss of support resulting from the death of a parent.[3] However, not all children of a deceased parent are eligible for these benefits. To be eligible, an applicant must demonstrate that he or she (1) is the "child" of the deceased wage earner[4] and (2) was dependent on that person at the time of that person's death.[5]

Whether an applicant is the child of a deceased wage earner for purposes of the Social Security Act is governed by 42 USC 416(h)(2)(A), which provides:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter [42 USC 401 through 434], the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application or, *if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death* . . . . [Emphasis added.]

Thus, because Jeffery was domiciled in Michigan when he died, the issue to be resolved is whether our state intestacy law permits the twins to inherit from Jeffery.

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[2] See generally 42 USC 402(d).

[3] *Mathews v Lucas*, 427 US 495, 507; 96 S Ct 2755; 49 L Ed 2d 651 (1976).

[4] 42 USC 402(d)(1) and (2).

[5] 42 USC 402(d)(1)(C)(ii).

The United States Supreme Court recently spoke on this subject in the case of *Astrue v Capato*.[6] The respondent's husband had died 18 months before she gave birth to twins conceived through in vitro fertilization using the decedent's frozen sperm. The respondent applied for social security survivors' benefits on their behalf. When the Social Security Administration denied her application, she brought an action in the courts to review the decision.

The trial court found that the respondent's deceased husband was domiciled in Florida at his death. Under Florida law, children conceived after a parent's death cannot inherit from that parent through intestate succession and thus cannot receive social security survivors' benefits as children of that parent. The United States Court of Appeals for the Third Circuit reversed that decision. It applied the Social Security Act and opined that the undisputed biological children of an insured and his widow qualify for survivors' benefits without regard to state intestacy law.[7] But the United States Supreme Court reversed the judgment of the Third Circuit. It held that the question whether posthumously conceived children qualify for social security survivors' benefits must be determined under state intestacy law.[8]

Michigan law has long established that the rights to intestate inheritance vest at the time of a decedent's death.[9] They are governed by statutory provisions

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[6] *Astrue v Capato*, 566 US ___; 132 S Ct 2021; 182 L Ed 2d 887 (2012).

[7] *Capato v Social Security Comm'r*, 631 F3d 626, 630 (CA 3, 2011).

[8] *Astrue*, 566 US at ___; 132 S Ct at 2031-2033.

[9] *In re Adolphson Estate*, 403 Mich 590, 593; 271 NW2d 511 (1978) ("Determinations of heirs are to be governed by statutes in effect at the time of death . . . ."); *In re Dempster's Estate*, 247 Mich 459, 462; 226 NW 243 (1929), quoting *In re Pivonka's Estate*, 202 Iowa 855; 211 NW 246 (1926) (" 'The estate of the insured' came into being as the estate of a deceased person . . . instantly upon the death of such deceased person. The heirs of a decedent are . . . to be determined by ascertaining upon whom the law casts the estate immediately upon the death of the ancestor.").

found in article II, part 1 of the Estates and Protected Individuals Code (EPIC).[10]

Several EPIC provisions bear on whether plaintiff's twins can inherit from Jeffery. The first, MCL 700.2101(1), provides that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act . . . ." Next, MCL 700.2103 provides that "[a]ny part of the intestate estate that does not pass to the decedent's surviving spouse . . . passes . . . to [certain] . . . individuals who survive the decedent[.]" MCL 700.1107(j) defines "survive" as meaning that "an individual neither predeceases an event, including the death of another individual, nor is considered to predecease an event under [MCL 700.2104 or MCL 700.2702]."[11]

Likewise, MCL 700.2106(3)(b) defines "surviving descendant" as "a descendant who neither predeceased the decedent nor is considered to have predeceased the decedent under [MCL 700.2104]." MCL 700.2104 states, "An individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent's heirs are determined accordingly." Hence, an individual must be alive when the decedent dies and live more than 120 hours afterward to inherit from the decedent's estate under the laws of intestate succession.

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[10] MCL 700.2101 *et seq*.

[11] *Random House Webster's College Dictionary* (2001) similarly defines "survive" as, among other things, "**1.** to remain alive, as after the death of another or the occurrence of some event; continue to live. . . . **4.** to continue to live or exist after the death, cessation, or occurrence of." Thus, to survive the death of another, one must be living at the time of that person's death.

Also relevant is MCL 700.2108 which states, "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." Finally, MCL 700.2114(1)(a) provides, in pertinent part:

> If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession.

On the basis of these provisions, there are two groups of people relevant to this case that may acquire intestate inheritance rights: (1) descendants alive at the moment of the decedent's death who live more than 120 hours immediately following the decedent's death and (2) descendants in gestation at the time of the decedent's death who live 120 hours after birth.

B. APPLICATION

Considering these statutes, plaintiff's twins cannot inherit from Jeffery by intestate succession. The record shows that plaintiff's eggs were not inseminated with Jeffery's sperm and implanted until January 30, 2001, which was 12 days after Jeffery died. Because plaintiff's twins were not in gestation at Jeffery's death, no inheritance rights vested in them at that time pursuant to MCL 700.2108. Moreover, because the twins were not living at the time of his death, they had no inheritance rights as heirs pursuant to MCL 700.2104.

Nor does MCL 700.2114(1)(a) allow the twins to inherit from Jeffery. That statute indicates that, for

purposes of intestate succession, a child is presumed to be the natural issue of both spouses if born or conceived during the marriage. It includes in that presumption children conceived by a married woman with the consent of her husband following the use of assisted reproductive technology. Applying that provision here, the twins were neither conceived nor born during plaintiff and Jeffery's marriage because "[m]arriage is a status that legally terminates . . . upon the death of a spouse . . . ."[12] Accordingly, the twins are not Jeffery's children for purposes of the state laws of intestate succession and, therefore, they cannot inherit from him.[13]

In sum, nothing in EPIC or in other relevant statutory provisions contemplates intestate succession rights for plaintiff's twins. Because they were conceived and born after Jeffery's death, they did not survive him as his heirs in the eyes of the law. Therefore, we answer the certified question in the negative.

III. CONCLUSION

We hold that under Michigan intestacy law, plaintiff's twins, who were conceived after the death of Jeffery Mattison through artificial insemination using his sperm, cannot inherit from Jeffery as his children. We answer the certified question in the negative and return the case to the district court for such further proceedings as that court deems appropriate.

MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

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[12] *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997).

[13] Although it is not relevant to our determination in this case, we note that Jeffery died without a will.

MARILYN KELLY, J. (*concurring*). I write separately to express my view that although the Court's decision in this matter is accurate and required by the law, it is lamentable.

It is undisputed that the twins are Jeffery Mattison's biological children in that his sperm were used to inseminate plaintiff's eggs. Yet Michigan intestacy law prevents these children from inheriting from their father and, as a consequence, from receiving social security survivors' benefits. This is because our Legislature has not made provision for children conceived by assisted reproductive technology after a parent's death to inherit from the parent by intestate succession. This situation will likely reoccur.

It is not known whether the Legislature has ever considered the problem presented here. If it had, it would have been confronted with the fact that gestation by assisted reproductive technology can occur long after the death of one parent. If the estate of the deceased parent had to remain open while the widow or widower contemplated the use of assisted reproductive technology, timely probating of the estate could be frustrated.[1]

Standing in contrast to that consideration is the fact that one goal of the Estates and Protected Individuals Code (EPIC)[2] is "[t]o discover and make effective a decedent's intent in distribution of the decedent's property."[3] Two facts in this case relate to this goal: (1) the twins are undisputedly Jeffery's children and (2) Jeffery executed a power of attorney appointing plaintiff as his attorney-in-fact with the power to "take any and all action necessary pertaining to any sperm or embryos

[1] See MCL 700.1201(c).

[2] MCL 700.1101 *et seq*.

[3] MCL 700.1201(b).

[he] may have stored including their implantation or termination." Jeffery intended that any children conceived by in vitro fertilization using his sperm be entitled to the same rights as naturally conceived children, without regard to when they were conceived.

It is not the role of this Court to fashion a legal remedy allowing after-conceived children to inherit from a deceased parent by intestate succession. But the Legislature is capable of providing for it. For instance, the Legislature could provide for a limited period after a person's death during which his or her spouse could arrange for a child to be conceived by assisted reproductive technology. It could provide that a child conceived within that period would be entitled to inherit from the deceased parent by intestate succession. Alternatively, the Legislature could mandate that the conception occur within a reasonable time after a spouse's death in order for the child to be eligible to inherit.[4]

Some state legislatures have already grappled with the issue, while others have not, as summarized by this chart that also identifies the source of the law in each state:[5]

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[4] See, e.g., Carpenter, *A chip off the old iceblock: How cryopreservation has changed estate law, why attempts to address the issue have fallen short, and how to fix it*, 21 Cornell J L & Pub Policy 347, 380 (2011) (explaining that some states have enacted legislation that requires "(1) the decedent, in writing, [to] authorize[] the surviving spouse to use the genetic material, and (2) the child [to be] born within two years after the decedent's death").

[5] *Id*. at 403-404. See also Lorio, *Conceiving the inconceivable: Legal recognition of the posthumously conceived child*, 34 American College of Trust & Estate Counsel L J 154, 156-162 (2008). After Professor Benjamin Carpenter's article was published in 2011, the Nebraska Supreme Court held that Nebraska's statutes exclude posthumously conceived children from inheriting by intestate succession. See *Amen v Astrue*, 284 Neb 691; 822 NW2d 419 (2012).

TABLE 1: APPROACHES TO POSTHUMOUSLY CONCEIVED CHILDREN FOR PROBATE PURPOSES BY JURISDICTION

Source[6]	Includes	Excludes	Unclear	Jurisdiction
1946 MPC			4	Indiana, Maryland, Ohio, Pennsylvania
1969 UPC			3	Maine, Nebraska, Tennessee
1988 USCACA		1		Virginia
1990 UPC			8	Alaska, Arizona, Hawaii, Michigan, Montana, Vermont, West Virginia, Wisconsin
2000 UPA			7	Alabama, Delaware, New Mexico, Texas, Utah, Washington, Wyoming
2008 UPC	2			Colorado, North Dakota
Other statute	4	6	12	*Includes*: California, Florida, Iowa, Louisiana *Excludes*: Georgia, Idaho, Minnesota, South Carolina, South Dakota, New York *Unclear*: Connecticut, District of Columbia, Illinois, Kansas, Missouri, Oklahoma, Kentucky, North Carolina, Oregon, Rhode Island, Mississippi, Nevada
Caselaw	2	2		*Includes*: Massachusetts (*Woodward*);[7] New Jersey (*Kolacy*)[8] *Excludes*: Arkansas (*Finley*);[9] New Hampshire (*Khabbaz*)[10]
Total	**8**	**9**	**34**	

It is incumbent on the Legislature to keep our laws abreast of our times. This is especially true given the

[6] "MPC" stands for Model Probate Code. "UPC" stands for Uniform Probate Code. "USCACA" stands for Uniform Status of Children of Assisted Conception Act. "UPA" stands for Uniform Parentage Act.

[7] *Woodward v Social Security Comm'r*, 435 Mass 536; 760 NE2d 257 (2002).

[8] *In re Kolacy Estate*, 332 NJ Super 593; 753 A2d 1257 (2000).

[9] *Finley v Astrue*, 372 Ark 103; 270 SW3d 849 (2008).

[10] *Khabbaz v Social Security Admin Comm'r*, 155 NH 798; 930 A2d 1180 (2007).

"growing and complex area of nontraditional family life" and the increasing prevalence of assisted reproductive technology.[11]

For these reasons, I urge our Legislature to specifically address the issue presented in this case in the near future.

CAVANAGH, J., concurred with MARILYN KELLY, J.

YOUNG, C.J. (*dissenting*). While I agree with the majority's analysis of our state's intestacy laws, I respectfully dissent and would decline to answer the certified question. I do so for two reasons.

First, I continue to believe that this Court lacks the constitutional authority to issue advisory opinions[1] other than as described in article 3, § 8 of Michigan's 1963 Constitution.[2] My position regarding the Court's constitutional authority did not prevail, and I accept that the Court has determined otherwise.[3] However, my constitutional reservation counsels that this Court

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[11] Messmer, *Assisted reproductive technology: A lawyer's guide to emerging law and science*, 3 J Health & Biomed L 203, 204 (2007).

[1] See *In re Certified Question from the United States Dist Court for the Eastern Dist of Mich (Wayne Co v Philip Morris, Inc)*, 622 NW2d 518 (Mich, 2001) (YOUNG, J., concurring); *In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 472 Mich 1225 (2005) (YOUNG, J., concurring); *In re Certified Question* (*Waeschle v Oakland Co Med Examiner*), 485 Mich 1116, 1117 (2010) (YOUNG, J., dissenting).

[2] Const 1963, art 3, § 8 grants this Court limited authority to issue advisory opinions: "Either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."

[3] In contrast to the narrow scope of authority described in Const 1963, art 3, § 8, MCR 7.305(B) authorizes this Court to answer certified questions from "a federal court, [foreign] state appellate court, or tribal court." I believe that MCR 7.305(B) exceeds this Court's judicial power and is unconstitutional.

should accept and answer certified questions from the federal courts sparingly and only when the Michigan legal issue is a debatable one and pivotal to the federal case that prompted the request for the certified question. It is this prudential concern that I now address.

I concede that the question whether the children at issue are "heirs" of their deceased father under Michigan intestacy law is determinative to the federal case.[4] Under federal law, the children are entitled to social security survivors' benefits if the children can take as heirs from their father under Michigan intestacy law, MCL 700.2101 *et seq*.[5] The children's entitlement to take as heirs is provided by MCL 700.2103, under which it must be shown that the children are both their father's descendants[6] *and* that they survived their father.[7] However, as the majority opinion conclusively establishes, the question whether the children may be considered to have been alive at the time of their father's death is not debatable under our intestacy laws—a point plaintiff's counsel conceded at oral argu-

[4] Although the question is determinative, neither the federal court nor the plaintiff felt much urgency because the certified question was not filed with this Court for nearly five years after the federal court ordered that the question be certified.

[5] See 42 USC 416(h)(2)(A).

[6] Whether the children are their father's descendants has not been a point of dispute in this litigation. MCL 700.2114 describes various ways in which "[t]he parent and child relationship" may be established in order to show that a claimant is a descendant of a decedent. However, merely showing that a claimant is a descendant under MCL 700.2114 is insufficient to establish an entitlement to take as an heir under Michigan's laws of intestate succession. Rather, the plain language of MCL 700.2103 also requires that the descendant "survive the decedent[.]"

[7] MCL 700.1107(j) defines "survive" to mean that "an individual neither predeceases an event, including the death of another individual, nor is considered to predecease an event under [MCL 700.2104 or MCL 700.2702]." Thus the children are deemed to have survived their father if they did not die before, i.e., did not predecease, the death of their father.

ment. The only way that the children may be deemed to have survived their father is if they were "in gestation" at the time of their father's death.[8] Thus, the only way plaintiff could prevail is if this Court failed to give the word "gestation" its plain and ordinary meaning. Indeed, plaintiff's counsel urged that these children could be deemed "in gestation" by construing gestation as a "process" that included hormone therapy administered to the mother before the father's death as well as in vitro fertilization and embryo transfer that occurred after the father's death. This, of course, is no more than a call for construction by eisegesis and would require an entirely apocryphal interpretation of a common term: gestation.

I believe that no serious debate regarding the plain language of the relevant laws exists and that no reasonable construction of our laws would permit the children to take as heirs of their deceased father under our intestacy provisions.[9] Indeed, both the Social Security

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[8] MCL 700.2108, concerning afterborn heirs, provides in full as follows: "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."

[9] Contrary to the assertions of the concurrence, it cannot be said that "[i]t is not known whether the Legislature has ever considered the problem presented here." *Ante* at 80. For more than 130 years, Michigan's law regarding the intestate inheritance rights of afterborn children remained substantively unchanged, simply providing that "[p]osthumous children are considered as living at the death of their parents." 1846 RS, ch 67, § 13; 1857 CL 2824; 1871 CL 4321; How Stat 5784; 1897 CL 9076; 1915 CL 11807; 1929 CL 13452. See also 1939 PA 288, ch II, § 85; 1948 CL 702.85; 1970 CL 702.85. If that historical statutory language had remained unaltered, the Mattison children would be entitled to inherit as heirs because they are the "posthumous children" of their natural father, Jeffery Mattison.

However, beginning with 1978 PA 642, the Legislature amended the law, providing in former MCL 700.109(2) that "[h]eirs of the decedent *conceived before his death* but born thereafter shall inherit as if they had been born in the lifetime of the decedent." (Emphasis added.) With the

Administration and the administrative law judge who reviewed the case applied the common meaning of gestation and denied survivor's benefits to the children because, as the Social Security Administration phrased it, the children "were not in gestation at the time of Mr. Mattison['s] death." That being the case, the federal court should have been easily able to determine for itself the very answer to its certified question that the majority has provided. As such, this would appear to be the textbook example of the kind of certified question that this Court ought to have exercised its discretion and declined to answer.

For these reasons, I respectfully dissent and would decline to answer the certified question.

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enactment of the Estates and Protected Individuals Code (EPIC), 1998 PA 386, MCL 700.1101 *et seq*., the law was amended to reflect the current language, requiring that a child be "in gestation" at the time of a decedent's death in order to be treated as living at that time. Thus, the Legislature has *twice* amended the law to unambiguously reflect that an afterborn child may take as an heir under our intestate succession provisions provided that the child is *in utero* at the time of a decedent's death.

Moreover, the enactment of MCL 700.2114(1)(a) affirmatively repudiates any claim that the Legislature failed to consider the implications of advanced reproductive technology on Michigan's law of intestate succession. MCL 700.2114(1)(a) states that the necessary "parent and child relationship" may be established when a "child [is] conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology . . . ."

While the concurrence believes that the Legislature's failure to allow after-conceived children to inherit under our law of intestate succession is lamentable, such a policy choice is perfectly consistent with the Legislature's stated "purposes and policies" underlying the enactment of EPIC, which include "promot[ing] a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c). Because frozen human reproductive material remains viable for many years, providing an open-ended period of entitlement for after-conceived children to take as heirs would prevent the closure of an intestate decedent's estate for an indefinite period of time.

PEOPLE v MINCH

Docket No. 144631. Argued October 25, 2012. Decided December 21, 2012.

Kurtis R. Minch pleaded guilty in the Muskegon Circuit Court to charges of possessing a short-barreled shotgun, MCL 750.224b, and possessing a firearm during the commission of a felony, MCL 750.227b. The court, Timothy G. Hicks, J., granted defendant's motion to have numerous other firearms, which were not contraband but had been lawfully seized during a police raid of his home, turned over to defendant's mother, who had a durable power of attorney to attend to defendant's affairs while he was in prison. The prosecution appealed by leave granted. The Court of Appeals, HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., affirmed, holding that denying defendant's designee the right to take possession of the weapons would deprive defendant of his property without due process of law. 295 Mich App 92 (2011). The prosecution applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 491 Mich 931 (2012).

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

Michigan's felon-in-possession statute, MCL 750.224f, prevents a police department from delivering lawfully seized noncontraband firearms to the designated agent of a convicted felon. However, the statute does not prevent a court from appointing a successor bailee to maintain possession of a felon's weapons during his or her period of legal incapacity.

1. Under MCL 750.224f(2), persons convicted of specified felonies may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until certain conditions have been met. However, the statute does not sever a felon's ownership interest in his or her firearms. Accordingly, in this case the police department became a constructive bailee of the noncontraband firearms. Defendant could not directly possess his noncontraband firearms under the statute. Nor could defendant constructively possess the firearms. The test for constructive possession is whether the totality of the circumstances indicates a

sufficient nexus between the defendant and the contraband. Were defendant to designate an agent to possess the firearms on his behalf and were the agent to do so, defendant would be in violation of the statute because a sufficient nexus would remain between defendant and the firearms. However, it would be lawful for another third party, including defendant's mother, to assume possession of the firearms as bailee. Unlike an agent, a bailee by definition remains free from the felon's control. Because nothing prevents a person from serving as both an agent of and a bailee for someone, one person could serve as bailee of defendant's firearms and as defendant's agent for purposes of managing his other property.

2. When analyzing a due process claim, courts first ask whether there exists a liberty or property interest of which a person has been deprived and, if so, whether the procedures followed by the state were constitutionally sufficient. In this case, the Court of Appeals erred when it concluded that the police department's continued possession of defendant's firearms as bailee violated defendant's right to due process. With regard to his possessory interest in the firearms, defendant received all the process to which he was due when he pleaded guilty of the underlying felonies. The Court of Appeals' decision in *Banks v Detroit Police Dep't*, 183 Mich App 175 (1990), which held to the contrary, was overruled.

3. In its ultimate disposition of the firearms, the circuit court must use precise language so as not to authorize a violation of MCL 750.224f. The circuit court may order the police department to turn the firearms over to an appointed successor bailee as long as the order is clear that the nature of the relationship between defendant the successor is that of a bailment and that defendant must have no control over or access to the firearms. Defendant's mother may possess the firearms as long as she does so as a bailee and not as defendant's agent. The successor bailee may not engage in any actions that would destroy defendant's ownership rights in the firearms, such as selling them. If no successor bailee is willing to hold the firearms under the conditions the circuit court outlines, the police department may retain possession as constructive bailee until defendant is lawfully entitled to possess them.

Judgment of the Court of Appeals reversed; circuit court order requiring that the firearms be turned over to defendant's mother vacated; case remanded to the circuit court for entry of an order clarifying the disposition of the firearms.

Justices CAVANAGH, MARILYN KELLY, and HATHAWAY concurred in the result only.

1. CRIMINAL LAW — WEAPONS — FELONS IN POSSESSION OF FIREARMS — RETURN OF NONCONTRABAND SEIZED FIREARMS — SUCCESSOR BAILEES.

Under MCL 750.224f(2), the felon-in-possession statute, persons convicted of specified felonies may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until certain conditions have been met; however, the statute does not sever a felon's ownership interest in his or her firearms; when a police department lawfully seizes noncontraband firearms belonging to a felon, the police department becomes a constructive bailee of the firearms; the felon-in-possession statute prevents the police department from delivering those firearms to the designated agent of the convicted felon, but the statute does not prevent a court from appointing a successor bailee to maintain possession of the felon's weapons during his or her period of legal incapacity.

2. CRIMINAL LAW — WEAPONS — FELONS IN POSSESSION OF FIREARMS — DEPRIVATION OF POSSESSORY INTEREST — DUE PROCESS.

When analyzing a due process claim, courts first ask whether there exists a liberty or property interest of which a person has been deprived and, if so, whether the procedures followed by the state were constitutionally sufficient; with regard to depriving a felon of his or her possessory interest in noncontraband firearms under the felon-in-possession statute, MCL 750.224f, the felon receives all the process to which the felon is due when he or she is convicted of the underlying felony.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Nolan Law Offices, PLLC (by *Kevin J. Wistrom*), for defendant.

PER CURIAM. At issue in this case is whether Michigan's "felon in possession" statute, MCL 750.224f, prevents a police department from delivering lawfully seized noncontraband firearms to the designated agent of a convicted felon. We conclude that it does. The statute does not, however, prevent a court from appointing a successor bailee to maintain possession of a

defendant's weapons during his or her period of legal incapacity. Therefore, we reverse the Court of Appeals' judgment, vacate the circuit court's order of November 24, 2010, and remand this matter to the circuit court for entry of an order not inconsistent with this opinion that clarifies its disposition of the firearms.

Following a domestic disturbance, the Fruitport Police Department executed a search warrant and lawfully seized 87 firearms from defendant's home. Of these, defendant lawfully owned 86, but he illegally possessed one short-barreled shotgun. Defendant was charged with and pleaded guilty to one count of possession of a short-barreled shotgun[1] and one count of felony-firearm.[2]

After his sentencing, defendant moved to have all of his lawfully owned weapons, which were still in the police department's possession, "returned to Carol Cutler [defendant's mother], as designated by Defendant in his proposed Durable Power of Attorney . . . ." In arguing the motion, defendant's counsel informed the court that defendant and counsel "would advise" defendant's mother to sell the weapons in accordance with the authority conveyed in the power of attorney. The Muskegon Circuit Court granted defendant's motion in an order dated November 24, 2010, over the prosecution's objection.

The prosecution appealed by leave granted. The Court of Appeals affirmed the circuit court's decision in a published opinion per curiam, holding that "denying defendant's designee the right to take possession of the weapons would deprive defendant of his property without due process of law."[3] Having heard oral argument

[1] MCL 750.224b.

[2] MCL 750.227b.

[3] *People v Minch*, 295 Mich App 92, 95; 811 NW2d 571 (2011).

on the prosecution's application for leave to appeal,[4] we reverse the judgment of the Court of Appeals and remand this case to the circuit court for further proceedings not inconsistent with this opinion.

MCL 750.224f(2) states:

> A person convicted of a specified felony[5] shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has paid all fines imposed for the violation.
>
> (*ii*) The person has served all terms of imprisonment imposed for the violation.
>
> (*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

Under this statute, defendant cannot directly possess his firearms because he is a convicted felon. Nor can defendant constructively possess the firearms. This Court has held that for possessory crimes in Michigan, actual possession is not required; constructive possession is sufficient.[6] The test for constructive possession is whether "the totality of the circumstances indicates a sufficient nexus between defendant and the contra-

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[4] See *People v Minch*, 491 Mich 931 (2012).

[5] Both of defendant's convictions qualify as "specified felon[ies]." See MCL 750.224f(6)(*iii*).

[6] *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002).

band."[7] "Although not in actual possession, a person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . ."[8] Thus, if defendant designates an agent to possess the firearms on his behalf and the agent does so, defendant is in violation of MCL 750.224f(2) because a sufficient nexus would remain between defendant and the firearms.

While MCL 750.224f(2) suspends a felon's possessory interest in his or her firearms until the statutorily enumerated conditions are met, nothing in the statute severs a felon's ownership interest in his or her firearms.[9] Thus, a felon continues to own his or her firearms but may not actually or constructively possess them or engage in any of the other prohibited activities listed in the statute.[10] Accordingly, neither the police department's lawful seizure of the firearms at issue here nor its continued possession of the firearms deprived defendant of his ownership rights in the firearms.

We agree with the prosecution that a constructive bailment has been created between defendant and the

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[7] *Id.*

[8] *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010) (quotation marks and citations omitted).

[9] That a convicted felon loses his or her possessory interest, but not his or her ownership interest in the firearms is consistent with many federal cases addressing the issue. See, e.g., *United States v Miller*, 588 F3d 418, 420 (CA 7, 2009) ("Because the United States did not commence a timely forfeiture proceeding, Miller's property interest in the firearms continues even though his possessory interest has been curtailed."); *Cooper v City of Greenwood*, 904 F2d 302, 304 (CA 5, 1990) ("[W]e hold that Cooper's claimed ownership interest in the firearms survived his criminal conviction . . . .").

[10] If a defendant were to subsequently engage in any of the prohibited activities listed in MCL 750.224f, the weapons would be subject to forfeiture pursuant to MCL 750.239.

police department.[11] As a constructive bailee of the noncontraband weapons,[12] the police department is charged with all the attendant duties and obligations of a bailee.[13] Nothing in MCL 750.224f precludes the appointment of a successor bailee to maintain possession of a felon's weapons for the duration of the felon's incapacity. Thus, it would be lawful for another third party, including defendant's mother, to assume possession of these firearms as bailee.

To ensure compliance with MCL 750.224f, the person appointed by the court to assume possession of a felon's firearms must do so as a bailee, not as the felon's agent. Unlike an agent, a bailee, by definition, remains free from the felon's control.[14] This is especially important where, as here, the bailor's desires for the disposition of the property may be adverse to the bailee's permissible actions.[15] The distinction between a bailee and an agent is essential, especially if defendant's mother is ap-

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[11] A constructive bailment "arises . . . where a person has lawfully acquired possession of personal property of another otherwise than by a mutual contract of bailment . . . ." 8A Am Jur 2d, Bailments, § 12, pp 533-534.

[12] See 8A Am Jur 2d, Bailments, § 2, p 522 n 4 ("A sheriff or other officer who takes custody of the property of another may be a constructive bailee of the property.").

[13] See *Godfrey v City of Flint*, 284 Mich 291, 297-298; 279 NW 516 (1938) (concluding that a bailee owes the bailor a duty to preserve the property with the ordinary care that a prudent person would apply to his or her own property).

[14] See 2A CJS, Agency, § 13, pp 313-314 ("A bailee over whose actions the bailor has no control is not an agent, even though he or she acts for the benefit of the bailor."); see also 8A Am Jur 2d, Bailments, § 17, p 539 ("The primary distinction between an agency and a bailment is the bailee's freedom from control by the bailor . . . .").

[15] 8A Am Jur 2d, Bailments, § 17, p 539 ("In a bailment relationship, the interests of the parties may be completely antagonistic, whereas a person who undertakes to act as an agent for another cannot deal in the agency matter for his or her own benefit without the consent of the

pointed successor bailee because her power of attorney already suggests the existence of an agency relationship.[16] Because nothing prevents a person from serving as both an agent of and a bailee for someone,[17] one person could serve as bailee of defendant's firearms and as defendant's agent for purposes of managing all his other property. But if defendant retained control over the firearms, the person holding the firearms would be acting as an agent, rather than a bailee, and would be aiding and abetting defendant's violation of MCL 750.224f(2).[18]

The Court of Appeals erred when it concluded that the police department's continued possession of defendant's firearms as a bailee violated defendant's right to due process. In analyzing a claim under the Due Process Clause, "[w]e first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient."[19] Regarding defendant's possessory interest in his weapons, he received all the process to which he was due when he pleaded guilty of the underlying felonies, became a convicted felon, and was rendered statutorily ineligible to possess his 86 firearms.[20] No additional process is required to determine that defendant cannot possess

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principal, freely given with full knowledge of every detail known to the agent which might affect the transaction.").

[16] See *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001).

[17] 8A Am Jur 2d, Bailments, § 17, pp 538-539 ("[A] bailee may also be an agent of the bailor for some purposes with respect to the subject matter of the same transaction or for other purposes . . . .").

[18] Defendant's control over the agent would create the necessary nexus required for constructive possession. See *Johnson*, 466 Mich at 500.

[19] *Swarthout v Cooke*, 562 US ___, ___; 131 S Ct 859, 861; 178 L Ed 2d 732 (2011); see also *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004).

[20] *United States v Felici*, 208 F3d 667, 670 (CA 8, 2000) ("When it is apparent that the person seeking a return of the property is not lawfully

these firearms because "the law's requirements turn on [a defendant's felony] conviction alone—a fact that a convicted [defendant] has already had a procedurally safeguarded opportunity to contest."[21] Moreover, because the police department does not seek to deprive defendant of his *ownership* interest in his firearms, no due process violation has occurred.[22]

The Court of Appeals also erred by relying on *Banks v Detroit Police Department*.[23] We now overrule the erroneous decision in *Banks*. In *Banks*, the Detroit Police Department seized various firearms, jewelry, and cash while executing a search warrant on Alfonso Banks's house.[24] No charges were brought against Banks after the seizure, but the department refused to return the firearms because Banks was a convicted felon.[25] Like the defendant here, Banks sought to have the firearms turned over to a third party. The Court of Appeals panel held that Banks was entitled to "designate an individual to receive the guns or produce the owners of the guns to reclaim them," concluding that continued possession by the police department deprived Banks of his property interest in the weapons without due process of law.[26] But this decision, utterly devoid of

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entitled to own or possess the property, the district court *need not hold an evidentiary hearing*.") (emphasis added).

[21] *Connecticut Dep't of Pub Safety v Doe*, 538 US 1, 7; 123 S Ct 1160; 155 L Ed 2d 98 (2003).

[22] See note 9 of this opinion. As stated by the prosecution, "The Fruitport Police Department recognizes Defendant's ownership interest in the firearms, subject to the limitations imposed by MCL 750.224f."

[23] *Banks v Detroit Police Dep't*, 183 Mich App 175; 454 NW2d 198 (1990).

[24] *Id.* at 177. At the time, Michigan did not have a "felon in possession" statute, but the police department argued that Banks's possession of the firearms violated the similar federal statute, 18 USC 922(g).

[25] *Banks*, 183 Mich App at 177-178.

[26] *Id.* at 180.

analysis, failed to consider that Banks, who did not even own the firearms, received sufficient due process regarding any possessory interest he had in the firearms when he became a convicted felon in the first place. Thus, contrary to the panel's conclusion, no due process violation occurred in *Banks*, and the instant Court of Appeals panel's reliance on *Banks* was misplaced.

In its ultimate disposition of defendant's firearms, the Muskegon Circuit Court must use precise language so as not to authorize a violation of MCL 750.224f. The circuit court may order the police department to turn over the firearms to an appointed successor bailee as long as the operative order is clear that the nature of the relationship between defendant and the successor is that of a bailment and that defendant must have no control over or access to the firearms whatsoever. Even defendant's mother, who had a durable power of attorney to attend to defendant's affairs while he was incarcerated, may possess the firearms as long as she does so as a bailee and not as defendant's agent.[27] The successor bailee may not engage in any actions that would destroy defendant's ownership rights in the guns.[28] If no replacement bailee is willing to hold the

[27] The power of attorney is evidence of an agency relationship between defendant and his mother. See *Persinger*, 248 Mich App at 503. This agency relationship is not incompatible with defendant's mother holding the guns as a bailee, but it emphasizes the need for clarity in the circuit court's order. The circuit court's November 24, 2010, order was problematic because it created ambiguity about the mother's authority.

[28] Destroying defendant's ownership rights would violate the duty of care owed by a bailee to a bailor. See 8A Am Jur 2d, Bailments, § 77, pp 77-78. At oral argument defendant's attorney suggested that defendant's mother would sell the guns. This would be impermissible, for to do so at defendant's instruction would be in violation of MCL 750.224f(2), and to do so independently would destroy defendant's ownership interest. If defendant's mother becomes a bailee, she may take no action other than to hold the guns until defendant's possession rights are reinstated.

firearms in accordance with the conditions outlined by the court, then the police department may retain possession as constructive bailee until defendant is lawfully entitled to possession of his firearms. Any of the foregoing dispositions more than satisfy the due process rights attendant to defendant's ownership interest in his firearms.

Accordingly, we reverse the judgment of the Court of Appeals, vacate the circuit court's order of November 24, 2010, and remand this matter to the circuit court for entry of an order not inconsistent with this opinion that clarifies its disposition of the firearms.

YOUNG, C.J., and MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ. We concur in the result only.

KIM v JPMORGAN CHASE BANK, NA

Docket No. 144690. Argued October 10, 2012 (Calendar No. 9). Decided December 21, 2012.

Euihyung and In Sook Kim brought an action in the Macomb Circuit Court against JPMorgan Chase Bank, N.A., seeking to set aside a sheriff's sale of their home. Plaintiffs had obtained a loan from Washington Mutual Bank to refinance their home and granted Washington Mutual a mortgage interest in the property to secure the loan. The federal Office of Thrift Management subsequently closed Washington Mutual and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the bank. Defendant acquired Washington Mutual's assets, including loans and loan commitments, pursuant to a purchase and assumption agreement that it reached with the FDIC. After plaintiffs defaulted on their loan payments, defendant foreclosed on the property by advertisement and purchased the property at the sheriff's sale. Both parties moved for summary disposition. Plaintiffs argued in part that defendant had failed to comply with the statutory foreclosure-by-advertisement requirements and that as a result the foreclosure sale was void *ab initio*. The court, Richard L. Caretti, J., granted summary disposition in favor of defendant, finding that because defendant had acquired plaintiffs' mortgage by operation of law, defendant was not required to record the mortgage assignment before beginning foreclosure-by-advertisement proceedings. The Court of Appeals, DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ., reversed, concluding that because defendant was not the original mortgagee and had acquired the loan by assignment rather than by operation of law, defendant was obligated under MCL 600.3204(3) to record the assignment of plaintiffs' mortgage to it before foreclosing by advertisement. The Court of Appeals determined that defendant's failure to record the assignment rendered the sheriff's sale void *ab initio*. 295 Mich App 200 (2012). The Supreme Court granted defendant's application for leave to appeal. 491 Mich 915 (2012).

In an opinion by Justice MARILYN KELLY, joined by Justices CAVANAGH, MARKMAN, and HATHAWAY, the Supreme Court *held*:

When a subsequent mortgagee acquires an interest in a mortgage through a voluntary purchase agreement with the FDIC, the mortgage has not been acquired by operation of law and that subsequent mortgagee must comply with the provisions of MCL 600.3204 and record the assignment of the mortgage before foreclosing on the mortgage by advertisement. Any defect or irregularity in a foreclosure proceeding results in a foreclosure that is voidable, not void *ab initio*.

1. The FDIC, when acting in its capacity as conservator or receiver of failed depository institutions, acquires by operation of law all rights, titles, powers, and privileges of the failed insured depository institution and title to the books, records, and assets of any previous conservator or other legal custodian of such institution under 12 USC 1821(d)(2)(A). Accordingly, the FDIC succeeded to Washington Mutual's assets, which included plaintiffs' mortgage, by operation of law.

2. Under 12 USC 1821(d)(2)(G), the FDIC may dispose of a failed bank's assets (1) by merging the insured depository institution with another insured depository institution or (2) by transferring, subject to approval by the appropriate federal banking agency, any asset or liability of the institution to another depository institution. A transfer occurs by operation of law when it takes place unintentionally, involuntarily, or through no affirmative action on the part of the transferee. The transfer of Washington Mutual's assets from the FDIC to defendant was an assignment and did not take place by operation of law because defendant acquired Washington Mutual's assets in a voluntary transaction pursuant to 12 USC 1821(d)(2)(G)(i)(II). The FDIC chose to transfer Washington Mutual's assets through the voluntary purchase agreement, not by a merger, which would have effectuated the transfer of assets by operation of law under 12 USC 1821(d)(2)(G)(i)(I).

3. Under MCL 600.3204(3), if the party foreclosing on a mortgage by advertisement is not the original mortgagee, a record chain of title must exist evidencing the assignment of the mortgage to the party foreclosing on the mortgage before the date of sale. Defendant failed to record the assignment of plaintiffs' mortgage before foreclosing on it by advertisement.

4. Defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*. To set aside a foreclosure-by-advertisement sale on the basis of a failure to follow the foreclosure requirements set forth in MCL 600.3204, the party claiming a defect must demonstrate prejudice by showing that it would have been in a better position to preserve its interest in the

property absent the other party's statutory noncompliance. Because defendant failed to record its interest in plaintiffs' mortgage in compliance with MCL 600.3204 before foreclosing on the property by advertisement, the sale was voidable, not void *ab initio* as the Court of Appeals incorrectly determined.

Affirmed in part, reversed in part, and remanded for further proceedings.

Justice MARKMAN, concurring, wrote separately to emphasize that the dissent did not provide an affirmative definition of "operation of law," did not explain the legal significance of its observation that the transaction at issue was "specialized," and did not support its contention that the FDIC's characterization of the transfer should be accorded respectful consideration in light of the fact that this case concerned only Michigan law and that the affidavit submitted was not a product of the standard rulemaking process. Justice MARKMAN would also have offered additional guidance to the trial court concerning the nature of the prejudice that plaintiffs must demonstrate in order to set aside the foreclosure.

Justice ZAHRA, joined by Chief Justice YOUNG and Justice MARY BETH KELLY, dissenting, would have reversed the judgment of the Court of Appeals and held that the FDIC's transfer of Washington Mutual's assets to defendant occurred by operation of law. Under 12 USC 1821(d)(2)(G)(i)(II), the FDIC is empowered to resolve the business of a failed bank by transferring any asset or liability without any assignment, or consent with respect to that transfer. As stated by the FDIC in an affidavit, the transfers of assets from Washington Mutual to the FDIC, as the receiver, and then almost immediately to defendant occurred by operation of law without an assignment; the transfer was not a simple sale as asserted by the majority. The FDIC's characterization of a transfer under its governing statute should be accorded respectful consideration. Contrary to the majority's conclusion, a transfer by operation of law does not have to be involuntary. Such a rule ignores that other transfers, such as those that occur by intestacy or a joint tenancy, occur by operation of law but require acceptance by the transferee. The transaction between the FDIC and defendant was the legal equivalent of a merger because defendant received the assets and liabilities without an assignment and stepped into Washington Mutual's shoes. Because defendant acquired plaintiffs' mortgage without assignment and by operation of law pursuant to the FDIC's statutory authority, the recording requirements of MCL 600.3204(3) did not apply. Defendant was legally considered the original mortgagee, was not required to record anything in the chain of title, and properly foreclosed on plaintiffs' mortgage by advertisement.

1. MORTGAGES — TRANSFER OF MORTGAGES — OPERATION OF LAW.

The transfer of a mortgage occurs by operation of law when it takes place unintentionally, involuntarily, or through no affirmative action on the part of the transferee.

2. MORTGAGES — ACQUISITION OF MORTGAGES — ASSIGNMENT OF MORTGAGES.

When a subsequent mortgagee acquires an interest in a mortgage through a voluntary purchase agreement with the Federal Deposit Insurance Corporation, acting in its capacity as the conservator or receiver of a failed depository institution, pursuant to 12 USC 1821(d)(2)(G)(i)(II), the mortgage has not been acquired by operation of law and the subsequent mortgagee must comply with the provisions of MCL 600.3204 and record the assignment of the mortgage before foreclosing on the mortgage by advertisement.

3. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — DEFECTS IN FORECLOSURE BY ADVERTISEMENTS — VOIDABLE.

Defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*; to set aside a foreclosure-by-advertisement sale on the basis of a failure to follow the foreclosure requirements set forth in MCL 600.3204, the party claiming a defect must demonstrate prejudice by showing that it would have been in a better position to preserve its interest in the property absent the other party's statutory noncompliance.

Dykema Gossett, PLLC (by *Joseph H. Hickey*, *Jospeh A. Doerr*, and *Jill M. Wheaton*), for Euihyung and In Sook Kim,

Christenson & Fiederlein, P.C. (by *Bernhardt D. Christenson*), for JPMorgan Chase Bank, N.A.

Amici Curiae:

Warner Norcross & Judd LLP (by *Nicole L. Mazzocco* and *James H. Breay*), for the Michigan Bankers Association.

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

Miller Canfield Paddock and Stone, PLC (by *James L. Allen* and *Scott R. Lesser*), for the Real Property Law Section of the State Bar of Michigan.

MARILYN KELLY, J. At issue in this case is the manner in which defendant JPMorgan Chase Bank, N.A. (Chase), the successor in interest to Washington Mutual Bank (WaMu), acquired plaintiffs' mortgage. Plaintiffs' mortgage was among the assets held by WaMu when it collapsed in 2008 in the largest bank failure in American history.[1] Specifically, we must determine whether defendant acquired plaintiffs' mortgage by "operation of law" and, if so, whether MCL 600.3204(3), which sets forth requirements for foreclosing by advertisement, applies to the acquisition of a mortgage by operation of law. We asked the parties to address whether, if the foreclosure proceedings that defendant initiated were flawed, the subsequent foreclosure is void *ab initio* or merely voidable.[2]

We hold that defendant did not acquire plaintiffs' mortgage by operation of law. Rather, defendant acquired that mortgage through a voluntary purchase agreement. Accordingly, defendant was required to comply with the provisions of MCL 600.3204. We further hold, differently than did the Court of Appeals, that the foreclosure sale in this case was voidable rather than void *ab initio*. Accordingly, we affirm in part and

[1] See Dash & Sorkin, *Government Seizes WaMu and Sells Some Assets*, NY Times, September 25, 2008, available at <http://www.nytimes.com/2008/09/26/business/26wamu.html?pagewanted=all> (accessed December 20, 2012).

[2] "Void *ab initio*" is defined as "[n]ull from the beginning, as from the first moment when a contract is entered into." Black's Law Dictionary (9th ed). By contrast, "voidable" is defined as "[v]alid until annulled; [especially], (of a contract) capable of being affirmed or rejected at the option of one of the parties." *Id*.

reverse in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 11, 2007, plaintiffs obtained a loan from WaMu in the amount of $615,000 to refinance their residence. As security for the loan, plaintiffs granted a mortgage on the property to WaMu, which properly recorded it later that month.

When WaMu collapsed on September 25, 2008, the federal Office of Thrift Management closed the bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for its holdings. That same day, the FDIC, acting as WaMu's receiver, transferred virtually all of WaMu's assets to defendant under authority set forth in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[3] Under 12 USC 1821, the FDIC is empowered to transfer the assets of a failed bank "without any approval, assignment, or consent . . . ."[4] However, in this case, it did not avail itself of that authority. Instead, the FDIC sold WaMu's assets to defendant pursuant to a purchase and assumption (P&A) agreement.

Plaintiffs sought a loan modification in 2009 because they were having difficulty making their mortgage payments. They assert that a WaMu representative advised them that they were ineligible for a loan modification because they were not at least three months in arrears on their payments. Plaintiffs claim that on the basis of this information, they deliberately allowed their mortgage to become delinquent to qualify for a loan

[3] PL 101-73, 103 Stat 183 *et seq*.

[4] 12 USC 1821(d)(2)(G)(i)(II).

modification. They further allege that they signed documents to complete the modification and that their attorney assured them that their loan modification had been approved.

Defendant notified plaintiffs in May 2009 that it was foreclosing on their property. Plaintiffs contend that they attempted to ascertain whether the foreclosure notice had been sent in error in light of the purported loan modification and were advised by a WaMu representative "not to worry." Defendant published the required notice of foreclosure in May and June 2009. The property was sold to defendant at a sheriff's sale on June 26, 2009.

Plaintiffs filed suit on November 30, 2009, seeking to set aside the sale on the ground that they had received a loan modification and that defendant had not bid fair market value for the property at the sale. Defendant responded with a motion for summary disposition. The trial court granted summary disposition to defendant. It ruled that defendant had acquired plaintiffs' mortgage by operation of law. As a consequence, MCL 600.3204(3), which requires that a mortgage assignment be recorded before initiation of a foreclosure by advertisement, was inapplicable.

Plaintiffs appealed, pursuing only their claim that defendant had failed to comply with MCL 600.3204(3) and that, as a result, the foreclosure sale was void *ab initio*. The Court of Appeals agreed. It held that MCL 600.3204(3) applied to defendant because defendant was not the original mortgagee and acquired the loan by assignment rather than by operation of law.[5] It reasoned that the FDIC, as receiver of WaMu's assets, had acquired those assets by operation of law, but not

[5] *Kim v JPMorgan Chase Bank, NA*, 295 Mich App 200, 207; 813 NW2d 778 (2012).

defendant, which had purchased them from the FDIC.[6] Hence, the Court of Appeals held that defendant had a statutory obligation to record the assignment of plaintiffs' mortgage to it before foreclosing by advertisement.[7] Moreover, the Court of Appeals held that defendant's failure to record the assignment rendered the sheriff's sale void *ab initio*.[8] Accordingly, it remanded the case to the trial court for entry of judgment in favor of plaintiffs.

Defendant filed an application for leave to appeal in this Court. We granted its application.[9]

II. ANALYSIS

A. LEGAL BACKGROUND

We review de novo the grant or denial of a motion for summary disposition.[10] We use the same standard to review questions of statutory interpretation.[11]

At the heart of this dispute are the statutory provisions governing the foreclosure of mortgages by advertisement.[12] MCL 600.3204 sets forth the requirements, providing in relevant part:

> (1) Subject to subsection (4) [providing certain exceptions inapplicable to this case], a party may foreclose a mortgage by advertisement if all of the following circumstances exist:

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[6] *Id*.

[7] *Id*. at 208.

[8] *Id*.

[9] *Kim v JPMorgan Chase Bank, NA*, 491 Mich 915 (2012).

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

[11] *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

[12] MCL 600.3201 *et seq*.

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

(c) The mortgage containing the power of sale has been properly recorded.

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

* * *

(3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.3216] evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Thus, as a general matter, a mortgagee cannot validly foreclose a mortgage by advertisement before the mortgage and all assignments of that mortgage are duly recorded.

This common understanding of the requirement of recordation before foreclosure by advertisement was also set forth in a 2004 Attorney General opinion. Our Attorney General stated that "a mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded."[13] In 2004, the operative language now set forth in

[13] OAG, 2003-2004, No 7147, p 93 (January 9, 2004).

MCL 600.3204(3) was found in MCL 600.3204(1)(c).[14]

The general powers of the FDIC in its capacity as conservator or receiver[15] that are germane to this case are set forth in 12 USC 1821. Specifically, 12 USC 1821(d)(2) describes the manner in which the FDIC acquires assets. It provides, in relevant part:

> (A) Successor to institution.—The [FDIC] shall, as conservator or receiver, and *by operation of law*, succeed to—
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

Subsection (d)(2) also sets forth the FDIC's authority to dispose of a failed bank's assets, providing in pertinent part:

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[14] MCL 600.3204, as amended by 1994 PA 397, provided, in relevant part:

> (1) A party may foreclose by advertisement if all of the following circumstances exist:
>
> * * *
>
> (c) The mortgage containing the power of sale has been properly recorded and, if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Subsequent amendments by 2004 PA 186 and 2009 PA 29 produced the current language.

[15] The Federal Deposit Insurance Act (FDIA), 12 USC 1811 *et seq*., governs the actions of the FDIC. The FDIA directs the FDIC to operate in two separate and legally distinct capacities: FDIC corporate and FDIC acting as receiver. FDIC corporate functions as an insurer of bank deposits. See 12 USC 1821(a). This function of the FDIC is not at issue here.

> (G) Merger; transfer of assets and liabilities.—
>
> (i) In general.—The [FDIC] may, as conservator or receiver—
>
> (I) merge the insured depository institution with another insured depository institution; or
>
> (II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.
>
> (ii) Approval by appropriate Federal banking agency.—No transfer described in clause (i)(II) may be made to another depository institution . . . without the approval of the appropriate Federal banking agency for such institution.

B. APPLICATION

Against this backdrop, we consider the manner in which defendant acquired plaintiffs' mortgage and whether the requirements of MCL 600.3204 apply to that acquisition.

1. DEFENDANT DID NOT ACQUIRE PLAINTIFFS' MORTGAGE BY OPERATION OF LAW

Two transfers of plaintiffs' mortgage occurred on September 25, 2008. The first, between WaMu and the FDIC, was consummated when the Office of Thrift Management closed WaMu and appointed the FDIC as its receiver. This transfer took place pursuant to 12 USC 1821(d)(2)(A)(i) and (ii), which provide that the FDIC "shall, as conservator or receiver, and *by operation of law*, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution . . . and title to the books, records, and assets of any previous conservator or other legal custodian of such institution." (Emphasis added.) Thus, when the FDIC succeeded to WaMu's assets, which included plaintiffs'

mortgage, it did so by clear operation of a statutory provision—12 USC 1821(d)(2)(A). With respect to this transfer, the FDIC acquired plaintiffs' mortgage by operation of law.

But the FDIC only briefly possessed WaMu's assets, including plaintiffs' mortgage. It immediately transferred those assets to defendant. The dispositive question in this case is whether the second transfer of WaMu's assets—the transfer from the FDIC to defendant—took place by operation of law.

The seminal case discussing the term "operation of law" in the context of foreclosures by advertisement is *Miller v Clark*.[16] In *Miller*, a mortgagee died intestate. The Court considered whether the guardian of his heirs was obliged to record an assignment of the mortgage before foreclosing on it by advertisement. The Court held:

> The authority to foreclose such mortgages by advertisement is purely statutory, and all the requirements of the statute must be substantially complied with. To entitle a party to foreclose in this manner it is required, among other things, that the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereof shall have been recorded. And also that the notice shall specify the names of the mortgagor and the mortgagee, and of the assignee of the mortgage, if any.
>
> *The assignments which are required to be recorded are those which are executed by the voluntary act of the party, and this does not apply to cases where the title is transferred by operation of law*; the object of the statute being to restrict the execution of the power to the owner of the legal title to the instrument.[17]

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[16] *Miller v Clark*, 56 Mich 337; 23 NW 35 (1885).

[17] *Id*. at 340-341 (emphasis added) (quotation marks omitted). The statute governing foreclosures by advertisement in effect when *Miller* was decided in 1885, 1871 CL 6913, was considerably different from the current statute, MCL 600.3204.

Thus, *Miller* contemplated that a transfer occurs by operation of law when it takes place involuntarily or as the result of no affirmative action on the part of the transferee.

Miller's interpretation of when a transfer occurs by "operation of law" is consistent with Black's Law Dictionary's definition of the expression. Black's defines "operation of law" as "[t]he means by which a right or a liability is created for a party *regardless of the party's actual intent*."[18] Similarly, this Court has long understood the expression to indicate "the manner in which a party acquires rights *without any act of his own*."[19] Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee.

Applying this proposition, we hold that the transfer of WaMu's assets from the FDIC to defendant did not take place by operation of law. Defendant acquired WaMu's assets from the FDIC in a voluntary transaction; defendant was not forced to acquire them. Instead, defendant took the affirmative action of voluntarily paying for them. Had defendant not willingly purchased them, it would not have come into possession of plain-

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[18] Black's Law Dictionary (9th ed) (emphasis added).

[19] *Merdzinski v Modderman*, 263 Mich 173, 175; 248 NW 586 (1933) (emphasis added) (citation and quotation marks omitted); see also *Union Guardian Trust Co v Emery*, 292 Mich 394, 406-407; 290 NW 841 (1940) (holding in a discussion of a constructive trust that, "[w]hile the term 'constructive trust' has been broadly defined as a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust, in a more restricted sense and contradistinguished from a resulting trust it has been variously defined as a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice; *one not arising by agreement or intention, but by operation of law*") (emphasis added).

tiffs' mortgage. WaMu's assets did not pass to defendant "without any act of [defendant's] own"[20] or "regardless of [defendant's] actual intent."[21] Accordingly, the Court of Appeals correctly concluded that defendant did not acquire WaMu's assets by operation of law.

Defendant and the dissent contend that the transfer occurred by operation of law because, although not a merger, the transfer was analogous to a merger and should be treated as one. We find this reasoning unpersuasive.[22] 12 USC 1821(d)(2)(G)(i)(I) empowered the FDIC to merge WaMu with another financial institution such as defendant. Had a merger occurred under that statutory provision, defendant would have a strong argument that it had merely stepped into the shoes of WaMu. It would have had no need to engage in a transfer of any of WaMu's assets. And the transaction would have occurred without any voluntary or affirmative action by defendant, given that the FDIC may, at its discretion, merge a failed bank with another institution. The transaction could have constituted a transfer by operation of law under traditional banking and corporate law.[23]

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[20] *Merdzinski*, 263 Mich at 175.

[21] Black's Law Dictionary (9th ed).

[22] We also find unpersuasive the FDIC's characterization of the transfer as one that occurred by operation of law. We have given respectful consideration to the FDIC's position, but we do not resort to it for guidance in this matter due to its lack of persuasiveness. In addition, the authorities cited by the dissent in support of its contention that the FDIC's position should be accorded respectful consideration, *post* at 124 n 10, are inapposite. This case is concerned with Michigan law, not federal law. The dispositive issue is whether defendant satisfied MCL 600.3204, which implicates whether the transfer from the FDIC to defendant occurred by operation of law. Whether the transfer occurred by operation of law is governed by Michigan law.

[23] See, e.g., 12 USC 215a(e) ("All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of

But here, a merger did not occur. In selling WaMu's assets to defendant, the FDIC relied on a different statutory provision, 12 USC 1821(d)(2)(G)(i)(II), which allows the FDIC to "transfer" the assets and liabilities of failed institutions. Hence, although the FDIC could have effectuated a merger in reliance on subsection (d)(2)(G)(i)(I), it explicitly chose not to do so. Indeed, the FDIC submitted an affidavit to the Court that describes the transaction, specifically citing the subsection of the statute authorizing transfers, rather than the subsection authorizing mergers.[24] Unlike the dissent, we will not conclude that a merger took place when the FDIC so clearly chose to engage in a different type of transaction under a different statutory provision.[25]

In sum, the Court of Appeals correctly held that defendant did not acquire WaMu's assets by operation of law.

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property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer."); MCL 450.1724(1)(b) ("When a merger takes effect, . . . the title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment.").

[24] The affidavit provides, in relevant part:

> 3. As authorized by . . . 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment, or consent with respect to such transfer.
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> 4. Pursuant to the terms and conditions of a [P&A] Agreement between the FDIC as receiver of Washington Mutual and [defendant] . . . [defendant] acquired certain of the assets, including all loans and all loan commitments, of Washington Mutual.
>
> 5. As a result, on September 25, 2008, [defendant] became the owner of the loans and loan commitments of Washington Mutual by operation of law.

[25] Although the FDIC's affidavit purports that the sale of WaMu's assets to defendant was effected by operation of law, the FDIC may not by unilateral declaration make it so.

2. DEFENDANT'S FAILURE TO COMPLY WITH MCL 600.3204(3) RENDERS THE FORECLOSURE OF PLAINTIFFS' PROPERTY VOIDABLE

As noted earlier, MCL 600.3204 sets forth several requirements for foreclosing a property by advertisement. Subsection (3) requires a party that is not the original mortgagee to record the assignment of the mortgage to it before foreclosing. Because defendant acquired plaintiffs' mortgage through a voluntary transfer, and given that it was not the original mortgagee, it was subject to the recordation requirement of MCL 600.3204(3). Having made that determination, we must now decide the effect of defendant's failure to comply with that provision.[26]

With meager supporting analysis, the Court of Appeals concluded that defendant's failure to record its mortgage interest before initiating foreclosure proceed-

[26] Because we have held that defendant acquired plaintiffs' mortgage through a voluntary transfer, we need not decide whether MCL 600.3204(3) applies to the acquisition of a mortgage by operation of law. The dissent must decide this issue to support its position. In doing so, it acknowledges that changes have been made to the language of the foreclosure-by-advertisement statute during the 127 years since *Miller* was decided. It mentions that both versions "required the recordation of mortgage assignments before foreclosure was permitted." But it overlooks the fact that the 1871 statute required the recordation of assignments only "if [the mortgage] shall have been assigned," 1871 CL 6913, whereas the current statute, MCL 600.3204(3), requires recordation if the foreclosing party "is not the original mortgagee." These are two distinct triggering mechanisms for recordation. Moreover, the fact that in the 1871 statute the recordation requirement was triggered by assignment seems particularly significant. "Assignment" is defined as "**1.** The transfer of rights or property. **2.** The rights or property so transferred." Black's Law Dictionary (9th ed). By contrast, as noted earlier, "operation of law" expresses devolution of a right absent the acts of a party, such as assignment, to obtain them. Thus, the *Miller* Court correctly focused on the voluntariness of transfer and concluded that involuntary transfers by operation of law did not trigger the recording requirement because they did not constitute assignments. The same conclusion cannot be made when construing the language of MCL 600.3204(3).

ings rendered the foreclosure sale void *ab initio*. It cited one case in support of its holding, *Davenport v HSBC Bank USA*.[27] There, the plaintiff, who was in default on her mortgage, brought an action to void a foreclosure. The defendant, who was the successor in interest of the initial mortgagee, had initiated the foreclosure proceeding several days before acquiring its interest in the mortgage. The trial court granted summary disposition to defendant.

The Court of Appeals reversed the trial court's ruling. It held that the defendant's failure to comply with MCL 600.3204(1)(d), which requires that a party own some or all of the indebtedness before foreclosing by advertisement, rendered the foreclosure proceedings void *ab initio*.[28] But it cited not a single case in support of the proposition that the foreclosure was void *ab initio* as opposed to merely voidable.

Davenport's holding was contrary to the established precedent of this Court. We have long held that defective mortgage foreclosures are voidable. For example, in *Kuschinski v Equitable & Central Trust Co*,[29] the Court considered a foreclosure undertaken in violation of a restraining order. The Court held:

> Our attention is called to a few isolated cases where under a different factual set-up, such sales have been held to be void. *The better rule seems to be that such sale is voidable and not void*. Plaintiff was not misled into believing that no sale had been had because of the order restraining such action. He knew of the sale and, although he was warned by defendants' attorneys, violated the rule

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[27] *Davenport v HSBC Bank USA*, 275 Mich App 344; 739 NW2d 383 (2007).

[28] *Id*. at 347-348.

[29] *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23; 268 NW 797 (1936).

> that in seeking to set aside a foreclosure sale, the moving party must act promptly after he becomes aware of the facts upon which he bases his complaint. The total lack of equity in plaintiff's claim, his failure to pay anything on the mortgage debt and his laches preclude him from any relief in a court of equity.[30]

Similarly, in *Feldman v Equitable Trust Co*, the Court held that a foreclosure commenced without first recording all assignments of the mortgage is not invalid if the defect does not harm the homeowner.[31] This Court, the Court of Appeals, and the United States District Court for the Eastern District of Michigan have consistently used this interpretation.[32] We continue to adhere to it.

Therefore, we hold that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*. Because the Court of Appeals erred by holding to the contrary, we reverse that portion of its decision. We leave to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs' property is voidable. In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204. To

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[30] *Id*. at 26-27 (emphasis added) (citations omitted).

[31] *Feldman v Equitable Trust Co*, 278 Mich 619, 624-625; 270 NW 809 (1937).

[32] See, e.g., *Fox v Jacobs*, 289 Mich 619, 624; 286 NW 854 (1939) (holding that the failure of a foreclosure notice to specify an assignee of the mortgage, as required by statute, did not render the foreclosure sale absolutely void, but only voidable); *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502; 739 NW2d 656 (2007) (holding that a defect in notice renders a foreclosure sale voidable and not void); *Jackson Investment Corp v Pittsfield Prod, Inc*, 162 Mich App 750, 756; 413 NW2d 99 (1987) ("We conclude that the trial court correctly held that the notice defect rendered the [foreclosure] sale voidable and not void."); *Worthy v World Wide Fin Servs, Inc*, 347 F Supp 2d 502, 511 (ED Mich, 2004) ("[E]ven if Defendant failed to comply with the foreclosure notice statute, I would not have sufficient grounds to invalidate the foreclosure sale, because of a lack of prejudice.").

demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute.[33]

III. RESPONSE TO THE DISSENT

At the outset, the dissent claims that the FDIC has more familiarity with the type of transaction that occurred in this case than does this Court. We do not underestimate the FDIC's grasp of what is involved in the liquidation of failed banking institutions. However, we are more familiar with the judicial review process of interpreting statutes and applying them to a set of facts than is an executive agency.

The dissent states that pursuant to 12 USC 1821(d)(2)(G)(i)(I) and (II), the FDIC may merge a failed bank with or transfer a failed bank's assets to a financially healthy bank. It claims that, "[u]nder either provision, the statute provides for transfers by operation of law."[34] This is simply false. Neither statutory provision indicates that either a merger or a transfer takes place by operation of law. The language of 12 USC 1821(d)(2)(G) is in stark contrast with that of 12 USC 1821(d)(2)(A), which explicitly provides that the FDIC succeeds to various property interests by operation of law. The dissent compounds its error by conflating the FDIC's statutory authority to *engage* in a transaction involving a failed bank's assets and liabilities with the *nature* of the transaction itself.[35]

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[33] See, generally, *Kuschinski*, 277 Mich at 26-27; *Sweet Air*, 275 Mich App at 503; *Jackson*, 162 Mich App at 756.

[34] *Post* at 125.

[35] Similarly, the dissent's focus on which of WaMu's assets the FDIC transferred to defendant is irrelevant. It is the nature of the transaction, not its contents, that informs our conclusion that the transfer did not take place by operation of law.

More problematic, however, is the dissent's failure to analyze the issue most central to this case: what is meant by a transfer by "operation of law." The dissent states as an *ipse dixit* that "a transfer by operation of law need not be involuntary . . . ."[36] It cites not a trace of authority for this fiat. The dissent would also analyze whether a transaction took place by operation of law through the lens of the subjective intent of a related party.[37] This cannot be.[38]

By contrast, in giving meaning to the phrase "operation of law," we have carefully considered decades-old precedent from this Court, as well as consulted a legal dictionary. We defer to these established authorities for the proposition that a transfer that takes place by operation of law is one that occurs unintentionally, involuntarily, or through no affirmative act of the transferee.

Finally, the dissent also errs in its alternative argument that defendant is exempt from MCL 600.3204(3) even if the transfer in question did not occur by operation of law. This argument hinges on the belief that defendant did not

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[36] *Post* at 128.

[37] In effect, the dissent's definitionless approach to this case would *re*define the phrase "operation of law" to mean "as provided by law." The dissent essentially argues that because the FDIC, by statute, may liquidate failed banks, when it does so the resulting transfer occurs by operation of law. Under the dissent's approach, any lawful transaction would constitute a transfer by operation of law. It fails to recognize this contradiction.

[38] The dissent also attempts to undermine our definition of "operation of law" by arguing that transfers accomplished by intestate succession occur by operation of law. It posits that, contrary to our definition of the phrase, those transfers cannot be completed without the affirmative act of a recipient in accepting the property. This position is incorrect. In intestacy succession, if an heir takes no affirmative action, he or she may acquire rights to a decedent's property. It is only if an heir takes the affirmative step of *disclaiming* his or her inheritance that it does not pass to that individual. See MCL 700.2902(1).

acquire its interest in plaintiffs' mortgage by assignment. The statute plainly indicates that "a record chain of title shall exist" if the party foreclosing by advertisement "is not the original mortgagee." It is undisputed that defendant is not the original mortgagee. Thus, regardless of *why* no chain of title exists, defendant cannot foreclose by advertisement.[39]

IV. CONCLUSION

Defendant acquired plaintiffs' mortgage through a voluntary purchase agreement with the FDIC. It follows that it did not acquire the mortgage by operation of law. Accordingly, defendant was required to record its interest in compliance with the provisions of MCL 600.3204 before foreclosing on the property by advertisement. We further hold, differently than did the Court of Appeals, that the sale of the foreclosed property was voidable rather than void *ab initio*. Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings. We direct the trial court to expedite its decision on remand.

We do not retain jurisdiction.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

MARKMAN, J. (*concurring*). I fully concur in the analysis and results of the majority opinion and write separately only to supplement that opinion with the following observations:

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[39] The dissent opines that nothing exists that could be recorded in the chain of title evidencing the assignment of interest. This is untrue. For example, defendant could file a copy of the P&A agreement with the register of deeds.

First, it must be emphasized that the dissent fails entirely to provide an affirmative definition of the legal term of art that is at the heart of this dispute: "operation of law." The closest the dissent comes is merely stating in the negative that "a transfer by operation of law need not be involuntary . . . ." *Post* at 128. However, it would be more instructive for the development of our law to know what *affirmative* meaning the dissent would ascribe to "operation of law." To the extent that some definition can be inferred from the dissent, that definition is, in my judgment, plainly incorrect. As the majority points out, the dissent essentially seeks to redefine the term "operation of law" to mean "as provided by law." That is, the dissent argues that because the FDIC acted *pursuant to* or in *accordance with* federal statutes, its actions necessarily occurred by "operation of law." Under this theory, it is difficult to envision any transfer of money or property, short of the payment of a bribe or blackmail, that would not occur by "operation of law."

Second, it is difficult to ignore the dissent's repeated references to the fact that the transaction at issue "was not a simple contract for the sale of assets," *post* at 121, but rather constituted a "specialized transaction," see *post* at 121. Although the dissent makes several references to the "special" nature of the transaction, it fails to explain how that nature communicates any *legal* significance. In fact, there is no obvious reason, and the dissent supplies none, for the proposition that the assertedly "special" nature of the instant transaction has any bearing on the determination of whether a transfer is or is not by "operation of law." Certainly, that the transfer was "special" has nothing to do with the *voluntariness* of the transfer. The dissent's emphasis in this regard only has the effect of obscuring the legal realities of this case that *are* relevant.

Third, I believe it deserves emphasis that the dissent's contention that the FDIC's characterization of the transfer should be accorded "respectful consideration" and the authorities cited in support of this contention, *post* at 124 n 10, are inapposite. To begin with, this case is concerned with *Michigan* law, not *federal* law. The critical issue is whether Chase satisfied the *Michigan* "foreclosure by advertisement" statute, which implicates whether the transfer from the FDIC to Chase was accomplished by "operation of law," as that phrase is understood under *Michigan* caselaw. Thus, clearly only issues of *Michigan* law are involved. Furthermore, even if the issues in this case *did* implicate federal law, the FDIC's purported "guidance" is offered through an affidavit submitted by an individual "receiver in charge" for the FDIC. This affidavit is not the statement of the governing board of directors of the FDIC, it is not the statement of any single member of the governing board of directors of the FDIC, and it certainly is not the fruit of rulemaking or adjudication by the FDIC.[1] As the United States Supreme Court advised in *United States v Mead Corp*, 533 US 218, 229; 121 S Ct 2164; 150 L Ed 2d 292 (2001), "[a] very good indicator of delegation meriting [deference] is [an] express congressional authorization[] to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed." There is an utter absence of any such "indicator" in this case.

Finally, I would offer additional guidance to the trial court concerning the nature of the "prejudice" that plaintiffs must demonstrate in order to set aside the

[1] For these reasons, I would also characterize differently than does the majority opinion the "FDIC's affidavit," *ante* at 112 n 25, and the "FDIC's position," *ante* at 111 n 22.

foreclosure. Although a nonexhaustive listing, some of the factors that might be relevant in this demonstration would include the following: whether plaintiffs were "misled into believing that no sale had been had," *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23, 26; 268 NW 797 (1936); whether plaintiffs "act[ed] promptly after [they became] aware of the facts" on which they based their complaint, *id.*; whether plaintiffs made an effort to redeem the property during the redemption period, *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 503; 739 NW2d 656 (2007); whether plaintiffs were "represented by counsel throughout the foreclosure process," *Jackson Investment Corp v Pittsfield Prod, Inc*, 162 Mich App 750, 756; 413 NW2d 99 (1987); and whether defendant "relied on the apparent validity of the sale by taking steps to protect its interest in the subject property," *id.* at 757.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's conclusion that plaintiffs' mortgage did not pass to JPMorgan Chase Bank, N.A., by operation of law. Under federal law, the Federal Deposit Insurance Corporation (FDIC) has broad statutory powers for resolving the business of a failed bank. The FDIC's transfer of plaintiffs' mortgage to Chase was part of a larger, specialized transaction authorized under federal law that was undertaken by the FDIC to resolve the business of Washington Mutual Bank (WaMu), a failed bank. Pursuant to this federal authority, the FDIC was permitted to transfer the assets of WaMu "without any approval, assignment, or consent . . . ."[1] The particular transaction consummated here was not a simple contract for the sale of assets, as characterized by the

[1] 12 USC 1821(d)(2)(G)(i)(II).

majority. The majority's conclusions represent a fundamental misunderstanding of the FDIC's authority to liquidate WaMu.

Michigan law has long recognized that a mortgage obtained by operation of law need not be recorded before foreclosure is allowed because the successor mortgagee steps into the shoes of the original mortgagee.[2] Because Chase obtained plaintiffs' mortgage from the FDIC by operation of law, I would hold it exempt from the recordation requirement of MCL 600.3204(3). I would reverse the judgment of the Court of Appeals.

I. ALL TRANSFERS OF ASSETS UNDER 12 USC 1821(d)(2)(G)(i) OCCUR BY OPERATION OF LAW

The majority correctly concludes that "when the FDIC succeeded to WaMu's assets, which included plaintiffs' mortgage, it did so by clear operation of a statutory provision—12 USC 1821(d)(2)(A). With respect to this transfer, the FDIC acquired plaintiffs' mortgage by operation of law."[3] But I disagree with the majority that the subsequent transfer, from the FDIC to Chase, did not occur by operation of law. In fact, the FDIC transferred WaMu's assets to Chase by operation of another statutory provision—12 USC 1821(d)(2)(G)(i)(II). This provision empowers the FDIC to resolve the business of a failed bank by transferring any asset or liability "without any approval, assignment, or consent with respect to such transfer."[4]

The majority, following the erroneous logic employed by the Court of Appeals, characterizes the transaction

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[2] *Miller v Clark*, 56 Mich 337, 340-341; 23 NW 35 (1885).

[3] *Ante* at 108-109.

[4] 12 USC 1821(d)(2)(G)(i)(II).

between the FDIC and Chase as a simple contractual sale.[5] Simply put, this characterization fundamentally misunderstands the structure of the agreement. Rather than an ordinary sale of assets, this was a specialized transaction facilitated by the FDIC in accordance with its mandate to resolve the businesses of failed banks.[6] The FDIC, through its statutory powers, enabled a transition in which it stepped into WaMu's shoes as receiver and took possession of WaMu's assets and liabilities without any assignment; then, almost instantaneously, the FDIC transferred substantially all of WaMu's assets and liabilities to Chase. This transfer of assets was intended to be accomplished by operation of law and again without an assignment. The FDIC confirmed as much in its October 2, 2008, affidavit, which it executed contemporaneously with the transfer. In pertinent part, the FDIC stated the following:

> 2. On September 25, 2008, Washington Mutual Bank, formerly known as Washington Mutual Bank, FA ("Washington Mutual"), was closed by the Office of Thrift Supervision and the FDIC was named receiver.
>
> 3. As authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment, or consent with respect to such transfer.

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[5] The majority states:

> Under 12 USC 1821, the FDIC is empowered to transfer the assets of a failed bank "without any approval, assignment, or consent . . . ." However, in this case, it did not avail itself of that authority. Instead, the FDIC sold WaMu's assets to defendant pursuant to a purchase and assumption (P&A) agreement. [*Ante* at 103.]

[6] 12 USC 1821(c)(2)(A)(ii) ("The [FDIC] shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution . . . .").

> 4. Pursuant to the terms and conditions of a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual and JPMorgan Chase Bank, National Association ("JPMorgan Chase"), dated September 25, 2008 (the "Purchase and Assumption Agreement"), JPMorgan Chase acquired certain of the assets, including all loans and all loan commitments, of Washington Mutual.
>
> 5. As a result, on September 25, 2008, JPMorgan Chase became the owner of the loans and loan commitments of Washington Mutual *by operation of law*.[7]

This affidavit is not, as the majority suggests, the FDIC's attempt to make, by unilateral declaration, the transaction one completed by operation of law.[8] Rather, it is the FDIC, which undoubtedly has more familiarity with this particular type of transaction than the majority,[9] accurately characterizing the actions it took pursuant to federal law.[10] I cannot accept the majority's

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[7] Emphasis added. The affidavit was executed contemporaneously with the transfer at issue in this case, long before any litigation commenced.

[8] *Ante* at 112 n 25 ("Although the FDIC's affidavit purports that the sale of WaMu's assets to defendant was effected by operation of law, the FDIC may not by unilateral declaration make it so.").

[9] Between October 1, 2000, and December 1, 2012, the FDIC was appointed receiver or conservator in 502 bank failures. See Failed Bank List, FDIC, available at <http://www.fdic.gov/bank/individual/failed/banklist.html> (accessed December 20, 2012).

[10] Though not binding on this Court, the FDIC's characterization of a transfer under its governing statute should be accorded respectful consideration. See *United States v Mead Corp*, 533 US 218, 227; 121 S Ct 2164; 150 L Ed 2d 292 (2001) ("[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered."); *Skidmore v Swift & Co*, 323 US 134, 140; 65 S Ct 161; 89 L Ed 124 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); see also *Wells Fargo Bank v FDIC*, 354 US App DC 6; 310 F3d

conclusion that the FDIC and Chase entered into a simple sale rather than a transfer by operation of law considering that the FDIC's receivership powers—reserved only for the special situation of a bank failure—do not contemplate ordinary sales like the one suggested by the majority. Pursuant to 12 USC 1821(d)(2)(G)(i), the FDIC as receiver may either merge a failed bank with a healthy bank[11] or transfer any asset or liability of the failed bank "without any approval, assignment, or consent with respect to such transfer."[12] Under either provision, the statute provides for transfers by operation of law. If the FDIC attempted to transfer assets of a failed bank *without* relying on one of the provisions of 12 USC 1821(d)(2)(G)(i), it would be acting outside the scope of its statutory authority.[13]

The majority erroneously concludes that a transfer completed by operation of law must be one that occurred involuntarily, ignoring basic business realities. For example, when two companies merge—an action

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202, 208 (2002) ("At the very least, however, because the FDIC is charged with administering this highly detailed regulatory scheme, we may resort to its 'body of experience and informed judgment' for guidance to the extent that its position is persuasive."). The majority instead chooses to entirely ignore the FDIC's position that it, in fact, transferred the WaMu assets to Chase by operation of law. While we are ultimately interpreting the requirements of MCL 600.3204(3), the question whether the transfer at issue occurred "by operation of law" truly concerns the character of the transaction as defined by federal law, which the FDIC is tasked with administering. Thus, contrary to the majority's assertion, the issues raised in this case certainly implicate federal law and the majority would do well to give some deference to the contemporaneous transaction documents indicating that this transfer is understood under federal law to have been completed by operation of law.

[11] 12 USC 1821(d)(2)(G)(i)(I).

[12] 12 USC 1821(d)(2)(G)(i)(II).

[13] *Louisiana Pub Serv Comm v FCC*, 476 US 355, 374; 106 S Ct 1890; 90 L Ed 2d 369 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

requiring affirmative intent and, often, substantial consideration[14]—the law is settled that the assets of the merging companies vest in the resulting company *by operation of law*.[15] And even the majority admits that a merger results in the transfer of assets by operation of law.[16] Thus, the majority's conclusion that a transfer by operation of law can only occur involuntarily simply does not follow.

Moreover, the majority's conclusion that operation-of-law transfers must be fully involuntary ignores the standards applicable to the most fundamental operation-of-law transactions. Surely the majority would agree that transfers accomplished by intestacy or

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[14] For example, when AOL and Time Warner merged on January 10, 2000, in the largest merger in history, AOL *purchased* Time Warner for $165 billion to facilitate the merger. Both companies intended to enter the deal, and hefty consideration was paid. See Hansell, *Media Megadeal: The Overview; America Online Agrees to Buy Time Warner for $165 Billion; Media Deal is Richest Merger*, NY Times, January 11, 2000, available at <http://nytimes.com/2000/1/11/business/media-megadeal-overview-america-online-agrees-buy-time-warner-for-165-billion.html> (accessed December 20, 2012).

[15] See 12 USC 215(e) ("All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer."); MCL 450.1724(b) ("The title to all real estate and other property and rights owned by each corporation party to the merger are vested in the surviving corporation without reversion or impairment.").

[16] *Ante* at 111 ("Had a merger occurred . . . , defendant would have a strong argument that it had merely stepped into the shoes of WaMu."). The majority further states that the FDIC could have merged WaMu and Chase pursuant to 12 USC 1821(d)(2)(G)(i)(I) without Chase's consent. But the statute in no way proposes that the FDIC could merge a failed bank and a healthy bank without the healthy bank's consent. On the contrary, it is 12 USC 1821(d)(2)(G)(i)(II) that allows transfers without approval. The majority's concept of a forced merger utterly lacks a statutory basis and further demonstrates the majority's misunderstanding of the FDIC's authority.

a joint tenancy occur by operation of law.[17] Yet neither of these traditional operation-of-law transfers can be completed without the affirmative decision of the recipient to accept the property.[18] Michigan law allows a party to disclaim an operation-of-law conveyance.[19] Thus, a transfer by operation of law cannot occur unless the recipient *voluntarily* decides not to exercise his or her right to disclaim the conveyance. Our sister court in New Hampshire eloquently described the rationale behind a right of disclaimer:

> [W]e held that a devisee has the power to renounce a testamentary gift. An intestate heir also may disclaim an intestate share under our common law. The same is true of a right of survivorship in a joint tenancy. . . . The motivating factor permitting renunciation of these interests is that one should not be forced to accept burdensome, unbargained for tenders.[20]

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[17] See, e.g., *Simon v Simon's Estate*, 158 Mich 256, 259; 122 NW 544 (1909) ("'The property of one dying intestate goes, by operation of positive law, . . . to certain persons in certain shares.'"); *Klooster v City of Charlevoix*, 488 Mich 289, 303; 795 NW2d 578 (2011) ("When one of only two joint tenants dies, an estate in land passes by operation of law to the survivor.").

[18] It is also worth noting that both types of transfers occur pursuant to statutory authority. MCL 700.2101(1) ("Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs *as prescribed in this act* . . . .") (emphasis added); Title of 1925 PA 126, MCL 557.81 *et seq*. ("An act to provide for the payment to the survivor of husband and wife, of land contracts, and of notes and other obligations secured by a mortgage, given as part of the purchase price of lands held as a tenancy by the entirety, and the vesting of the title of the mortgage or land contract in the survivor."); MCL 491.616(2) (creating a joint tenancy in multiperson bank accounts unless specified otherwise).

[19] MCL 700.2901 to 700.2912.

[20] *In re Lamson Estate*, 139 NH 732, 733-734; 662 A2d 287 (1995) (citations omitted); see also *Nat'l City Bank of Evansville v Oldham*, 537 NE2d 1193, 1197 (Ind App, 1989) ("Generally speaking, legal title to real property devised by will vests in the devisee upon the decedent's death by

By similar logic, the fact that Chase could have refused, but voluntarily accepted, the transfer does not destroy its character as an operation-of-law transaction.

Having established that a transfer by operation of law need not be involuntary, I have no trouble concluding that the instant transaction was completed by operation of law. I am also not troubled by the conclusion that the FDIC/Chase transaction was for all intents and purposes the equivalent of a merger. By this transaction, Chase absorbed substantially all of WaMu's assets and liabilities. In a September 25, 2008, press release announcing the transaction, FDIC Chairman Sheila C. Bair called the transaction "simply a combination of two banks."[21] Chase did not sort through the various assets of WaMu and pick and choose only the most appealing items; it absorbed the entire bank except for very select assets and liabilities that remained with the receiver.[22] The first page of the

operation of law. It has long been recognized, however, that a person cannot be forced to accept property against his will and therefore a transfer of title is not complete until it is accepted by the recipient.") (citations omitted); 20 Am Jur 2d, Cotenancy and Joint Ownership, § 4 ("Under the Uniform Disclaimer of Property Interests Act, a surviving joint tenant may disclaim the transfer of any property or interest by right of survivorship by delivering a written disclaimer. The purpose of allowing such disclaimer is that one should not be forced to accept burdensome, unbargained-for tenders.").

[21] FDIC, Press Release, *JPMorgan Chase Acquires Banking Operations of Washington Mutual*, September 25, 2008, available at <http://www.fdic.gov/news/news/ press/2008/pr08085.html> (accessed December 20, 2012) (emphasis added).

[22] See, e.g., schedule 3.5 of the purchase and assumption (P&A) agreement, captioned "Certain Assets Not Purchased" (excluding only payouts on or refunds for insurance policies, actions or judgments against directors or underwriters of the failed bank, leased premises, fixtures, and equipment, and criminal/restitution orders in favor of the failed bank from the agreement); schedule 2.1 of the P&A agreement, captioned "Certain Liabilities Not Assumed" (excluding only preferred stock and pending litigation against WaMu, subordi-

purchase and assumption (P&A) agreement indicates that Chase acquired much more than a loan portfolio, stating that with the FDIC acting as the conduit, it received "substantially all of the assets and assum[ed] all deposit and substantially all other liabilities" of WaMu.[23] And while the P&A agreement established the framework for the transfer, the actual transaction was completed under the FDIC's statutory authority to transfer assets and liabilities "without any approval, assignment, or consent . . . ."[24] Having received the assets and liabilities without any assignment, Chase stepped into WaMu's shoes and began occupying WaMu's legal status. While this conclusion is perhaps the result of a legal fiction, like a merger, this is the manner in which the law treats these transactions. Accordingly, no further formalities were necessary to vest the rights Chase acquired from WaMu because, as with a merger, they vested upon completion of the deal.

At its heart, the majority's and the Court of Appeals' errors are in redefining this transaction, giving short shrift to the specialized context in which it occurred. The FDIC and Chase did not execute a simple contractual sale; it was a transfer of assets and liabilities consummated without any assignments that only could have been completed under the FDIC's statutory authority for resolving failed banks. Accordingly, I would

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nated and senior debt, some employee benefit plans sponsored by WaMu's holding company, and certain deferred compensation and consulting agreements maintained by WaMu).

[23] See also Brooks, *The Federal Deposit Insurance System: The past and the potential for the future*, 5 Ann R Banking L 111, 112 (1986) ("A purchase and assumption transaction is a merger of the failing bank into a successful bank; the successful bank assumes all deposit liabilities of the failing bank.").

[24] 12 USC 1821(d)(2)(G)(i)(II).

hold that Chase acquired plaintiffs' mortgage by operation of law.[25]

II. THE RECORDING REQUIREMENT OF MCL 600.3204(3) DOES NOT APPLY TO TRANSACTIONS PROPERLY COMPLETED WITHOUT ASSIGNMENT, INCLUDING MORTGAGES ACQUIRED BY OPERATION OF LAW

MCL 600.3204 provides the requirements for foreclosure by advertisement. MCL 600.3204(1) lists the four general requirements before a mortgagee can foreclose:

> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

MCL 600.3204(3) states an additional requirement:

> If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.3216]

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[25] Alternatively, as fully explained in part II of this opinion, I question whether the majority's conclusion that the transfer did not occur by operation of law resolves the matter. Indeed, the operative recording statute, MCL 600.3204(3), only requires the recordation of mortgages that have been assigned, and pursuant to 12 USC 1821(d)(2)(G)(i)(II), the mortgage here was transferred *without* an assignment.

> [setting the conditions for the sheriff's sale] evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Chase was exempt from the requirements of MCL 600.3204(3) because it obtained the mortgage by operation of law. The key phrase in making this determination is "evidencing the assignment." If there has been no assignment—i.e., if the mortgage was transferred by operation of law—then there can be no chain of title because the party holding the mortgage is, by law, the original mortgagee. This is so even if the party holding the mortgage was not the party that actually recorded the mortgage. In other words, the statute implies that when no assignment has occurred, the party holding the mortgage has stepped into the shoes of the original mortgagee. When there has been no assignment of a mortgage, there can be no assignment to record. Accordingly, because Chase acquired the plaintiffs' mortgage by operation of law instead of by assignment, and was thus legally considered the original mortgagee, it was not required to record anything in the chain of title.

Michigan law has long recognized that only transfers completed by assignment need to be recorded before foreclosure by advertisement is permitted. In the 1885 decision of *Miller v Clark*, this Court analyzed the foreclosure-by-advertisement statute and determined that mortgages obtained by operation of law need not be recorded before foreclosure by advertisement is permitted.[26] In *Miller*, the mortgagee was an individual who died with the mortgage passing as part of his estate to

[26] *Miller*, 56 Mich at 337. The foreclosure-by-advertisement statute in effect in 1885, 1871 CL 6913, contained different language than the current statute but similarly required the recordation of mortgage assignments before foreclosure was permitted.

the guardian of his heirs.[27] The guardian foreclosed on the mortgage without recording it.[28] This Court, in discussing whether the recording requirement applied to the peculiar way that the guardian came to possess the mortgage *without* an assignment, held that "[t]he assignments which are required to be recorded are those which are executed by the voluntary act of the party, and *this does not apply to cases where the title is transferred by operation of law* . . . ."[29] So if there is no assignment to record because the mortgage passed by operation of law, then the recording requirement does not apply.[30] Because Chase obtained the plaintiffs' mortgage without an assignment pursuant to the FDIC's

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[27] *Id.* at 339-340.

[28] *Id.* at 340.

[29] *Id.* at 340-341 (emphasis added). The majority relies on this quote to erroneously conclude that a transfer by operation of law must be involuntary. But *Miller* made no such determination. The quoted language only held that voluntary *assignments* must be recorded, making no determination whatsoever with respect to voluntary *operation-of-law* transactions like corporate mergers or the transfer that took place here.

The majority also concludes that the rule of *Miller* does not control because the recording requirement has been modified and the "triggering mechanisms for recordation" are different now than when *Miller* was decided, with the mechanism now being only that the foreclosing party "is not the original mortgagee." As explained earlier, this errant focus on the "triggering mechanisms" prevents the majority from viewing the statute as a whole and ignores the fact that MCL 600.3204(3) still only requires a recording to exist "evidencing the assignment." Again, one cannot evidence an assignment that does not exist and need not exist to effectuate the transfer. An assignment is thus necessary *both* under MCL 600.3204 as it exists now and as its predecessor provided when *Miller* was decided.

[30] Michigan's Attorney General reiterated the *Miller* holding in 2004, stating that "[a] mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (*except those assignments effected by operation of law*) are entitled to be, and have been, recorded." OAG, 2003-2004, No 7147, p 93 (January 9, 2004) (emphasis added). When the Attorney General made this statement, the recording requirement was found in MCL 600.3204(1)(c) but

statutory authority, MCL 600.3204(3) did not require Chase to record the mortgage before foreclosing.

Alternatively, it is not at all clear that the transfer must even be characterized as one completed by operation of law to be exempt from the recordation requirement of MCL 600.3204(3). Indeed, the statutory language itself does not explicitly exempt transfers completed by operation of law; instead, it requires recordation when there *is* an assignment.[31] So in 1885, when this Court held that an operation-of-law transaction was exempt from the recordation requirement, it did so not because the transaction *was* completed by operation of law but because the transaction *was not* an assignment.[32] Thus, even if the instant transaction was not by operation of law per se, it would still be exempt from the recording statute if no recordable assignment existed. And indeed, pursuant to 12 USC 1821(d)(2)(G)(i)(II), the FDIC transferred WaMu's assets to Chase without an assignment. So even accepting the majority's conclusion that this was *not* a transfer by operation of law, MCL 600.3204(3) would still not apply because no assignment existed and none was necessary to complete the transfer.[33]

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used the same language as the current statute. MCL 600.3204(1)(c), as amended by 1994 PA 397, provided in relevant part:

> The mortgage containing the power of sale has been properly recorded and, if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.

[31] The original statute, 1871 CL 6913, required recording if the mortgage had been assigned; the current statute, MCL 600.3204(3) requires a recording "evidencing the assignment."

[32] See *Miller*, 56 Mich at 337.

[33] In responding to this alternative argument, the majority states that a record chain of title must exist before foreclosure is permitted, yet it does not say what should be recorded in the chain of title to "evidenc[e]

III. CONCLUSION

By redefining the character of the transaction between the FDIC and Chase, the majority, like the Court of Appeals before it, erroneously concludes that it was an ordinary contractual sale rather than a specialized transfer by operation of law. In reality, the transaction was possible only because of the FDIC's special statutory powers for resolving the business of a failed bank like WaMu. Moreover, Chase was not required to record the mortgage before foreclosing because it obtained the mortgage by operation of law and stepped into WaMu's shoes as the original mortgagee. Thus, the recording requirement of the foreclosure-by-advertisement statute was inapplicable. Accordingly, I respectfully dissent and would reverse the judgment of the Court of Appeals.[34]

YOUNG, C.J., and MARY BETH KELLY, J., concurred with ZAHRA, J.

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the assignment" as required by MCL 600.3204(3). Here, no assignment occurred, so nothing exists that can be recorded in the chain of title. Indeed, under the majority's construction, Chase could never satisfy MCL 600.3204(3) because it is not the original mortgagee, but it also lacks the ability to record an assignment in the chain of title.

[34] Because I conclude that no defect existed in the foreclosure, it is unnecessary for me to decide whether a defect in the foreclosure renders the foreclosure sale voidable or void *ab initio*. However, because the majority reaches this issue, I note my agreement with the majority's reasoning on this issue and conclusion that "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*." *Ante* at 115.

STATE OF MICHIGAN v McQUEEN

Docket No. 143824. Argued October 11, 2012 (Calendar No. 7). Decided February 8, 2013.

On behalf of the state of Michigan, the Isabella County Prosecuting Attorney filed a complaint in the Isabella Circuit Court for a temporary restraining order, a show-cause order, a preliminary injunction, and a permanent injunction, seeking to enjoin the operation of Compassionate Apothecary, LLC (CA), a medical-marijuana dispensary that was owned and operated by Brandon McQueen and Matthew Taylor. McQueen was a registered qualifying patient and a registered primary caregiver for three qualifying patients under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Taylor was the registered primary caregiver for two qualifying patients. They operated CA as a membership organization. To be a member of CA, an individual had to be either a registered qualifying patient or a registered primary caregiver. Caregivers could only be members of CA if a qualifying patient with whom he or she was connected through the state's registration process was also a member. Patients and caregivers who were members of CA could rent lockers from CA. Patients would rent lockers from CA when they had grown more marijuana than they needed to treat their own debilitating medical conditions and wanted to make the excess available to other patients. Caregivers would rent lockers when their patients did not need all the marijuana that they had grown. Patients and caregivers desiring to purchase marijuana from another member's locker could view the available marijuana strains in CA's display room. After the patient or caregiver had made a selection, a CA employee would retrieve the marijuana from the appropriate locker, weigh and package the marijuana, and record the purchase. The price of the marijuana would be set by the member who rented the locker, but CA kept a service fee for each transaction. The prosecuting attorney alleged that McQueen and Taylor's operation of CA did not comply with the MMMA, was contrary to the Public Health Code (PHC), MCL 333.1101 *et seq*., and, thus, was a public nuisance. The court, Paul H. Chamberlin, C.J., denied the prosecuting attorney's requests for a temporary restraining order and a show-cause order. After a hearing, the court further denied the

prosecuting attorney's request for a preliminary injunction and closed the case, concluding that the operation of CA was in compliance with the MMMA because the patient-to-patient transfers of marijuana that CA facilitated fell within the act's definition of the "medical use" of marijuana. The prosecuting attorney appealed. The Court of Appeals, MURRAY, C.J., and HOEKSTRA and STEPHENS, JJ., reversed and remanded for entry of judgment in favor of the prosecuting attorney, concluding that defendants' operation of CA was an enjoinable public nuisance because the operation of CA violated the PHC, which prohibits the possession and delivery of marijuana. The Court of Appeals reasoned that defendants' violation of the PHC was not excused by the MMMA because defendants did not operate CA in accordance with the provisions of the MMMA—specifically, the Court explained that McQueen and Taylor had engaged in the sale of marijuana through their operation of CA, that the "medical use" of marijuana, as defined by the MMMA, does not include patient-to-patient sales of marijuana, and that no other provision of the MMMA could be read to permit such sales. 293 Mich App 644 (2011). The Supreme Court granted defendants leave to appeal. 491 Mich 890 (2012).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Contrary to the conclusion of the Court of Appeals, the definition of "medical use" in the MMMA includes the sale of marijuana. However, the Court of Appeals reached the correct result because the act does not permit a registered qualifying patient to transfer marijuana for another registered qualifying patient's medical use. Accordingly, the prosecuting attorney was entitled to injunctive relief to enjoin the operation of defendants' business because it constituted a public nuisance.

1. The MMMA authorizes the medical use of marijuana to the extent that it is carried out in accordance with the provisions of the act. Section 3(e) of the act, MCL 333.26423(e), defines "medical use" broadly to include the transfer of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. Because a transfer is any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, the word "transfer," as part of the statutory definition of "medical use," also includes sales. The Court of Appeals erred by concluding that a sale of marijuana was not a medical use, and that portion of its judgment was reversed.

2. Under § 7(a) of the MMMA, MCL 333.26427(a), any medical use of marijuana must occur in accordance with the provisions of

the act. Absent a situation triggering the affirmative defense of § 8 of the MMMA (MCL 333.26428), § 4 of the act (MCL 333.26424) sets forth the requirements for a person to be entitled to immunity for the medical use of marijuana. MCL 333.26424(d) creates a presumption of medical use and then states how that presumption may be rebutted. A rebutted presumption of medical use renders immunity under § 4 of the MMMA inapplicable. Under the statute, the presumption may be rebutted upon a showing that the conduct related to marijuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the medical condition in accordance with the act. The definite article in § 4(d) refers to the qualifying patient who is asserting § 4 immunity. Because the MMMA's immunity provision contemplates that a registered qualifying patient's medical use of marijuana only occur for the purpose of alleviating his or her own debilitating medical condition or symptoms associated with that condition, and not another patient's condition or symptoms, § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient. Similarly, to be eligible for § 4 immunity, a registered primary caregiver must be engaging in marijuana-related conduct for the purpose of alleviating the debilitating medical condition, or symptoms associated with the medical condition, of a registered qualifying patient to whom the caregiver is connected through the registration process of Michigan's Department of Community Health. Thus, § 4 does not offer immunity to a registered primary caregiver who transfers marijuana to anyone other than a registered qualifying patient to whom the caregiver is connected through the state's registration process. Defendants' business facilitated patient-to-patient sales, but those transfers did not qualify for § 4 immunity because they encompassed marijuana-related conduct that was not for the purpose of alleviating the transferor's debilitating medical condition or its symptoms. Because defendants' medical use of marijuana did not comply with the immunity provisions of §§ 4(a), (b), and (d), defendants could not claim that § 4 insulated them from a public nuisance claim.

3. Section 4(i) of the MMMA, MCL 333.26424(i), permits any person to assist a registered qualifying patient with using or administering marijuana, but the terms "using" and "administering" are limited to conduct involving the actual ingestion of marijuana. Section 4(i) did not apply to defendants' actions, which involved assisting patients with acquiring and transferring marijuana.

4. The affirmative defense of § 8 of the MMMA, MCL 333.26428, applies only to criminal prosecutions involving marijuana, subject to limited exceptions contained in § 8(c) for disciplinary action by a business or occupational or professional licensing board or bureau or forfeiture of any interest in or right to property. Accordingly, § 8 did not provide defendants a basis to assert that their actions were in accordance with the MMMA.

5. Under MCL 600.3801, any building used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in MCL 333.7104 is declared a nuisance. Marijuana is a controlled substance under MCL 333.7104. Because the medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the MMMA, the MMMA controlled whether defendants' business constituted a public nuisance. While the Court of Appeals erred by excluding sales from the definition of "medical use," it correctly concluded that the MMMA does not contemplate patient-to-patient sales of marijuana for medical use and that by facilitating such sales, defendants' business constituted a public nuisance.

Court of Appeals' decision affirmed on alternative grounds.

Justice CAVANAGH, dissenting, disagreed with the majority's interpretation of the MMMA and would have held that when a qualified patient transfers marijuana to another qualified patient, both individuals have the right to assert immunity under § 4 of the act. The presumption that a qualifying patient or primary caregiver is engaged in the medical use of marijuana may be rebutted with evidence that the conduct related to marijuana was not for the purpose of alleviating the qualifying patient's medical condition. The majority reasoned that the reference to "the" qualified patient requires the conclusion that only the recipient of marijuana is entitled to § 4 immunity for a patient-to-patient transfer of marijuana. The majority's interpretation was inconsistent with the rules of statutory interpretation and with the purpose of the MMMA. The reference in § 4(d)(2) of the act to "the" qualifying patient simply requires that one of the two qualified patients involved in the transfer of marijuana have a debilitating medical condition that the transfer of marijuana is intended to alleviate. The majority's erroneous interpretation of § 4(d) further led it to an incorrect conclusion that any facilitation of a patient-to-patient transfer of marijuana was enjoinable as a public nuisance.

Justice MCCORMACK took no part in the decision of this case.

1. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — MEDICAL-USE DEFINED — SALES OF MARIJUANA.

The Michigan Medical Marihuana Act authorizes the medical use of marijuana to the extent that it is carried out in accordance with the provisions of the act; § 3(e) of the act, MCL 333.26423(e), defines "medical use" broadly to include the transfer of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition; because a transfer is any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, the definition of "medical use" includes sales of marijuana.

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY — REQUIREMENTS FOR IMMUNITY — SALES OF MARIJUANA.

Section 4 of the Michigan Medical Marihuana Act, MCL 333.26424, sets forth the requirements for a person to be entitled to immunity for the medical use of marijuana; to be eligible for immunity under § 4, a registered qualifying patient must be engaging in marijuana-related conduct for the purpose of alleviating the patient's own debilitating medical condition or symptoms associated with that condition; § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient; similarly, to be eligible for § 4 immunity, a registered primary caregiver must be engaging in marijuana-related conduct for the purpose of alleviating the debilitating medical condition, or symptoms associated with the medical condition, of a registered qualifying patient to whom the caregiver is connected through the registration process of Michigan's Department of Community Health; § 4 does not offer immunity to a registered primary caregiver who transfers marijuana to anyone other than a registered qualifying patient to whom the caregiver is connected through the state's registration process.

3. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — ASSISTING REGISTERED QUALIFYING PATIENTS WITH USING OR ADMINISTERING MARIJUANA.

Section 4(i) of the Michigan Medical Marihuana Act, MCL 333.26424(i), permits any person to assist a registered qualifying patient with using or administering marijuana, but the terms "using" and "administering" are limited to conduct involving the actual ingestion of marijuana.

4. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — AFFIRMATIVE DEFENSE — APPLICABILITY OF THE AFFIRMATIVE DEFENSE.

The affirmative defense of § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, applies only to criminal prosecutions involv-

ing marijuana, subject to limited exceptions contained in § 8(c) for disciplinary action by a business or occupational or professional licensing board or bureau or forfeiture of any interest in or right to property.

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Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heather S. Meingast* and *John R. Wright*, Assistant Attorneys General, for the Attorney General.

Gerald A. Fisher for the Michigan Municipal League, the Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan.

David P. Cahill, *Dennis M. Hayes*, and *Rosemary Gordon Pánuco* for Ann Arbor Medical Cannabis Guild, Inc.

YOUNG, C.J. In this public nuisance action, we must determine whether defendants' business, which facilitates patient-to-patient sales of marijuana, operates in accordance with the provisions of the Michigan Medical Marihuana Act (MMMA).[1] We hold that it does not and that, as a result, the Court of Appeals reached the correct result when it ordered that defendants' business be enjoined as a public nuisance.

The MMMA authorizes "[t]he medical use of marihuana . . . to the extent that it is carried out in accor-

[1] MCL 333.26421 *et seq*.

dance with the provisions of [the] act."[2] Section 3(e) of the act defines "medical use" broadly to include the "transfer" of marijuana "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[3] Because a transfer is "[*a*]*ny* mode of disposing of or parting with an asset or an interest in an asset, including . . . *the payment of money*,"[4] the word "transfer," as part of the statutory definition of "medical use," also includes sales. The Court of Appeals erred by concluding that a sale of marijuana was not a medical use.

Nevertheless, the immunity from arrest, prosecution, or penalty provided to a registered qualifying patient in § 4 of the MMMA for engaging in the medical use of marijuana can be rebutted upon a showing "that conduct related to marihuana was not for the purpose of alleviating *the* qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act."[5] Because the MMMA's immunity provision clearly contemplates that a registered qualifying patient's medical use of marijuana only occur for the purpose of alleviating *his own* debilitating medical condition or symptoms associated with his debilitating medical condition, and not *another patient's* condition or symptoms, § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient. Accordingly, while the Court of Appeals erred by exclud-

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[2] MCL 333.26427(a).

[3] MCL 333.26423(e).

[4] Black's Law Dictionary (8th ed), p 1535 (emphasis added); see also *Random House Webster's College Dictionary* (2d ed, 1997), p 1366 (defining "transfer" as "to convey or remove from one place, person, or position to another").

[5] MCL 333.26424(d) (emphasis added).

ing sales from the definition of "medical use," we affirm on alternative grounds its conclusion that the MMMA does not contemplate patient-to-patient sales of marijuana for medical use and that, by facilitating such sales, defendants' business constituted a public nuisance.

I. FACTS AND PROCEDURAL HISTORY

Defendants Brandon McQueen and Matthew Taylor own and operate C.A., LLC (hereinafter CA), formerly known as Compassionate Apothecary, LLC, a members-only medical marijuana dispensary located in Isabella County. McQueen is both a registered qualifying patient and a registered primary caregiver within the meaning of the MMMA,[6] while Taylor is a registered primary caregiver. Their stated purpose in operating CA is to "assist in the administration of [a] member patient's medical use" of marijuana.

CA requires every member to be either a registered qualifying patient or registered primary caregiver pursuant to § 6 of the MMMA and to possess a valid, unexpired medical marijuana registry identification card from the Michigan Department of Community Health (MDCH).[7] CA's basic membership fee of $5 a month allows a member to access CA's services. For an additional fee, a member can rent one or more lockers

[6] A "qualifying patient" is defined in the MMMA as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h). A "primary caregiver" is defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g). The patient and caregiver registration processes are outlined in MCL 333.26426.

[7] Moreover, according to defendants, a registered primary caregiver can only become a member if the caregiver's patient is also a member and authorizes the caregiver to become a member.

to store up to 2.5 ounces of marijuana and make that marijuana available to other CA members to purchase.[8] The member sets the sale price of his marijuana,[9] and defendants retain a percentage of that price (about 20 percent) as a service fee. Defendants and their employees retain access at all times to the rented lockers, although the member may remove his marijuana from the lockers during business hours if he no longer wishes to make it available for sale.[10]

All CA members may purchase marijuana from other members' lockers.[11] A member who wishes to purchase marijuana for himself (or, if the member is a registered primary caregiver, for his patient) must show his unexpired MDCH qualifying patient or primary caregiver registry identification card when entering CA. A representative of CA—either one of the individual defendants or an employee—will then take the member to the display room, where a variety of strains are available for purchase.[12] The member makes a selection, and the CA representative measures and weighs the marijuana, packages it, seals it, and records the transaction.

CA opened for business in May 2010. In July 2010, the Isabella County Prosecuting Attorney, on behalf of the state of Michigan, filed a complaint in the Isabella

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[8] In order to rent a locker, the member must expressly authorize CA to sell the marijuana stored in that locker to other CA members.

[9] The sale price of marijuana at CA ranges from $7 a gram to $20 a gram.

[10] Defendants supervised four employees, but it is not clear from the record whether the employees were either registered qualifying patients or registered primary caregivers.

[11] CA does not allow a member to purchase more than 2.5 ounces over a 14-day period.

[12] The police officer who initially made contact with defendants testified that, in addition to "displays of various marijuana with prices," the display room also contained brownies "and other ingestible products."

Circuit Court, alleging that defendants' business constitutes a public nuisance because it does not comply with the MMMA. The complaint sought a temporary restraining order, a preliminary injunction, and a permanent injunction. After holding a two-day evidentiary hearing, the circuit court denied plaintiff's request for a preliminary injunction. The court found that defendants "properly acquired registry identification cards," that they "allow only registered qualifying patients and registered primary caregivers to lease lockers," and that the patients or caregivers possess permissible amounts of marijuana in their lockers. Moreover, the court found that defendants themselves "do not possess amounts of marihuana prohibited by the MMMA."

The court further determined that "the registered qualifying patients and registered caregivers perform medical use of the marihuana by transferring the marihuana within the lockers to other registered qualifying patients and registered primary caregivers." The court noted that plaintiff had "failed to provide any evidence that defendants' medical marihuana related conduct was not for the purpose of alleviating any qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." As a result, "the patient-to-patient transfers and deliveries of marihuana between registered qualifying patients fall soundly within medical use of marihuana as defined by the MMMA." The court then determined that § 4 of the MMMA expressed the intent "to permit . . . patient-to-patient transfers and deliveries of marihuana between registered qualifying patients in order for registered qualifying patients to acquire permissible medical marihuana to alleviate their debilitating medical conditions and their respective symptoms." Finally, it noted that "[e]ssentially, defendants

assist with the administration and usage of medical marihuana, which the Legislature permits under the MMMA."[13]

The Court of Appeals reversed the circuit court's decision and remanded for entry of judgment in favor of plaintiff.[14] The Court concluded that two of the circuit court's findings of fact were clearly erroneous. First, it concluded that possession of marijuana is not contingent on having an ownership interest in the marijuana and that, because "defendants exercise dominion and control over the marijuana that is stored in the lockers," they "possess the marijuana that is stored in the lockers."[15] Second, the Court concluded that defendants were engaged in the selling of marijuana because defendants (or their employees) "intend for, make possible, and actively engage in the sale of marijuana between CA members," even though they do not themselves own the marijuana that they sell.[16]

The Court concluded that the MMMA does not allow patient-to-patient sales. After noting that the MMMA "has no provision governing the dispensing of marijuana,"[17] the Court explained that the definition of "medical use" does not encompass the sale of marijuana, because it only allows the "delivery" and "transfer" of marijuana, not its sale, which "consists of the delivery or transfer *plus* the receipt of compensation."[18] In reaching this conclusion, the Court reasoned that

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[13] The court also noted that the issue of marijuana dispensaries "[was] not before the court" because this case involved "patient-to-patient transfers."

[14] *Michigan v McQueen*, 293 Mich App 644; 811 NW2d 513 (2011).

[15] *Id.* at 654.

[16] *Id.* at 655.

[17] *Id*. at 663.

[18] *Id.* at 668.

§ 4(e), which allows a caregiver to receive compensation but mandates that "[a]ny such compensation shall not constitute the sale of controlled substances,"[19] would be unnecessary if the definition of "medical use" encompassed sales.[20] Finally, the Court noted that defendants are not entitled to immunity under § 4(i) of the MMMA, which insulates from liability someone who assists a registered qualifying patient "with using or administering marihuana."[21] It explained that "[t]here is no evidence that defendants assist patients in preparing the marijuana to be consumed" or that they "physically aid the purchasing patients in consuming marijuana."[22] As a result, it concluded that plaintiff was entitled to a preliminary injunction, and it reversed the circuit court's ruling.

This Court granted defendants' application for leave to appeal and requested that the parties brief "whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits patient-to-patient sales of marijuana."[23]

II. STANDARD OF REVIEW

We review for an abuse of discretion the decision to deny a preliminary injunction,[24] but we review de novo questions regarding the interpretation of the MMMA,[25] which the people enacted by initiative petition in No-

[19] MCL 333.26424(e).

[20] *McQueen*, 293 Mich App at 669.

[21] MCL 333.26424(i).

[22] *McQueen*, 293 Mich App at 673.

[23] *Michigan v McQueen*, 491 Mich 890 (2012).

[24] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

[25] *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

vember 2008.[26] "[T]he intent of the electors governs" the interpretation of voter-initiated statutes,[27] just as the intent of the Legislature governs the interpretation of legislatively enacted statutes.[28] The first step in interpreting a statute is to examine the statute's plain language, which provides " 'the most reliable evidence of . . . intent . . . .' "[29] "If the statutory language is unambiguous, . . . '[n]o further judicial construction is required or permitted' " because we must conclude that the electors " 'intended the meaning clearly expressed.' "[30]

A trial court's findings of fact may not be set aside unless they are clearly erroneous.[31] A ruling is clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[32]

III. ANALYSIS AND APPLICATION

In this nuisance action, we must examine whether the MMMA allows the patient-to-patient sales that defendants facilitate or, instead, whether plaintiff is entitled to an injunction pursuant to MCL 600.3801.

At the time this action was brought, MCL 600.3801 stated that "[a]ny building . . . used for the *unlawful*

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[26] See Const 1963, art 2, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . .").

[27] *Kolanek*, 491 Mich at 405.

[28] *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[29] *Sun Valley Foods*, 460 Mich at 236, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[30] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012), quoting *Sun Valley Foods*, 460 Mich at 236 (alteration in original).

[31] MCR 2.613(C); *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

[32] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in [MCL 333.7104] . . . is declared a nuisance . . . ."[33] Marijuana is a controlled substance as defined in MCL 333.7104. However, because "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with [the MMMA]."[34] the MMMA controls whether defendants' business constitutes a public nuisance.

This Court first interpreted the MMMA in *People v Kolanek* and explained:

> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]."[35]

In contrast to several other states' medical marijuana provisions,[36] the MMMA does not explicitly provide for

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[33] Emphasis added. MCL 600.3805 allows the prosecuting attorney to maintain an action for equitable relief to abate a nuisance under MCL 600.3801. During the pendency of this case, the Legislature amended MCL 600.3801, but the operative language relevant to this case was unchanged. 2012 PA 352.

[34] MCL 333.26427(a).

[35] *Kolanek*, 491 Mich at 394, quoting MCL 333.26427(a) (alteration in original).

[36] For instance, Colorado provides for and regulates "medical marijuana center[s]" that sell marijuana to registered medical marijuana patients. Colo Rev Stat 12-43.3-402. Similarly, Maine permits a registered medical marijuana patient to designate a not-for-profit dispensary that may provide marijuana for the patient and "[r]eceive reasonable monetary compensation for costs associated with assisting or for cultivating marijuana for a patient who designated the dispensary[.]" Me Rev Stat tit 22, § 2428(1-A). See also Ariz Rev Stat 36-2801(11) (defining "[n]onprofit medical marijuana dispen-

businesses that dispense marijuana to patients. Nevertheless, defendants claim that § 3(e) of the MMMA allows their business to facilitate patient-to-patient sales of marijuana. The Court of Appeals disagreed and held that the term "medical use," defined in § 3(e), does not encompass sales. We turn now to this provision.

A. "MEDICAL USE" OF MARIJUANA

As stated, § 7(a) of the MMMA provides that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of [the MMMA]." The MMMA specifically defines "medical use" in § 3(e) 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.[37]

At issue in this case is whether the sale of marijuana is an activity that falls within this definition of "medical use." The definition specifically incorporates nine activities relating to marijuana as "medical use," but it does not expressly use the word "sale." Because of this omission, plaintiff argues, and the Court of Appeals held, that the sale of marijuana falls outside the statutory definition of "medical use":

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sary" as "a not-for-profit entity that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to cardholders"); RI Gen Laws 21-28.6-3(2) (defining "[c]ompassion center" as "a not-for-profit corporation . . . that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies or dispenses marijuana, and/or related supplies and educational materials, to registered qualifying patients and/or their registered primary caregivers who have designated it as one of their primary caregivers").

[37] MCL 333.26423(e).

> [T]he sale of marijuana is not equivalent to the delivery or transfer of marijuana. The delivery or transfer of marijuana is only one component of the sale of marijuana—the sale of marijuana consists of the delivery or transfer *plus* the receipt of compensation. The "medical use" of marijuana, as defined by the MMMA, allows for the "delivery" and "transfer" of marijuana, but not the "sale" of marijuana. MCL 333.26423(e). We may not ignore, or view as inadvertent, the omission of the term "sale" from the definition of the "medical use" of marijuana.[38]

Defendants claim that the Court of Appeals erred by excluding sales from the definition of "medical use."

In determining whether a sale constitutes "medical use," we first look to how the MMMA defines the term "medical use." In particular, the definition of "medical use" contains the word "transfer" as one of nine activities encompassing "medical use." The MMMA, however, does not itself define "transfer" or any of the other eight activities encompassing "medical use." Because undefined terms "shall be construed and understood according to the common and approved usage of the language,"[39] it is appropriate to consult dictionary definitions of terms used in the MMMA.[40]

A transfer is "[*a*]*ny* mode of disposing of or parting with an asset or an interest in an asset, including a gift, *the payment of money*, release, lease, or creation of a lien or other encumbrance."[41] Similarly, a sale is "[t]he *transfer* of property or title for a price."[42] Given these

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[38] *McQueen*, 293 Mich App at 668.

[39] MCL 8.3a.

[40] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[41] Black's Law Dictionary (8th ed), p 1535 (emphasis added); see also *Random House Webster's College Dictionary* (2d ed, 1997), p 1366 (defining "transfer" as "to convey or remove from one place, person, or position to another").

[42] Black's Law Dictionary (8th ed), p 1364 (emphasis added); see also *Random House Webster's College Dictionary* (2d ed, 1997), p 1143 (defining "sale" as "transfer of property for money or credit").

definitions, to state that a transfer does not encompass a sale is to ignore what a transfer encompasses. That a sale has an *additional* characteristic, distinguishing it from other types of transfers, does not make it any less a transfer, nor does that additional characteristic require that the definition of "medical use" separately delineate the term "sale" in order for a sale to be considered a medical use.

Nor do other provisions of the MMMA limit the definition of "medical use" to exclude sales. For instance, § 4(e) allows a registered primary caregiver to "receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana," but states that "[a]ny such compensation shall not constitute the sale of controlled substances."[43] While this section specifically contemplates that a registered qualifying patient may compensate his caregiver, it does not narrow the word "transfer" as used in the § 3(e) definition of "medical use."[44] Rather, § 4(e) independently describes the relationship between a registered caregiver and his registered qualifying patient and provides an additional protection for the patient-caregiver relationship by emphasizing that it is not a criminal act for a registered qualifying patient to compensate a registered primary caregiver for costs associated with providing marijuana to the patient.[45]

Additionally, § 4(k) establishes criminal sanctions for a patient or caregiver "who sells marihuana to someone who is not allowed to use marihuana for medical

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[43] MCL 333.26424(e).

[44] MCL 333.26423(e).

[45] Defendants claim that this provision excludes a caregiver's reimbursement from the provisions of the General Sales Tax Act, MCL 205.51 *et seq*. Because it is well beyond the scope of this case, we need not address that issue.

purposes under [the MMMA] . . . ."[46] This provision is also irrelevant to understanding the definition of "medical use" in § 3(e). *Any* transfer to a person who is "not allowed to use marihuana for medical purposes"[47]—whether for a price or not—is already specifically excluded from the definition of "medical use," which requires a medical use to have the specific purpose to "treat or alleviate a *registered qualifying patient's* debilitating medical condition or symptoms associated with the debilitating medical condition."[48] Thus, rather than inform the definition of "medical use," § 4(k)[49] simply provides an additional criminal penalty for certain actions that *already* fall outside the definition of "medical use" and that are already barred under the Public Health Code.[50]

Therefore, we hold that the definition of "medical use" in § 3(e) of the MMMA includes the sale of marijuana. The Court of Appeals erred by concluding otherwise, and we reverse that portion of the Court of Appeals' judgment defining "medical use." Nevertheless, this definition of "medical use" only forms the beginning of our inquiry. Section 7(a) of the act requires *any* medical use of marijuana to occur "in accordance with the provisions of [the MMMA]." That limitation requires this Court to look beyond the definition of "medical use" to determine whether defendants' business operates "in accordance with the provisions of [the

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[46] A registered qualifying patient or registered primary caregiver who violates § 4(k) "shall have his or her registry identification card revoked and is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both, in addition to any other penalties for the distribution of marihuana." MCL 333.26424(k).

[47] MCL 333.26424(k).

[48] MCL 333.26423(e) (emphasis added).

[49] MCL 333.26424(k).

[50] MCL 333.1101 *et seq*.

MMMA]."[51] Absent a situation triggering the affirmative defense of § 8 of the MMMA,[52] § 4 sets forth the requirements for a person to be entitled to immunity for the "medical use" of marijuana. It is entitlement to that immunity—not the definition of "medical use"—that demonstrates that the person's medical use of marijuana is in accordance with the MMMA. Therefore, we turn to § 4 to determine whether patient-to-patient sales are entitled to that section's provision of immunity.

B. SECTION 4 IMMUNITY

Section 4(a) of the MMMA grants a "qualifying patient who has been issued and possesses a registry identification card"[53] immunity from arrest, prosecution, or penalty "for the medical use of marihuana in accordance with this act . . . ."[54] Similarly, § 4(b) grants the same immunity from arrest, prosecution, or penalty

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[51] MCL 333.26427(a).

[52] These situations are limited to "any prosecution involving marihuana," MCL 333.26428(a), a "disciplinary action by a business or occupational or professional licensing board or bureau," MCL 333.26428(c)(1), or "forfeiture of any interest in or right to property," MCL 333.26428(c)(2). For further discussion of the § 8 affirmative defense, see part III(C) of this opinion.

[53] " 'Qualifying patient' means a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).

[54] MCL 333.26424(a). Section 4(a) also conditions immunity on the patient's possession of "an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility." Section 4(a) is consistent in structure with § 6(a)(6), which requires a registered qualifying patient to designate "whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." MCL 333.26426(a)(6). This determination is "based solely on the qualifying patient's preference." MCL 333.26426(e)(6).

to "[a] primary caregiver who has been issued and possesses a registry identification card . . . for assisting a qualifying patient to whom he or she is connected through the [MDCH's] registration process with the medical use of marihuana in accordance with this act . . . ."[55]

Furthermore, § 4(d) creates a presumption of medical use, which informs how § 4 immunity can be asserted or negated:

> There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. *The presumption may be rebutted* by evidence that conduct related to marihuana *was not for the purpose of alleviating* **the** qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.[56]

Because § 4(d) creates a presumption of medical use and then states how that presumption may be rebutted, we conclude that a rebutted presumption of medical use renders immunity under § 4 of the MMMA inapplicable.

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[55] MCL 333.26424(b). " 'Primary caregiver' means a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g). Section 4(b) also conditions immunity on the patient's possession of an amount of marijuana that does not exceed 2.5 ounces of usable marijuana for each qualifying patient to whom the caregiver is connected through the MDCH's registration process, and, for each qualifying patient who has specified that a primary caregiver will be allowed under state law to cultivate marijuana for the qualifying patient, 12 marijuana plants kept in an enclosed, locked facility.

[56] MCL 333.26424(d) (emphasis added).

The text of § 4(d) establishes that the MMMA intends to allow "a qualifying patient or primary caregiver" to be immune from arrest, prosecution, or penalty *only* if conduct related to marijuana is "for the purpose of alleviating *the* qualifying patient's debilitating medical condition" or its symptoms. Section 4 creates a *personal* right and protection for a registered qualifying patient's medical use of marijuana, but that right is limited to medical use that has the purpose of alleviating that patient's *own* debilitating medical condition or symptoms. If the medical use of marijuana is for some *other* purpose—even to alleviate the medical condition or symptoms of *a different registered qualifying patient*—then the presumption of immunity attendant to the "medical use" of marijuana has been rebutted.

The dissent claims that the presumption of immunity attendant to the "medical use" of marijuana applies when a qualifying patient transfers marijuana to another qualifying patient. However, the dissent's construction is not consistent with the statutory language that the people of Michigan actually adopted.[57] The presumption that "a qualifying patient" is engaged in the medical use of marijuana under § 4(d) is rebutted when marijuana-related conduct is "not for the purpose of alleviating *the* qualifying patient's debilitating medical condition . . . ." Contrary to the dissent's conclusion

[57] In concluding that our holding "is inconsistent with the purpose of the MMMA," *post* at 164, the dissent ignores that the purpose of any statutory text is communicated through the words actually enacted. By giving effect to the text of § 4(d), the Court *is* giving effect to the purpose of the MMMA. Similarly, the dissent's claim that qualifying patients "are, for all practical purposes, deprived of an additional route to obtain marijuana," *post* at 164, is irrelevant when the language of § 4(d) requires the conclusion that a transferor may not avail himself of immunity when the transfer is not to alleviate the transferor's debilitating medical condition.

that § 4(d) only requires "one of the two qualified patients involved in the transfer of marijuana [to] have a debilitating medical condition that the transfer of marijuana purports to alleviate,"[58] the definite article in § 4(d) refers to the qualifying patient who is asserting § 4 immunity, not to *any* qualifying patient involved in a transaction. While the introductory language of § 4(d) refers to "a" qualifying patient, that indefinite article simply means that any qualifying patient may claim § 4(d) immunity, as long as the marijuana-related conduct is related to alleviating "the" patient's medical condition.

Thus, § 4 immunity does not extend to a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferee's use[59] because the transferor is not engaging in conduct related to marijuana for the purpose of relieving *the transferor's own* condition or symptoms.[60] Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient *with whom the caregiver is connected through the MDCH's registration process*.

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[58] *Post* at 163.

[59] Our interpretation of § 4(d) does not turn on the fact that the patient-to-patient transfers occurred for a price. Rather, § 4(d) acts as a limitation on what sort of "medical use" is allowed under the MMMA. The same limitation that prohibits a patient from selling marijuana to another patient also prohibits him from undertaking *any* transfers to another patient.

[60] Of course, a registered qualifying patient who acquires marijuana—whether from another registered qualifying patient or even from someone who is not entitled to possess marijuana—to alleviate *his own* condition can still receive immunity from arrest, prosecution, or penalty because the § 4(d) presumption cannot be rebutted on that basis. In this sense, § 4 immunity is asymmetric: it allows a registered qualifying patient to obtain marijuana for his own medical use but does not allow him to transfer marijuana for another registered qualifying patient's use.

Defendants' business facilitates patient-to-patient sales, presumably to benefit the transferee patient's debilitating medical condition or symptoms. However, those transfers do not qualify for § 4 immunity because they encompass marijuana-related conduct that is not for the purpose of alleviating the *transferor's* debilitating medical condition or its symptoms. Because the defendants' "medical use" of marijuana does not comply with the immunity provisions of §§ 4(a), 4(b), and 4(d), defendants cannot claim that § 4 insulates them from a public nuisance claim.

Nevertheless, defendants posit that, even if they are not entitled to immunity under § 4(d), § 4(i) permits their business to operate in accordance with the MMMA. Section 4(i) insulates a person from "arrest, prosecution, or penalty in any manner . . . 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."[61] However, this provision does not apply to defendants' actions, nor does it apply to any patient-to-patient transfers of marijuana. First, defendants were not "solely . . . in the presence or vicinity of the medical use of marihuana" because they were actively facilitating patient-to-patient sales for pecuniary gain. Second, defendants were not "assisting a registered qualifying patient with using or administering marihuana." While they were assisting one registered qualifying patient with *acquiring* marijuana and another registered qualifying patient with *transferring* marijuana, they were not assisting *anyone* with *using* or *administering* marijuana.[62]

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[61] MCL 333.26424(i).

[62] Defendants specifically denied that they allowed any ingestion of marijuana to occur at CA.

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. "Use" is defined as "to employ for some purpose; put into service[.]"[63] "Administer" is defined in the medicinal context as "to give or apply: *to administer medicine*."[64] In this context, the terms "using" and "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. However, § 4(i) does not permit defendants' conduct in this case. Defendants transferred and delivered marijuana to patients by facilitating patient-to-patient sales; in doing so, they assisted those patients in acquiring marijuana. The transfer, delivery, and acquisition of marijuana are three activities that are part of the "medical use" of marijuana that the drafters of the MMMA chose *not* to include as protected activities within § 4(i). As a result, defendants' actions were not in accordance with the MMMA under that provision.

C. SECTION 8 AFFIRMATIVE DEFENSE

Finally, even though § 4 does not permit defendants to operate a business that facilitates patient-to-patient sales of marijuana, our decision in *Kolanek* makes clear that § 8 provides separate protections for medical marijuana patients and caregivers and that one need not satisfy the requirements of § 4 immunity to be entitled to the § 8 affirmative defense,[65] which allows "a patient and a patient's primary caregiver, if any, [to] assert the

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[63] *Random House Webster's College Dictionary* (2d ed, 1997), p 1414.

[64] *Id.* at 17.

[65] *Kolanek*, 491 Mich at 403.

medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ."[66] However, by its own terms, § 8(a) only applies "as a defense to any *prosecution* involving marihuana . . . ."[67] The text and structure of § 8 establish that the drafters and voters intended that "prosecution" refer only to a criminal proceeding. Specifically, § 8(b) explains that a person "may assert the medical purpose for using marihuana in a *motion to dismiss*, and the *charges* shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)."[68] As a result, § 8 does not provide defendants with a basis to assert that their actions are in accordance with the MMMA.

Although it did so for a different reason than the one we articulate, the Court of Appeals reached the correct conclusion that defendants are not entitled to operate a business that facilitates patient-to-patient sales of marijuana. Because the business model of defendants' dispensary relies entirely on transactions that do not comply with the MMMA, defendants are operating their business in "[a] building . . . used for the unlawful . . . keeping for sale . . . or furnishing of any controlled substance," and plaintiff is entitled to an injunction enjoining the continuing operation of the business because it is a public nuisance.[69]

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[66] MCL 333.26428(a).

[67] *Id.* (emphasis added).

[68] MCL 333.26428(b) (emphasis added). This limitation is further supported by the explicit exceptions that allow a person to assert the § 8 affirmative defense outside the criminal context. Section 8(c) allows a patient or caregiver to assert a patient's medical purpose for using marijuana outside the context of criminal proceedings, but only as a defense to "disciplinary action by a business or occupational or professional licensing board or bureau" or the "forfeiture of any interest in or right to property." MCL 333.26428(c). This case does not represent one of the two limited exceptions contained in § 8(c).

[69] Former MCL 600.3801.

IV. CONCLUSION

Because we conclude that defendants' business does not comply with the MMMA, we affirm the Court of Appeals' decision on alternative grounds. While the sale of marijuana constitutes "medical use" as the term is defined in MCL 333.26423(c), § 4 of the MMMA, MCL 333.26424, does not permit a registered qualifying patient to transfer marijuana for another registered qualifying patient's medical use. Plaintiff is thus entitled to injunctive relief to abate a violation of the Public Health Code.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

APPENDIX

As an aid to judges, practitioners, and the public, we provide the following summary of our holdings in this case:

(1) The term "medical use," as defined in § 3(e) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26423(e), encompasses the sale of marijuana "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."

(2) To be eligible for immunity under § 4 of the MMMA, MCL 333.26424, a registered qualifying patient must be engaging in marijuana-related conduct for the purpose of alleviating the patient's *own* debilitating medical condition or symptoms associated with the debilitating medical condition.

(3) To be eligible for § 4 immunity, a registered primary caregiver must be engaging in marijuana-related conduct for the purpose of alleviating the debili-

tating medical condition, or symptoms associated with the debilitating medical condition, of a registered qualifying patient to whom the caregiver is connected through the registration process of the Michigan Department of Community Health (MDCH).

(4) As a result, § 4 does not offer immunity to a registered qualifying patient who transfers marijuana to another registered qualifying patient, nor does it offer immunity to a registered primary caregiver who transfers marijuana to anyone other than a registered qualifying patient to whom the caregiver is connected through the MDCH's registration process.

(5) Section 4(i), MCL 333.26424(i), permits any person to assist a registered qualifying patient with "using or administering" marijuana. However, the terms "using" and "administering" are limited to conduct involving the actual ingestion of marijuana.

(6) The affirmative defense of § 8 of the MMMA, MCL 333.26428, applies only to criminal prosecutions involving marijuana, subject to the limited exceptions contained in § 8(c) for disciplinary action by a business or occupational or professional licensing board or bureau or forfeiture of any interest in or right to property.

CAVANAGH, J. (*dissenting*). I respectfully disagree with the majority's interpretation of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. In my view, § 4(d)(2) of the act, MCL 333.26424(d)(2), does not limit the definition of "medical use" of marijuana set forth in § 3(e) of the act, MCL 333.26423(e), so that a qualified patient who transfers marijuana to another qualified patient is precluded from asserting immunity under § 4(a) of the act, MCL 333.26424(a). Rather, I would hold that when a qualified patient transfers marijuana to another qualified patient, both individuals

have the right to assert immunity under § 4 of the act, MCL 333.26424. Furthermore, as a result of the majority's erroneous interpretation of § 4, the majority improperly concludes that any facilitation of the transfer of marijuana from patient to patient is unlawful and enjoinable as a nuisance.

As the majority explains, defendants' activity falls under the definition of "medical use" of marijuana set forth in § 3(e) of the act, which states that "medical use" means "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, *transfer*, or transportation of marihuana . . . to treat or alleviate a registered qualifying patient's debilitating medical condition . . . ." MCL 333.26423(e) (emphasis added). However, the majority erroneously concludes that *only* the qualified patient who receives marijuana is entitled to assert § 4 immunity in light of its interpretation of § 4(d)(2). Section 4(d) of the act provides a presumption that "a qualifying patient or primary caregiver is engaged in the medical use of marihuana" when certain conditions are met. MCL 333.26424(d). However, under § 4(d)(2), that presumption may be rebutted with evidence that the "conduct related to marihuana was not for the purpose of alleviating *the* qualifying patient's debilitating medical condition . . . ." MCL 333.26424(d)(2) (emphasis added). The majority reasons that the reference to "the" qualified patient requires the conclusion that only the recipient of marijuana is entitled to § 4 immunity for a patient-to-patient transfer of marijuana because only the transferee's medical condition may be alleviated as a result of the transfer.

I disagree with this interpretation because it is inconsistent with the rules of statutory interpretation. When interpreting the MMMA, "[w]e must give the

words of the MMMA their ordinary and plain meaning as would have been understood by the electorate." *People v Kolanek*, 491 Mich 382, 397; 817 NW2d 528 (2012), citing *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). It is true that, in order for the § 4(d) presumption to apply, the marijuana-related conduct at issue must be for the purpose of alleviating the medical condition or symptoms of the qualified patient who in fact suffers from a debilitating medical condition. However, when a qualified patient transfers marijuana to another qualified patient, the transferor is also engaged in marijuana-related conduct for the purpose of alleviating the medical condition of the qualified patient who is also involved in the transfer and is suffering from a debilitating medical condition. The marijuana-related conduct is the transfer of marijuana, which is expressly included in the definition of "medical use" of marijuana. MCL 333.26423(e). Thus, the reference in § 4(d)(2) to "the" qualifying patient simply requires that one of the two qualified patients involved in the transfer of marijuana have a debilitating medical condition that the transfer of marijuana is intended to alleviate.

Moreover, when interpreting a statute, "[a] court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme." *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010) (citation and quotation marks omitted). The majority's singular reliance on the reference in § 4(d)(2) to "the" qualifying patient ignores the fact that § 4(a) and the introductory language of § 4(d) refer to "a" qualifying patient. Therefore, when § 4(d)(2) is viewed in the context of § 4 in its entirety, it is clear that *any* qualified patient "who has been issued and possesses a registry identification card" has the right to assert § 4 immunity. MCL 333.26424(a).

The majority characterizes its holding as creating "asymmetric" immunity under § 4 because it permits a qualified patient who receives marijuana to assert immunity, but a qualified patient who transfers marijuana is not entitled to the same protection. *Ante* at 156 n 60. Thus, under the majority's holding, a qualified patient's right to receive marijuana is effectively extinguished because a patient-to-patient transfer of marijuana can never occur lawfully for both qualifying patients. I cannot conclude from the plain meaning of the language of the MMMA that the electorate intended to afford a person a right only to foreclose any real possibility that the person may benefit from that right. Furthermore, the majority's view is inconsistent with the purpose of the MMMA—to promote the "health and welfare of [Michigan] citizens"—because qualified patients who are in need of marijuana for medical use, yet do not have the ability to either cultivate marijuana or find a trustworthy primary caregiver, are, for all practical purposes, deprived of an additional route to obtain marijuana for that use—another qualified patient's transfer. MCL 333.26422(c).

Lastly, the majority's erroneous interpretation of § 4(d) leads the majority to an inadequate analysis regarding its ultimate conclusion that defendants' facilitation of the transfer of marijuana is enjoinable under MCL 600.3801 and MCL 600.3805 as a public nuisance.[1] Because I would conclude that the MMMA does not exclude patient-to-patient transfers of marijuana from the immunity afforded under § 4 of the act, the next inquiry should be whether the *facilitation* of the transfer of marijuana falls under the act's definition

[1] MCL 600.3801(1)(c) states that a building may be declared a nuisance if "[i]t is used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of a controlled substance."

of "medical use" of marijuana, which, if so, means that a qualified patient who facilitates the transfer of marijuana has the right to assert immunity under § 4(a) and is entitled to the presumption that he or she was engaged in the medical use of marijuana under § 4(d).[2] The majority skims over this question by employing the same flawed reasoning that it uses to conclude that the MMMA does not permit patient-to-patient transfers of marijuana—that the transfers of marijuana that defendants facilitated are only subject to immunity to the extent that the recipient of the marijuana may assert the immunity. Thus, not only has the majority improperly limited a qualified patient's right to receive marijuana for medical use from another qualified patient, as previously explained, but the majority also holds that virtually all medical-marijuana dispensaries are illegal and thus enjoinable as a nuisance because those operations facilitate patient-to-patient transfers of marijuana.

In sum, I respectfully disagree with the majority's interpretation of § 4(d)(2), which limits the definition of "medical use" of marijuana as set forth in § 3(e) because that interpretation erroneously precludes a qualified patient who transfers marijuana to another qualified patient from asserting § 4 immunity. Rather, I would hold that both qualified patients involved in a patient-to-patient transfer of marijuana have the right to assert

[2] Notably, the same analysis is not equally applicable to primary caregivers because while § 4(b) allows primary caregivers to assert immunity for the medical use of marijuana, that immunity is conditioned by the fact that the caregiver must be "assisting a qualifying patient to whom he or she is connected through the department's registration process . . . ." MCL 333.26424(b). Similarly, a qualified patient's right to assert § 4 immunity is conditioned on additional requirements apart from the requirement that he or she was engaging in the medical use of marijuana.

immunity and are entitled to immunity if they meet the specific requirements of § 4. Thus, I also disagree with the majority's conclusion that any facilitation of a patient-to-patient transfer of marijuana is enjoinable as a nuisance.

MCCORMACK, J., took no part in the decision of this case.

DEBANO-GRIFFIN v LAKE COUNTY

Docket No. 143841. Argued October 10, 2012 (Calendar No. 6). Decided February 8, 2013.

Cheryl Debano-Griffin brought an action in the Lake Circuit Court against Lake County and the Lake County Board of Commissioners alleging, in part, that she had been terminated from her position as the director of Lake County's 911 department in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., after she raised concerns about a potentially improper transfer of county funds from the county's ambulance account and regarding the ambulance service provided to the county. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The court, Peter J. Wadel, J., denied the motion, and the jury returned a verdict in plaintiff's favor. Defendants appealed. The Court of Appeals, ZAHRA, P.J. (WHITBECK, J., concurring, and M. J. KELLY, J., dissenting), in an unpublished opinion, issued October 15, 2009 (Docket No. 282921), reversed and remanded for entry of an order granting summary disposition to defendants. In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case to that Court for consideration of an additional argument that had been raised by defendants. 486 Mich 938 (2010). On remand, the Court of Appeals, MURRAY, P.J., and HOEKSTRA, J. (STEPHENS, J., dissenting), in an unpublished opinion per curiam, issued August 25, 2011 (Docket No. 282921), held that plaintiff had failed to establish a genuine issue of material fact regarding the causation element of her claim and again reversed the trial court's order denying defendants' motion for summary disposition. The Supreme Court granted plaintiff's application for leave to appeal. 491 Mich 874 (2012).

In an opinion by Justice CAVANAGH, joined by Chief Justice YOUNG and Justices MARKMAN and MARY BETH KELLY, the Supreme Court *held*:

Judicial review of plaintiff's claim under the WPA, which questioned defendants' proffered reason for the elimination of her position by asserting that the proffered reason for termination was a pretext for retaliation, violated neither the business-judgment

rule nor the separation of powers given that review of the claim merely required examination of whether the county board had acted outside its constitutionally and legislatively granted powers and that plaintiff did not question whether the purportedly economic decision was wise, shrewd, prudent, or competent.

1. Under the WPA, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) a causal connection existed between the protected activity and the adverse employment action. In this case, only the causal connection was at issue. Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link existed between the whistleblowing act and the employer's adverse employment action. A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a fact-finder could infer that the plaintiff was the victim of unlawful retaliation. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation when retaliation is claimed. In this case, when viewed in the light most favorable to plaintiff, the facts supported a reasonable inference that plaintiff was the victim of unlawful retaliation. Specifically, during a 12-day period when plaintiff engaged in protected activity by raising the concerns, her position went from fully funded to nonexistent; from that evidence, a rational fact-finder could infer that the board had decided to fund plaintiff's position until she voiced her complaints. Further, plaintiff made her complaints to the board that ultimately eliminated her position. It is reasonable to infer that the more knowledge the employer has of the protected activity, the greater the possibility of an impermissible motivation for the adverse employment action. Additionally, the board remedied its prior and potentially unlawful action after plaintiff voiced her concerns, suggesting that because of plaintiff's complaints, the board was forced to do something it would not otherwise have done. From that evidence, a reasonable inference could be drawn that the board was motivated to eliminate plaintiff's position because of her complaints.

2. Once a plaintiff establishes a prima facie case, a presumption of retaliation arises because an employer's adverse action is more likely than not based on the consideration of impermissible factors if the employer cannot otherwise justify the action. The employer might be entitled to summary disposition, however, if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that his or her protected activity was a motivating factor for the employer's adverse action. A plaintiff must

not merely raise a triable issue that the employer's proffered reason was pretextual, but must raise the issue that it was pretext for unlawful retaliation. In this case, defendants claimed that plaintiff's position was eliminated because of economic necessity and that plaintiff could not challenge that justification because any challenge would either impermissibly question defendants' business judgment or unconstitutionally require judicial review of a legislative body's policy decision, violating the separation of powers. A plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts (1) by showing that the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext. In this case, plaintiff did not question defendants' business judgment. Rather, plaintiff asserted that defendants' proffered justification had no basis in fact, or at least was not the actual factor motivating the decision, when she offered evidence that, when viewed in the light most favorable to her, suggested that the county was not facing a budget crisis. Further, the WPA expressly waives legislative immunity, making the act fully applicable to public employers. Thus, the question whether the board lawfully exercised its authority when it eliminated plaintiff's position was subject to judicial review, and that review did not violate the separation of powers. Plaintiff presented sufficient evidence to conclude that reasonable minds could differ regarding the board's true motivation for eliminating her position and raised a genuine issue of material fact regarding causation. Defendants were not entitled to summary disposition.

Judgment of the Court of Appeals reversed, trial court's denial of defendants' motion for summary disposition reinstated, and trial court order entering judgment in favor of plaintiff reinstated.

Justice ZAHRA took no part in the decision of this case because he was on the Court of Appeals panel that issued the initial opinion.

Justice MCCORMACK took no part in the decision of this case.

1. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — PRIMA FACIE CASE — CAUSAL CONNECTION — INDIRECT EVIDENCE — EMPLOYER'S KNOWLEDGE OF PROTECTED ACTIVITY.

Under the Whistleblowers' Protection Act, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) a causal

connection exists between the protected activity and the adverse employment action; absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action; something more than a temporal connection between protected conduct and an adverse employment action is required to show causation when retaliation is claimed; it is reasonable to infer that the more knowledge the employer has of the protected activity, the greater the possibility of an impermissible motivation for the adverse employment action (MCL 15.361 *et seq*.).

2. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — PRESUMPTION OF RETALIATION — LEGITIMATE, NONDISCRIMINATORY REASON FOR THE ADVERSE EMPLOYMENT ACTION — PRETEXT FOR UNLAWFUL RETALIATION — BUSINESS-JUDGMENT RULE.

Once a plaintiff establishes a prima facie case of retaliation under the Whistleblowers' Protection Act, a presumption of retaliation arises; the employer might be entitled to summary disposition, however, if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that his or her protected activity was a motivating factor for the employer's adverse action; a plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but must raise the issue that it was pretext for unlawful retaliation; a plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts (1) by showing that the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision; the soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext (MCL 15.361 *et seq*.).

3. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — WAIVER OF LEGISLATIVE IMMUNITY.

The Whistleblowers' Protection Act expressly waives legislative immunity, making the act fully applicable to public employers; the question whether a legislative body has lawfully exercised its authority when taking an adverse employment action is subject to judicial review (MCL 15.361 *et seq*.).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Parsons Law Firm, PLC* (by *Grant W. Parsons*), for Cheryl Debano-Griffin.

Abbott Nicholson, P.C. (by *John R. McGlinchey* and *Kristen L. Baiardi*), for Lake County and the Lake County Board of Commissioners.

CAVANAGH, J. This case requires us to determine whether plaintiff, Cheryl Debano-Griffin, provided sufficient evidence to create a genuine issue of material fact regarding the causation element of her claim under the Whistleblowers' Protection Act (WPA), MCL 15.361, *et seq*. We hold that plaintiff presented evidence that showed more than a temporal relationship between the protected activity and defendants' adverse employment action. See *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003). Also, because plaintiff must rely on circumstantial evidence to overcome defendants' motion for summary disposition, the framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), is applicable. In this case, we hold that plaintiff provided sufficient evidence to establish her prima facie case of unlawful retaliation under the WPA.

Additionally, we must determine whether plaintiff's claim, which questions defendants' proffered reason for the elimination of her position by asserting that the proffered reason was a pretext for retaliation, violates either the business-judgment rule, see *Hazle v Ford Motor Co*, 464 Mich 456, 475-476; 628 NW2d 515 (2001), or the separation of powers. We hold that it does not violate the separation of powers because judicial review of plaintiff's statutory claim merely examines whether the county board of commissioners acted outside its constitutionally and legislatively granted powers. Additionally, plaintiff's challenge to defendants' budgetary justifications does not implicate the business-judgment rule because plaintiff does not ques-

tion whether the economic decision was " 'wise, shrewd, prudent, or competent.' " See *id*. at 476 (citation omitted).

Moreover, in addition to adequately rebutting defendants' facially legitimate budgetary grounds for eliminating plaintiff's position, plaintiff presented sufficient evidence to conclude that reasonable minds could differ regarding defendants' true motivations for eliminating her position. Therefore, plaintiff created a triable issue of fact and defendants were not entitled to summary disposition. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's denial of defendants' motion for summary disposition.

I. FACTS AND PROCEEDINGS

In 1998, plaintiff began working as the director of Lake County's 911 department. Before her hiring, county voters had passed a millage for the purpose of operating Lake County's ambulance service. Lake County then contracted with Life EMS to provide two ambulances a day to service the county. In 2002, plaintiff discovered that Life EMS was using one of the ambulances to transport residents of other counties in nonemergency circumstances. She informed the county board of commissioners (hereinafter "the board") and other county officials that Life EMS was in breach of the contract, which posed a threat to the health and safety of county residents.

Additionally, on September 28, 2004, as authorized by the board, $50,000 was transferred from the ambulance account to a 911 account to use for a "mapping project." Plaintiff testified that on November 1, 2004, during a mapping meeting, plaintiff objected to the transfer, claiming that it violated the millage proposal and explaining that she had obtained a grant to cover

the cost of the mapping project. She further stated that she had previously made similar objections regarding the transfer to the board and at a county finance committee meeting. Later, the board voted to return the funds to the ambulance account, which occurred on November 12, 2004. Also, on November 10, 2004, the board voted to merge two county employment positions. As a result of the merger, plaintiff's position was eliminated. Plaintiff received official notice of her termination on December 22, 2004, which explained that her position was eliminated because of "budget problems" and that the county was "forced to take cost cutting measures in order to balance its budget." However, according to the proposed county budget as of October 29, 2004, the position of 911 director was fully funded at that time.

In January 2005, plaintiff filed a whistleblower claim under MCL 15.362,[1] asserting that she was terminated as result of her complaints regarding the funds transfer and Life EMS's ambulance service. Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff had not met her burden of establishing a prima facie case under the WPA because plaintiff did not engage in "protected activity" and had not provided sufficient evidence to

[1] MCL 15.362 states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

support causation. The trial court denied defendants' motion, and the jury returned a verdict in plaintiff's favor. Defendants appealed, and the Court of Appeals, holding that plaintiff was not engaged in protected activity under the WPA, reversed the trial court's denial of defendants' motion and remanded the case to the trial court for the entry of an order granting summary disposition to defendants. *Debano-Griffin v Lake Co*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2009 (Docket No. 282921).

Plaintiff sought leave to appeal, and, in lieu of granting leave to appeal, this Court reversed the judgment of the Court of Appeals and remanded the case to that Court for consideration of the argument raised by defendants but not addressed by the Court of Appeals during its initial review of the case. *Debano-Griffin v Lake Co*, 486 Mich 938 (2010). On remand, the Court of Appeals held that plaintiff had failed to establish a genuine issue of material fact on the causation element of her claim, relying primarily on *West*, and again reversed the trial court's order denying defendants' motion for summary disposition. *Debano-Griffin v Lake Co (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2011 (Docket No. 282921). We granted plaintiff's application for leave to appeal to consider "(1) whether the plaintiff established a causal connection between her protected activity and the adverse employment action" and

> (2) whether a whistleblower may challenge an adverse employment decision, which is claimed to be a matter of business judgment that was based on a fiscal or budgetary reason, as a mere pretext over the defendants' assertion that the separation of powers principle prevents the judiciary from examining the budgetary decisions of a legislative body. [*Debano-Griffin v Lake Co*, 491 Mich 874 (2012).]

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 397; 572 NW2d 210 (1998). Because defendants focused their argument supporting their motion for summary disposition on MCR 2.116(C)(10), we must ask whether a genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (citations and quotation marks omitted). Likewise, this Court reviews de novo constitutional questions, including those concerning the separation of powers. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

III. ANALYSIS

Under the WPA, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) "a causal connection exists between the protected activity" and the adverse employment action. *Chandler*, 456 Mich at 399.[2] However, the only issue that we must decide in this case is causation. Because whistleblower claims are analogous to other antiretaliation employment claims brought under employment discrimination statutes prohibiting various discriminatory animuses, they "should receive treat-

[2] This Court has previously determined that plaintiff was engaged in a "protected activity," see *Debano-Griffin*, 486 Mich 938, and there is no dispute that an "adverse employment action" was taken against plaintiff.

ment under the standards of proof of those analogous [claims]." *Shallal*, 455 Mich at 617. Specifically, this case requires application of the burden-shifting framework set forth in *McDonnell Douglas*. See, e.g., *Hazle*, 464 Mich at 462-466 (applying the *McDonnell Douglas* framework in the context of alleged discrimination in employment).

Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action. See *Hazle*, 464 Mich at 462-463. A plaintiff may " 'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation].' " *Id*. at 462, quoting *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-538; 620 NW2d 836 (2001). Once a plaintiff establishes a prima facie case, "a presumption of [retaliation] arises" because an employer's adverse action is "more likely than not based on the consideration of impermissible factors"—for example, here, plaintiff's protected activity under the WPA—if the employer cannot otherwise justify the adverse employment action. *Hazle*, 464 Mich at 463 (citations and quotation marks omitted).

The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable factfinder could still conclude that the plaintiff's protected activity was a "motivating factor" for the employer's adverse action. *Id*. at 464-465. "[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation]." *Id*. at 465-466 (citations and quotation marks omitted).

Against this backdrop, we must now determine whether plaintiff established a prima facie case of unlawful retaliation and, if so, to what extent plaintiff may argue that defendants' budgetary justification for the elimination of her position was pretextual.

A. PLAINTIFF'S PRIMA FACIE CASE

We hold that the Court of Appeals erred when it misapplied *West* to conclude that plaintiff had failed to establish her prima facie case because she did not create a genuine issue of material fact regarding causation under the WPA. In *West*, 469 Mich at 186, a majority of this Court stated that "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation" when retaliation is claimed. *Id*.

In the present case, plaintiff does not rely solely on the fact that defendants eliminated her position *after* she engaged in protected activity. To the contrary, plaintiff presented evidence of a causal link that shows more than a "coincidence in time." *Id.* at 186. Indeed, *during* a 12-day period when plaintiff made various complaints regarding the funds transfer and ambulance services, plaintiff's position went from fully funded to nonexistent. From this, a rational juror could infer that the board had already decided to fund plaintiff's position until she publicly voiced her complaints. See *Hazle*, 464 Mich at 462. This is especially so because one reasonable conclusion is that the county's financial situation could not have deteriorated in 12 days to the point that it had to consider extreme cost-saving measures at that particular time.

In addition, the fact that the same entity that made the decision to eliminate plaintiff's position, the board, was also the direct recipient of plaintiff's complaints strengthens the causal link between plaintiff's protected activity and defendants' adverse action because it is reasonable to infer that the more knowledge the employer has of the plaintiff's protected activity, the greater the possibility of an impermissible motivation. Similarly, it is reasonable to conclude that the more an employer is affected by the plaintiff's whistleblowing activity, the stronger the causal link becomes between the protected activity and the employer's adverse employment action. In this case, the board heeded plaintiff's advice and returned the transferred funds back into the ambulance fund. The fact that the board remedied its prior and potentially unlawful action lends support to plaintiff's position that defendants, because of plaintiff's complaints, were forced to do something that they would not have otherwise done and, thus, a reasonable inference may be drawn that the board was motivated to eliminate plaintiff's position *because of* her complaints.[3]

When viewed in a light most favorable to plaintiff, the foregoing facts support a reasonable inference that plaintiff was the victim of unlawful retaliation, which establishes her prima facie case and gives rise to a rebuttable presumption that defendants unlawfully re-

[3] In *West*, 469 Mich at 185, a majority of this Court noted that "[t]he evidence does not show that either of the supervisors, whom plaintiff allegedly informed about the call to the police, viewed the call as a matter of any consequence. Nor was either supervisor involved in the decision to discharge plaintiff." I continue to agree with Justice MARILYN KELLY's *West* dissent; however, the foregoing statement explains that when the same individual (or in this case the board) is the recipient of or affected by the plaintiff's whistleblowing activity, the inference that the employer unlawfully retaliated against the plaintiff becomes stronger.

taliated against plaintiff by eliminating her position. The next step in the analysis requires that we consider the extent to which plaintiff may rebut defendants' facially legitimate reason for its adverse action—that the board eliminated plaintiff's position because of the county's impending financial crisis.

B. PLAINTIFF'S ABILITY TO SHOW PRETEXT

As previously stated, defendants may rebut the presumption of retaliation and, thus, are entitled to summary disposition if they offer a legitimate justification for the elimination of plaintiff's position unless plaintiff can show that defendants' justification was a pretext for unlawful retaliation. Defendants claimed that the board eliminated plaintiff's position out of economic necessity and, in support of their motion for summary disposition, offered an audit report that, according to defendants, showed that the county was suffering financial strain and required budget cuts. Defendants also offered the affidavit of Shelly Myers, the Lake County Clerk and Register of Deeds, which stated that the county was facing "severe financial difficulties." Plaintiff responded, claiming that defendants' budgetary justification was pretextual and, instead, the board's motivating factor for the elimination of her position was punishment for her complaints about the board's allegedly illegal transfer of funds from the ambulance fund.

Defendants argue that plaintiff cannot challenge defendants' budgetary justification because any challenge would either impermissibly question defendants' "business judgment" or unconstitutionally require judicial review of a legislative body's policy decision, violating the separation of powers. We disagree.

1. BUSINESS-JUDGMENT RULE

Regarding whether plaintiff may question defendants' "business judgment," we stated in *Hazle*, 464 Mich at 476, that a "plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." (Citation and quotation marks omitted.) And similarly, in *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990), the Court of Appeals held that

> [t]here are three ways a plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext.

In this case, plaintiff did not question whether the decision to eliminate her position was "sound" or assert that it ineffectively combated the county's alleged financial crisis. Rather, plaintiff asserted that defendants' proffered justification was false or had no "basis in fact." *Id*. at 565. In other words, plaintiff questioned whether defendants' decision was in fact an economic decision by questioning the propriety of the county's audit report and the credibility of Myers. Specifically, plaintiff identified financial figures in the audit report that suggested that the county was not facing a budgetary crisis. Also, plaintiff discounted Myers's credibility by offering the minutes of a September 2004 county personnel committee meeting during which several county officials, including Myers, requested a pay raise

in 2005. Because defendants relied on Myers's representation of the county's financial status to show that the board based its decision to eliminate plaintiff's position on legitimate budgetary concerns, arguably Myers's credibility was in issue, presenting a question for the trier of fact with regard to whether defendants actually offered a legitimate justification for the board's decision. See *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973) (stating that "where the truth of a material factual assertion of a movant's affidavit depends on the affiant's credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted").

Moreover, even if defendants' position that the county was facing economic hardship had a "basis in fact," plaintiff nonetheless provided evidence to show that defendants' budgetary justification was "not the actual factor[] motivating the decision . . . ." See *Dubey*, 185 Mich App at 565-566. For example, plaintiff provided the deposition testimony of James Martin, who worked at Lake County Central Dispatch. He testified that during 2005 and 2006 defendants hired additional full-time employees. Plaintiff also provided the county's budget worksheet for 2005, which, in the budget-request column, indicated that several 911 dispatchers would be given raises. Viewing this evidence in the light most favorable to plaintiff, it is reasonable to conclude that even if the county was facing economic difficulties, those difficulties were not the board's "motivating factor" when it eliminated plaintiff's position. See *Hazle*, 464 Mich at 465.

Thus, plaintiff has successfully established a genuine issue of material fact regarding the causation element of her whistleblower claim because, when viewed in the light most favorable to plaintiff, reasonable minds may

differ with regard to whether defendants' facially legitimate economic motivation was based in truth or whether plaintiff's additional evidence showed that the motivating factor for the board's adverse decision was unlawful retaliation.

2. SEPARATION OF POWERS

Equally unpersuasive is defendants' alternative argument: that despite the fact that plaintiff might have offered sufficient evidence to create a triable issue of fact regarding causation, plaintiff may not question the board's decision to eliminate her position because it would require judicial review of a legislative policy determination, violating the separation of powers. Although defendants' argument conflates legislative immunity with separation of powers, we hold that neither doctrine precludes plaintiff's claim or ability to challenge defendants' budgetary justification for eliminating plaintiff's position as a pretext for unlawful retaliation under the WPA.

Defendants argue that the board is a legislative body and the board's elimination of plaintiff's position was a legislative act. Regarding the latter assertion, defendants cite *Bogan v Scott-Harris*, 523 US 44; 118 S Ct 966; 140 L Ed 2d 79 (1998). In *Bogan*, the United States Supreme Court held that the termination of the plaintiff's *position* was legislative in nature because the discretionary policy decision "reach[ed] well beyond the particular occupant of the office"; thus, the defendants, local city legislators, were entitled to immunity. *Id*. at 49-51, 55-56. *Bogan* further reasoned that the determination of whether an action is legislative "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id*. at 54. Indeed, this Court has reached a similar conclusion regarding executive

immunity. In *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997), we stated that "[t]he Legislature's grant of immunity . . . is written with utter clarity. We need not reach the concern that a malevolent-heart exception might not be workable, since the Legislature has provided no such test."[4]

However, defendants' argument ignores the fact that the WPA expressly waives legislative immunity, making the act fully applicable to public employers. In *Anzaldua v Band*, 457 Mich 530, 551-552; 578 NW2d 306 (1998), we stated that "[t]he Legislature expressly applied the act to the state by including the state and its political subdivisions in the definition of 'employer.' See MCL 15.361(b); MSA 17.428(1)(b). Because the state is expressly named in the act, it is within the act's coverage." And notably, *Anzaldua* explained that the waiver is consistent with the design of the WPA to "protect the public from unlawful conduct by corporations and government bodies . . . by removing barriers to the reporting of violations of law by employees." *Id.* at 533. Thus, plaintiff's claim is not barred by legislative immunity.[5]

Considering the merits of defendants' separation-of-powers argument, the Michigan Constitution states that

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[4] See MCL 691.1407(5), which states that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."

[5] While *Bogan* and MCL 691.1407(5) involve the extent to which an individual legislator may be immune from liability, this case is arguably distinguishable because only the liability of the board as a legislative body is at issue. Thus, we decline to address whether the naming of an individual board member as a defendant would have changed the outcome of this case.

"[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The authority of local governments derives from article 7 of Michigan's 1963 Constitution and from the Legislature. See Const 1963, art 7, § 1; see, also, *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 632 n 5; 502 NW2d 638 (1993). The Constitution states that county governments "shall have legislative, administrative and such other powers and duties *as provided by law*." Const 1963, art 7, § 8 (emphasis added).[6] And the Legislature has delegated to county government the authority to "[e]stablish rules and regulations in reference to the management of the interest and business concerns of the county as the board considers necessary and proper in all matters not especially provided for in this act or *under the laws of this state*." MCL 46.11(m) (emphasis added).

In the present case, despite the board's authority to make budgetary decisions, judicial review of plaintiff's whistleblower claim, which asserts that the board's budgetary justification for her termination was pretextual, does not violate the separation of powers. We have held that

> [i]t is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the *legitimate* discretion of any other department of government. *So long as they do no illegal act*, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them . . . . [*Detroit v Wayne Co Circuit Judge*, 79 Mich 384, 387; 44 NW 622 (1890) (emphasis added).]

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[6] Const 1963, art 7, § 8 refers to county boards of supervisors, but Const 1963, art 7, § 2 permits "the organization of county government in form different from that set forth in this constitution . . . ."

See, also, *Veldman v Grand Rapids*, 275 Mich 100, 113; 265 NW 790 (1936) (explaining that a court's inquiry into municipal affairs is limited to situations in which there exists "a malicious intent, capricious action or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them"). As previously stated, plaintiff does not argue that the board's decision to eliminate her position was a product of unsound or unwise judgment. Rather, plaintiff argues that the board's decision was *unlawful* under the WPA and, thus, its decision fell outside the otherwise legitimate discretion afforded to the board by the Constitution and the Legislature. Thus, the trial court, by merely providing plaintiff a forum in which to litigate her statutory claim under the WPA, did not infringe the board's legitimate exercise of its judgment and discretion.

Accordingly, given that the WPA expressly waives legislative immunity, we hold that the question whether the board *lawfully* exercised its authority when it eliminated plaintiff's position is subject to judicial review. To hold otherwise would essentially allow defendants an impenetrable defense because plaintiff lacked direct evidence of retaliation and would render futile the burden-shifting framework of *McDonnell Douglas*.

IV. CONCLUSION

In summary, we hold that the *McDonnell Douglas* framework applies to plaintiff's claim under the WPA because plaintiff lacked direct proof of a causal connection showing that the board possessed a retaliatory motivation when it eliminated her position. Additionally, the Court of Appeals erred when it concluded that plaintiff failed to show more than a temporal relation-

ship between the protected activity and the adverse employment action. In this case, plaintiff provided additional evidence to establish her prima facie case—particularly, the fact that plaintiff's position became unfunded within 12 days, which overlapped with when plaintiff engaged in the protected activity.

Lastly, we hold that plaintiff successfully rebutted defendants' proffered budgetary justification for the board's adverse decision. And plaintiff's ability to challenge the motives of the board did not call into question the board's business judgment because plaintiff's argument was that the budgetary decision had no basis in fact, not that its decision was unwise. Similarly, the trial court, by entertaining plaintiff's argument, did not unconstitutionally infringe on the board's legislative function in violation of the separation of powers.

Thus, because plaintiff presented sufficient evidence to conclude that reasonable minds could differ regarding the board's true motivation for eliminating plaintiff's position, plaintiff raised a genuine issue of material fact regarding causation and defendants were not entitled to summary disposition. We reverse the judgment of the Court of Appeals, reinstate the trial court's denial of defendants' motion for summary disposition, and reinstate the trial court's order entering judgment in favor of plaintiff.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., concurred with CAVANAGH, J.

ZAHRA, J., took no part in the decision of this case because he was on the Court of Appeals panel that issued the October 15, 2009, opinion.

MCCORMACK, J., took no part in the decision of this case.

PEOPLE v WHITE

Docket No. 144387. Argued October 11, 2012 (Calendar No. 8). Decided February 13, 2013. Rehearing denied, 493 Mich 962.

Kadeem Dennis White was charged in the Jackson Circuit Court with first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting death of Benjamin Willard. Before trial, defendant moved to suppress his inculpatory statements to the police. He argued that the statements should be suppressed because they were made after he had asserted his right to remain silent and in response to the statements of a police officer that constituted the functional equivalent of interrogation under *Rhode Island v Innis*, 446 US 291 (1980). The court, Thomas D. Wilson, J., granted the motion to suppress, finding that although the officer's statements did not constitute express questioning, the officer's statements were the functional equivalent of questioning. The prosecution appealed by delayed leave granted. The Court of Appeals, WILDER and MURRAY, JJ. (SHAPIRO, P.J., dissenting), reversed, concluding that the officer's statements did not constitute the functional equivalent of questioning given that (1) before defendant made his inculpatory statements, the officer had advised defendant that he was not asking defendant a question, but was only telling him that he hoped the gun used in the charged offense was in a place where no one could find it and be hurt, (2) nothing in the record indicated that the officer was aware of any peculiar susceptibility of defendant, and (3) the officer had not made a lengthy speech. 294 Mich App 622 (2011). The Supreme Court granted defendant's application for leave to appeal. 491 Mich 890 (2012).

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

Defendant was not subjected to express questioning or its functional equivalent after he invoked his right to remain silent, and the Court of Appeals correctly reversed the trial court's decision to suppress defendant's voluntary statements.

1. Under the Fifth Amendment of the United States Constitution, no person shall be compelled in any criminal case to be a

witness against himself or herself. The United States Supreme Court held in *Miranda v Arizona*, 384 US 436 (1966), that to protect that right, when the police continue to interrogate a suspect in custody after the suspect has invoked the right to remain silent and the suspect confesses as a result of the interrogation, the confession is inadmissible. The term "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect.

2. In this case, defendant was in custody. He was not, however, subjected to express questioning. A question asks for or invites a response. The officer's comment concerning the location of the gun did not ask for or invite a response, but was a mere expression of hope and concern. Nor did the addition of the words "okay" and "all right" at the end of the comment transform it into a question. The officer used the words repeatedly during the colloquy to indicate when he had finished a thought. Additionally, before making the comment, the officer informed defendant that he was not asking defendant questions. The officer's statement in that regard made it less likely that the officer would have reasonably expected defendant to answer with an incriminating response. Further, defendant's subsequent statement did not concern the gun's location, reinforcing the conclusion that the officer's comment was not a question. That conclusion is also reinforced by the fact that the officer seemed surprised by defendant's inculpatory statements.

3. Nor was defendant subjected to the functional equivalent of questioning. There was nothing in the record to suggest that the officer was aware that defendant was peculiarly susceptible to an appeal to his conscience concerning the safety of others. The mere fact that defendant was 17 years old and inexperienced with the criminal justice system did not mean that defendant was peculiarly susceptible. The fact that the officer was speaking directly to the defendant was also not determinative given that the police did not carry on a lengthy harangue in defendant's presence and given that the officer's comment was not particularly evocative. Defendant was not interrogated in violation of *Miranda*, and his confession was admissible and had to be made fully available to the jury.

Affirmed.

Justice CAVANAGH, dissenting, would have reversed the judgment of the Court of Appeals and reinstated the trial court's order

suppressing defendant's inculpatory statements. Assuming for the sake of argument that defendant was not subjected to express questioning, the officer's statements amounted to the functional equivalent of express questioning. The majority focused too heavily on the similarities in the content of the statements in *Innis* and this case and failed to give proper consideration to the context in which the statements were made. The primary considerations of *Innis* are the suspect's perception of the officer's statements and whether the officer should have known that his or her comments were reasonably likely to elicit an incriminating response. In this case, unlike in *Innis*, the officer's statements were made in a police interrogation room and were expressly directed to defendant, the only other person present. Regardless of whether the officer subjectively expected defendant to respond to his statements, defendant could have reasonably perceived that the officer was seeking a response, and the officer should have known that it was reasonably likely that defendant would respond. The use of psychological ploys by the police may also constitute interrogation. In this case, the officer's statements had the characteristics of a psychological ploy that exerted a compelling influence on defendant because they played to the likelihood that defendant would feel compelled to protect others. Defendant's youth and inexperience with the criminal justice system also increased the likelihood that he would feel compelled to respect and comply with the officer as an authority figure and would perceive the officer's statements as requiring a response. As a result, defendant was improperly subjected to the functional equivalent of express questioning.

Justice MARY BETH KELLY, dissenting, would have reversed the judgment of the Court of Appeals and suppressed defendant's statement because the officer engaged in the functional equivalent of express questioning by exploiting defendant's youth, a characteristic that made him particularly susceptible to the officer's compulsive techniques. The United States Supreme Court has spoken extensively about the unique characteristics of minors, explaining that they are generally wanting in maturity, are more susceptible to outside influences, and often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. They are uniquely susceptible to police interrogative efforts and should reasonably be expected to respond to those efforts. Given these unique characteristics, minors have long been afforded a special regard in the law. In the custodial-interrogation context, these characteristics require courts to exercise special care in their scrutiny of the record. In this case, the officer should have recognized that defendant's age made him especially susceptible to subtle compulsive efforts and

that such conduct would likely elicit an incriminating response. Examined in their entirety, the officer's remarks included a number of police tactics to which a youth would be readily susceptible. Accordingly, defendant was subjected to interrogation after he invoked his right to remain silent.

Justice MCCORMACK took no part in the decision of this case.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — CUSTODIAL INTERROGATIONS — EXPRESS QUESTIONING OR ITS FUNCTIONAL EQUIVALENT.

Under the Fifth Amendment of the United States Constitution, no person shall be compelled in any criminal case to be a witness against himself or herself; the United States Supreme Court has held that to protect that right, when the police continue to interrogate a suspect in custody after the suspect has invoked the right to remain silent and the suspect confesses as a result of the interrogation, the confession is inadmissible; the term "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect; a police officer's expression of concern about the location of a firearm involved in the crime being investigated does not necessarily constitute interrogation; a suspect's youth and inexperience with the criminal justice system do not necessarily render the suspect peculiarly susceptible to a particular form of persuasion (US Const, Am V).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Rappleye & Rappleye, P.C. (by *Robert Karl Gaecke, Jr.*), for defendant.

MARKMAN, J. The issue here is whether, in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), defendant was subjected to "interrogation" or, more specifically, "express questioning or its functional equivalent," *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980), after he invoked his

right to remain silent. Because we agree with the Court of Appeals that defendant was not subjected to such questioning after he invoked his right to remain silent, we affirm the judgment of the Court of Appeals, which correctly reversed the trial court's decision to suppress defendant's voluntarily given confession.

I. FACTS AND PROCEDURAL HISTORY

Defendant allegedly turned a drug buy into an armed robbery by pulling out a gun instead of proffering cash. He and the victim allegedly struggled over the gun, the gun went off, and the victim was killed. Defendant was then taken into custody. After a police officer read defendant his *Miranda* rights, the following colloquy, which was recorded on a DVD, immediately ensued:

> [*Officer*]: Okay. This is what they call the acknowledgement and waiver paragraph. I'm going to read this to you. If you wish to talk to me, I'm going to need you to sign and date [the] form. Even though you sign and date the form, you still have your rights to stop at any time you wish. Do you understand that?
>
> [*Defendant*]: No. No thank you sir. I'm not going to sign it.
>
> [*Officer*]: Okay. Okay. Sounds good.
>
> [*Defendant*]: I don't even want to speak.
>
> [*Officer*]: I understand. I understand Kadeem. Okay then. The only thing I can tell you Kadeem, is good luck man. Okay. Don't take this personal. It's not personal between me and you, I think I may have had one contact with you on the street. Okay. I've got to do my job. And I understand you've got to do what you've got to do to protect your best interests. Okay. The only thing that I can tell you is this, and I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right.

[*Defendant*]: I didn't even mean for it to happen like that. It was a complete accident.

[*Officer*]: I understand. I understand. But like I said, you, uhh, you get your attorney, man. Hey, look dude, I don't think you're a monster, all right. I don't think that. You could have came down to me and turned yourself in and there ain't no damn way I'd beat you up. Yeah. Okay, man? You all set, you straight with me? Who knows you're here? Who knows of your family? Because I know a lot of your family in town now.

[*Defendant*]: I know that I didn't mean to do it. I guarantee that, I know I didn't mean to do it.

[*Officer*]: Does your dad know you're down here?

[*Defendant*]: Yeah.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Before trial, defendant moved to suppress his statement to the police officer. The trial court granted defendant's motion, finding the officer's comment—"I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it"—to be the functional equivalent of express questioning, which is prohibited after a defendant has invoked his right to remain silent. In a published, and split, decision, the Court of Appeals reversed. *People v White*, 294 Mich App 622; 823 NW2d 118 (2011). The majority held that the officer's comment did not constitute the functional equivalent of express questioning under *Innis* and thus that there was no constitutional violation. The dissent would have suppressed the confession because, with the word "okay" appended to his expression of concern regarding the firearm, the officer's comment constituted an express question. At the very least, the dissent concluded, the officer's comment constituted the functional equivalent of a question and was thus prohibited. This Court

granted defendant's application for leave to appeal. *People v White*, 491 Mich 890 (2012).

II. STANDARD OF REVIEW

Because the pertinent facts here are undisputed, we review de novo the trial court's decision regarding whether defendant was subjected to "interrogation" or, more specifically, "express questioning or its functional equivalent." *Innis*, 446 US at 300-301. We agree with the Court of Appeals dissent that the majority erred by applying the "clear error" standard of review in evaluating whether such questioning occurred. As the dissent explained, given that the facts are undisputed, the de novo standard of review, not review for clear error, is applicable. See *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001) ("To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."). However, this error was harmless because the majority held that "[e]ven under a de novo review of the evidence, . . . we conclude, as did the trial court, that no express questioning occurred." *White*, 294 Mich App at 633.

III. ANALYSIS

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. See also Const 1963, art 1, § 17. Notwithstanding the apparent textual focus of the Fifth Amendment on whether a defendant's confession was undertaken voluntarily and without coercion,[1] the

[1] Before *Miranda*, the admissibility of a confession depended on its voluntariness. See *Bram v United States*, 168 US 532, 542-543; 18 S Ct

United States Supreme Court has held since *Miranda* that in the context of a "custodial interrogation," advising a defendant of his *Miranda* rights[2] is necessary to protect his constitutional privilege against self-incrimination, and "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 US at 444, 473-474. If the police continue to "interrogate" the defendant after he has invoked his right to remain silent, and the defendant confesses as a result of that "interrogation," the confession is inadmissible. *Id.* at 444-445. However, *Miranda* also clarified that voluntarily given confessions that are not the result of impermissible custodial interrogations remain admissible:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement

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183; 42 L Ed 568 (1897) (" '[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' ") (citation omitted); *Hardy v United States*, 186 US 224, 229; 22 S Ct 889; 46 L Ed 1137 (1902) ("[S]tatements which are obtained by coercion or threat or promise will be subject to objection."); *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489; 12 L Ed 2d 653 (1964) ("[T]he constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary . . . .' ").

[2] That is, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 US at 444.

> that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. [*Id.* at 478.]

In this case, there is no question that defendant was in "custody" and that after defendant was read his *Miranda* rights, he invoked his right to remain silent. Thus, the question here is whether, after defendant invoked his right to remain silent, he was then subjected to "interrogation."

In *Innis*, 446 US at 300-302, the United States Supreme Court explained the circumstances under which a defendant is deemed to have been subjected to "interrogation":

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [Emphasis in the original.]

The Court further explained, however, that the underlying intent of the police is not irrelevant:

> [I]t may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect. [*Id.* at 301 n 7.]

But again, as one academic commentator explained, the focus must be on the objective manifestation of the officer's words rather than on the officer's subjective intentions in speaking the words:

> [T]he best reading of the *Innis* test is that it turns upon the *objective* purpose *manifested* by the police. Thus, an officer "should know" that his speech or conduct will be "reasonably likely to elicit an incriminating response" when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose. To ensure that the inquiry is entirely *objective*, the proposed test could be framed as follows: if an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute "interrogation." [2 LaFave, Criminal Procedure (3d ed), § 6.7(a), p 757, quoting White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich L R 1209, 1231-1232 (1980) (emphasis in the original).]

On the basis of the foregoing principle, *Innis* concluded that the defendant was not "interrogated" within the meaning of *Miranda*. The defendant had been suspected of robbing and killing taxicab drivers with a sawed-off shotgun. When the police arrested him, they repeatedly read him his *Miranda* rights, and

the defendant invoked his right to counsel. On the way to the police station, the defendant was in the backseat of a squad car accompanied by three officers. The officers were having a conversation and one of them stated that there were "a lot of handicapped children running around in this area" because a school for handicapped children was located nearby, and "God forbid one of them might find a weapon with shells and they might hurt themselves." *Innis*, 446 US at 294-295. In the course of this conversation, the officers were interrupted by the defendant, who directed them to turn the squad car around so that he could show them where the gun was hidden.

The Court held that the defendant had not been "interrogated" in violation of *Miranda* because he was neither subjected to "express questioning" nor its "functional equivalent." Regarding the latter, the Court noted that (1) "[t]here is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children"; (2) "[n]or is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest"; (3) "the entire conversation appears to have consisted of no more than a few offhand remarks"; (4) "[t]his is not a case where the police carried on a lengthy harangue in the presence of the suspect"; (5) "[n]or does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly 'evocative.' " *Id.* at 302-303. Finally, the Court held that the lower court had "erred . . . in equating 'subtle compulsion' with interrogation" because even when there is subtle compulsion, "[i]t must also be established that a suspect's incriminating response was the product of words or actions on

the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Id*. at 303.

In the instant case, we agree with the Court of Appeals that defendant was not subjected to "express questioning" after he invoked his right to remain silent. First, a "question" asks for or invites a response. *Id.* at 302 (holding that the respondent was not subjected to "express questioning" because "no response from the respondent was invited"); *Random House Webster's College Dictionary* (2001) (defining "question" as "a sentence in an interrogative form addressed to someone in order to get information in reply" or "the act of asking or inquiring"). The officer's comment in this case—"I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it"—was not a question because it did not ask for an answer or invite a response. It was a mere expression of hope and concern.

Second, the officer's addition of the words "okay" and "all right" at the end of his comment did not transform a non-question into a question. This is especially obvious when the conversation is considered in its entirety, as it must be, because the officer *repeatedly* used the words "okay" and "all right" in a manner that failed to garner any response from defendant. See *Acosta v Artuz*, 575 F3d 177, 191 (CA 2, 2009) ("*Innis* calls upon courts to consider police conduct in light of the totality of the circumstances in assessing whether the police 'should have known' that their actions 'were reasonably likely to elicit an incriminating response.' "), quoting *Innis*, 446 US at 303. We agree with Justice CAVANAGH that

> it is not unusual for people to use certain words or phrases repeatedly while speaking without intending for those

> words to have significant meaning. In fact, during the approximately five-minute-long colloquy between Stiles and defendant, Stiles repeatedly used the phrases "okay" and "all right" to punctuate statements, apparently without intending to extract a response from defendant. [*Post* at 212-213.]

Indeed, the officer used the word "okay" 17 times during the 5-minute conversation, and yet defendant only "responded" 3 times, including the "response" that is at issue in this case, and the other 2 "responses"—if that is even a proper characterization of what defendant's statements amounted to—were simply "yeah" and "okay." Similarly, the officer used the phrase "all right" 4 times during the 5-minute conversation and only in this one instance did defendant again "respond," and, as discussed later in this opinion, that "response" was in no way responsive to the officer's statement because defendant said nothing about the gun—the very matter that had been the subject of the officer's statement. Moreover, from our own review of the video of the interview, the officer's comment, at least in our judgment, does not at all *sound* like a question. That is, the officer did not say the words "okay" and "all right" in a manner and with an emphasis that would have made a reasonable person believe that a response was expected. Instead, the use of these words reflected essentially a verbal tic on the officer's part meaning, "Okay, all right, I have finished my thought."

Furthermore, immediately before the officer made the statement at issue, he said, "I'm not asking you questions, I'm just telling you." Although this is certainly not dispositive of whether what follows constituted a "question," it is nevertheless relevant with regard to whether the officer reasonably should have expected an answer. The very utterance itself made it less likely either that the officer would have reasonably

expected defendant to answer with an incriminating response *or* that defendant would have proffered an incriminating response.[3]

Moreover, as previously noted, the fact that defendant's "response" to the officer's comment concerning the location of the gun did not have anything at all to do with the location of the gun also reinforces the conclusion that the officer's comment here was not a question. If it was a question, defendant certainly did not answer it. Instead, defendant said: "I didn't even mean for it to happen like that. It was a complete accident." If defendant was answering the *officer's* "question," one would think that he would have said something about the location of the gun, but he did not, and this, in our judgment, underscores that the officer's comment was not a question to begin with.

In addition, the fact that the officer responded to defendant's incriminating statement by saying, "[Y]ou, uhh, you get your attorney, man," and then asking defendant if his family knew that he was there, suggests that the officer was not expecting or trying to obtain an incriminating response from defendant. Instead, it seems that the officer was taken somewhat by surprise by defendant's incriminating statement, and he immediately sought to veer the conversation away from any

[3] We generally agree with Justice CAVANAGH that although "such statements do not magically transform what would otherwise be an express question into a constitutionally benign comment," "such qualifying statements might, in some situations, be relevant to a court's consideration of the totality of the circumstances . . . ." *Post* at 211-212. Indeed, we believe that such prefatory language will *almost always* be of at least *some* relevance to the court's "totality of circumstances" analysis in the sense that, whatever the subjective intentions of the officer, his disclaimer that no question is being asked, and thus that no answer is expected, can be assumed to have at least *some* deterrent effect on a defendant in answering the "question" on the assumption that the officer means what he says.

further incriminating statements. The fact that the officer was caught off guard by defendant's incriminating statement further underscores that the officer's comment was not "designed to elicit an incriminating response . . . ." *Innis*, 446 US at 302 n 7.

Finally, to the extent that the officer's statement can even be reasonably viewed as a question, this particular question does not seem intended to generate an incriminating response.[4] Instead, if anything, the officer was

[4] The Court of Appeals dissent stated that "it is difficult to conceive of another reason" for the officer to have said what he did other than to get defendant to make an incriminating statement. *White*, 294 Mich App at 639 (SHAPIRO, P.J., dissenting). However, perhaps the officer was simply *genuinely* concerned about somebody getting hold of the gun and injuring either themselves or somebody else. Just as

> "in *Innis*, there is a basis for concluding that the officer's remarks were made for some purpose *other* than that of obtaining evidence from the suspect" because an "objective listener could plausibly conclude that the policemen's remarks in *Innis* were made solely to express their genuine concern about the danger posed by the hidden shotgun." [2 LaFave at 757 n 20, quoting White, 78 Mich L R at 1234-1235 (emphasis in the original).]

See also *Innis*, 446 US at 303 n 9 ("[I]t was 'entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other.") (alterations in the original). Furthermore, given that after the officer said something about the gun, he asked defendant if his family knew where he was, perhaps the officer was hoping that defendant might tell a family member where the gun was if it was not in a safe location so that a family member could ensure that the gun was moved to a safe location. Finally, "the mere fact that a police officer may be aware that there is a 'possibility' that a suspect may make an incriminating statement is insufficient to establish the functional equivalent of interrogation." *United States v Taylor*, 985 F2d 3, 8 (CA 1, 1993), citing *Arizona v Mauro*, 481 US 520, 528-529; 107 S Ct 1931; 95 L Ed 2d 458 (1987) ("Officers do not interrogate a suspect simply by hoping that he will incriminate himself."). Contrary to Justice CAVANAGH's intimation, we fully recognize that the officer's subjective intent is not dispositive. However, as *Innis*, 446 US at 301 n 7, explained, such intent is not "irrelevant" either, and it is especially not "irrelevant" when a

simply trying to ensure that defendant heard and understood him. As the Court of Appeals explained:

> [W]e conclude, as did the trial court, that no express questioning occurred. After defendant invoked his right to remain silent, the detective informed defendant that he was not asking any more questions and was only going to make a statement. The brief statement was made, and though the detective stated "okay" and "alright" after the statement, the video makes clear that in context the detective was seeking affirmation that defendant heard the statement, not that he was seeking a response to the statement. And the detective's response once defendant blurted out an incriminating statement shows he had not intended that there be any sort of substantive response to the statement. Consequently, there was no express questioning of defendant. [*White*, 294 Mich App at 633-634.]

We further agree with the Court of Appeals that defendant was not subjected to the "functional equivalent" of express questioning after he invoked his right to remain silent. Just as in *Innis*, there is nothing in the record to suggest that the officer was aware that defendant was "peculiarly susceptible to an appeal to his conscience" concerning the safety of others. *Innis*, 446 US at 302. Justice CAVANAGH asserts that the officer's comment about the gun "played to the likelihood that defendant would respond to an *expression of concern for the safety of others*." *Post* at 225 (emphasis added). However, we have a difficult time fathoming that the officer believed that defendant was "peculiarly susceptible to an appeal to his conscience," especially where defendant had just been arrested for shooting another man to death for drugs. That is, under these circumstances, and absent any evidence of defendant's

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dissenting Court of Appeals judge has specifically asserted that the officer *must* have subjectively intended to coerce defendant to respond to the officer's comments.

peculiar susceptibility, we are not persuaded that the officer here should have known that "defendant would perceive the [officer's] comments as compelling a response in order to protect others . . . ." *Post* at 227.

Although Justice CAVANAGH states that "several of defendant's individual personal characteristics increased the likelihood that he would perceive Stiles's comments as requiring a response," *post* at 229, he only articulates two such characteristics: "defendant's youth and inexperience with the criminal justice system," *post* at 228-229. However, the mere fact that defendant was 17 years old and inexperienced in the criminal justice system does not mean that he was "peculiarly susceptible to an appeal to his conscience" or "unusual[ly] susceptib[le] . . . to a particular form of persuasion . . . ." *Innis*, 446 US 302.[5] Indeed, not even defendant himself has argued that he possesses any personal characteristics that made it more likely that he would feel compelled to respond to the officer's comment about the gun. And indeed, as previously discussed, defendant never did truly "respond" to the officer's comment about the gun—he never told the officer where the gun was. Therefore, the alleged importunings of the officer with regard to the safety of other persons must not have moved defendant excessively or weighed too heavily on his conscience.[6]

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[5] In the case relied on heavily by Justice MARY BETH KELLY—*JDB v North Carolina*, 564 US ___; 131 S Ct 2394, 2398, 2406; 180 L Ed 2d 310 (2011), which, unlike the instant case, involved a 13-year-old boy—the United States Supreme Court held that although "the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*," "[t]his is not to say that a child's age will be a determinative, or even a significant, factor in every case."

[6] Justice KELLY contends that we focus exclusively on the officer's comment about the gun and ignore his "references to violence and attempts to earn defendant's trust through expressions of understanding and references to defendant's family." *Post* at 235 n 20. The only

Also, just as in *Innis*, there is nothing in the record to suggest that the officer here was aware that defendant was "unusually disoriented or upset at the time of his arrest." *Innis*, 446 US at 303. Furthermore, the officer only made a single remark about the gun. "This is not a case where the police carried on a lengthy harangue in the presence of the suspect." *Id*. Nor was the officer's remark "particularly 'evocative.' " *Id*. Indeed, the officer's comment in the instant case was far less "evocative" than the officer's comment in *Innis*. In *Innis*, the officer said, "[T]here's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 294-295. In the instant case, the officer said, "I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it . . . ." Unlike the officer in *Innis*, the officer here did not invoke God or handicapped children. And even if the officer's remark could be considered "subtle compulsion," *Innis* held that "subtle compulsion" is not "interrogation." *Id*.[7]

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purported "reference to violence" was the officer's statement: "You could have came down to me and turned yourself in and there ain't no damn way I'd beat you up." That is, the officer said that he would *not* have beat defendant up. Accordingly, the officer's statement is probably better understood as a reference to *nonviolence* than to violence. And while it is true that the officer did refer to defendant's family and did render expressions of understanding, we hardly believe that these statements transformed a non-interrogation into an interrogation. Nor do we do not believe that police officers violate the United States Constitution by rendering expressions of understanding to suspects or by inquiring as to whether their families are aware that they are in custody.

[7] Contrary to Justice CAVANAGH's contention, *Mauro* did not hold that subjecting a suspect to "psychological ploys" constitutes "interrogation." *Post* at 223-224. *Mauro* simply noted that the defendant in that case had *not* been subjected to "psychological ploys." *Mauro*, 481 US at 529. This by no means indicates that "psychological ploys" necessarily constitute "interrogation." Indeed, as previously discussed, *Innis*, 446 US at 303, ex-

Justice CAVANAGH is correct that the instant case is factually distinguishable from *Innis* in the sense that the officers in *Innis* were talking to themselves, and not directly to the defendant, about the gun, whereas in the instant case, the officer was clearly talking directly to defendant about the gun given that defendant was the only other person in the room.[8] However, we do not

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pressly held that "subtle compulsion" does not constitute "interrogation." See also *Acosta*, 575 F3d at 189 (stating that "police conduct would not qualify as interrogation simply because it 'struck a responsive chord' in a defendant"), quoting *Innis*, 446 US at 303. Furthermore, we do not view what happened here as a "psychological ploy" at all. Justice CAVANAGH contends that "the record is devoid of any support for the majority's speculation regarding Stiles's subjective intent in making the statements at issue." *Post* at 220 n 2. However, the record is equally devoid of any contrary subjective intent, and why should an officer of the law expressing concern about the risk to others being posed by an abandoned firearm be presumed to be engaged in a "psychological ploy"? Why can't it be presumed, absent more, that the expression of such a concern is sincere and genuine and an altogether legitimate aspect of the officer's professional responsibilities? Indeed, it is difficult to imagine a more legitimate concern that an officer of the law might express.

[8] Justice CAVANAGH relies heavily on *In re EG*, 482 A2d 1243 (DC, 1984), for the proposition that whether the officer was talking directly to the defendant is a significant factor. In *In re EG*, the officer was told that a man wearing a beige hat and dark sunglasses had just committed an armed robbery. When the officer stopped the defendant and found a beige hat and dark sunglasses in the defendant's pocket, the officer said: "Here is the sunglasses and the hat. I wonder where the gun and money is [sic]." *Id.* at 1245. The defendant responded, "I gave it to my partner." *Id.* The District of Columbia Court of Appeals held that the officer's statement constituted "interrogation" because "there was no understandable explanation for [the officer's] rhetorical question other than to elicit a response from appellant." *Id.* at 1248. In the instant case, however, as previously discussed, there is a reasonable explanation for the officer's comment other than to elicit an incriminatory response from defendant—a genuine and legitimate concern about the danger posed by the missing gun. *In re EG* is also distinguishable from the instant case because in that case, the defendant was never told that he had a right to remain silent, while in the instant case defendant was informed that he had a right to remain silent, he invoked that right, and before the officer made the comment about the gun he specifically told defendant that it

believe that this difference alone requires a different outcome.[9] As the Court of Appeals explained, "federal courts have repeatedly held that revealing evidence or other facts directly to the defendant does not constitute the functional equivalent of questioning, absent any of the other *Innis* criteria." *White*, 294 Mich App at 635. For example, in *Fleming v Metrish*, 556 F3d 520, 523 (CA 6, 2009), when an officer told the suspect after the suspect had invoked his right to remain silent that "things did not look good for him and that 'maybe he needed to do the right thing' " and asked the suspect if he now wanted to talk to the lead detective, the court held that this did not constitute "interrogation." The

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was a statement, not a question. Finally, in *In re EG*, the officer made the comment while his service revolver was drawn and the defendant had his hands on the roof of the officer's police cruiser, while here the officer made the comment during a completely civil conversation with defendant at the police station. Therefore, not only is *In re EG*, of course, not binding on this Court, but it is also distinguishable on significant grounds.

[9] Contrary to Justice CAVANAGH's contention, we do not "fail[] to give proper consideration to the *context* in which the statements were made." *Post* at 218 (emphasis in the original). Instead, we are fully cognizant that the officer's comments at issue here were made in a distinct context from those at issue in *Innis*, because while the officer in *Innis* was speaking to another officer, the officer here was speaking to the defendant himself. However, this appears to be the only contextual difference relied on by Justice CAVANAGH (other than that the defendant in *Innis* was in a police car, while the defendant here was in a police interrogation room, which we believe is a distinction without a meaningful difference), and for the reasons explained above, we do not believe that this distinction by itself, although certainly a distinction, compels a different result. And contrary to Justice CAVANAGH's intimation, the fact that two of the *dissenting* justices in *Innis* opined that the officers' "remarks 'would obviously have constituted interrogation if they had been explicitly directed to respondent' " is of little relevance because they were *dissenting*. *Post* at 219, quoting *Innis*, 446 US at 305 (Marshall, J., dissenting). What *is* relevant is that the *majority* in *Innis* did not rely on the fact that the officers were not talking directly to the defendant in its analysis of whether the officers subjected the defendant to the functional equivalent of express questioning.

court specifically rejected that there was a significant distinction between the officers' conversation in *Innis* and the comments directed to the defendant:

> We recognize that *Innis* is arguably distinguishable on the basis that the conversation in *Innis* occurred between two police officers, and was not directed toward the suspect himself. Officer Clayton's brief remarks were, in contrast, clearly aimed at Fleming. Such a distinction might be significant if an officer's brief remarks morphed into, for example, a "lengthy harangue" because, other things being equal, extended comments directed toward a suspect are more likely to elicit an incriminating response. But this court has previously rejected a constitutional challenge to cursory comments aimed at a suspect in an analogous context. See *United States v. Hurst*, 228 F.3d 751, 760 (6th Cir.2000) (holding that "the mere statement by [a law-enforcement official] that 'we've got good information on you,' viewed in context, contains no compulsive element suggesting a Fifth Amendment violation under the circumstances."). [*Id.* at 527 (alteration in the original).]

Indeed, "courts have generally rejected claims . . . that disclosure of the results of a lineup or other inculpatory evidence possessed by the police, without more, constitutes 'interrogation' under *Innis*." *Acosta*, 575 F3d at 191. See, for example, *Easley v Frey*, 433 F3d 969, 974 (CA 7, 2006) (holding that informing the defendant that an eyewitness was willing to testify against him and that if convicted he could be subject to the death penalty did not constitute "interrogation"); *United States v Payne*, 954 F2d 199, 203 (CA 4, 1992) (holding that informing the defendant that a gun was found at his home did not constitute "interrogation"); *Shedelbower v Estelle*, 885 F2d 570, 572-573 (CA 9, 1989) (holding that informing the defendant that his accomplice had been arrested and that the victim had identified him as one of her assailants after being shown his photograph did not constitute "interrogation"); *People v McCuaig*,

126 Mich App 754, 760; 338 NW2d 4 (1983) (holding that "the statements made by the police officer, which merely advised defendant of the crime with which he was charged and which described the events which led to that charge, cannot be characterized as further interrogation by the officer or its functional equivalent"); *People v Kowalski*, 230 Mich App 464, 467-469, 483; 584 NW2d 613 (1998) (holding that informing the defendant that his accomplice had given a statement and inquiring whether the defendant still wanted an attorney did not constitute "interrogation").

Accordingly, direct statements to the defendant do not necessarily constitute "interrogation."[10] Again, the dispositive question is whether the "suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Innis*, 446 US at 303. And for the reasons set forth, we do not believe that defendant's incriminating response in this case can be characterized as such a product. As the Court of Appeals explained:

> [N]othing in the record suggests that the detective was aware of any peculiar susceptibility of defendant (or that he even had any). So, focusing on what defendant would have perceived from the statement in its context, we can only conclude that Detective Stiles should not have reasonably expected defendant to make an incriminating statement. After all, Detective Stiles had already told defendant both that he was not asking a question and that he

[10] Although we recognize that none of the cited decisions fully addresses the specific circumstances at issue here—few criminal cases are factually identical—these decisions are nonetheless helpful in resolving the present question because they all stand in common for the proposition that direct statements to a defendant do not necessarily constitute "interrogation." Therefore, the fact that the statement at issue here was a direct statement to defendant cannot, by itself, support Justice CAVANAGH's conclusion that the officer's statement constituted "interrogation."

> understood defendant's invocation of his right to remain silent. Amidst these other permissible comments—and absent any known sensitivities of defendant—it would not be reasonable to conclude that the one comment about the possibility of the gun being located and endangering others would result in a statement about the crime itself. Just as importantly, this "is not a case where the police carried on a lengthy harangue in the presence of" defendant, nor was Detective Stiles's comment "evocative." *Innis*, 446 US at 302-303. And these latter two points make any distinction between a direct remark made to defendant and a defendant overhearing remarks between police as in *Innis* insufficient to come to a different constitutional conclusion. [*White*, 294 Mich App at 632.]

IV. CONCLUSION

For these reasons, we agree with the Court of Appeals that defendant was not "interrogated" in violation of *Miranda*. Therefore, we affirm the judgment of the Court of Appeals, which reversed the trial court's decision to suppress defendant's voluntarily given confession. Defendant's confession must be made fully available to the jury in its pursuit of the truth with regard to what occurred in this case.

YOUNG, C.J., and ZAHRA, J., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). This case raises the issue of whether defendant, who was 17 years old at the time, was subjected to "interrogation" after invoking his Fifth Amendment right against compelled self-incrimination, contrary to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In my view, defendant was improperly subjected to the "functional equivalent" of interrogation under *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297

(1980); thus, I would reverse the judgment of the Court of Appeals, reinstate the trial court's order suppressing defendant's incriminating statements, and remand this case to the trial court for proceedings consistent with this opinion.

The United States and Michigan Constitutions guarantee the right against compelled self-incrimination. US Const, Am V; Const 1963, art 1, § 17. The United States Supreme Court has explained that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 US at 444. The necessary "procedural safeguards" are embodied in the now familiar *Miranda* warnings. *Innis*, 446 US at 297; *Colorado v Spring*, 479 US 564, 572; 107 S Ct 851; 93 L Ed 2d 954 (1987). The United States Supreme Court has "consistently . . . accorded a liberal construction" to the privilege against self-incrimination, *Miranda*, 384 US at 461, while still recognizing that "[c]onfessions remain a proper element in law enforcement" and "[v]olunteered statements of any kind are not barred by the Fifth Amendment," *id*. at 478. Indeed, not all statements obtained by the police after a person has been taken into custody are automatically considered the product of interrogation. *Innis*, 446 US at 299. Rather, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. However, if at any time "the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 US at 473-474.

In this case, it is undisputed that defendant was in custody, was given *Miranda* warnings, and had invoked

his right to remain silent before he made incriminating statements. Thus, the primary issue in this case is whether defendant was subjected to custodial interrogation after invoking his right to remain silent. The United States Supreme Court has explained that interrogation includes "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id*. at 444; see, also, *Yarborough v Alvarado*, 541 US 652, 661; 124 S Ct 2140; 158 L Ed 2d 938 (2004), but, in subsequent opinions, the Court has further explained that "interrogation" is not limited only to express questioning. Rather, certain "techniques of persuasion" may also amount to interrogation. *Innis*, 446 US at 299. Accordingly, "interrogation" includes either "express questioning or its functional equivalent." *Id.* at 300-301.

Although caselaw provides little guidance regarding how to determine whether specific statements by the police amount to express questioning, *Innis* explained that if a police officer's statement does not invite a response from the suspect, the statement does not amount to express questioning. *Id*. at 302. Although a communication asking someone for an answer obviously amounts to express questioning because it is a clear example of a remark that invites a response, *Innis* should not be interpreted to mean that only explicit or direct questions can amount to express questioning because other types of statements may also invite a response. Accordingly, police officers cannot remove their comments from the realm of express questioning merely by prefacing the comments with limiting phrases such as "I'm not asking you questions" or "I'm just telling you," as Detective Brett Stiles did in this case. Although such qualifying statements might, in some situations, be relevant to a court's consideration

of the totality of the circumstances, in my view merely prefacing a statement with "I'm not asking a question," "I'm just telling you," or other similar phrases should not be given significant weight because such statements do not magically transform what would otherwise be an express question into a constitutionally benign comment. For example, the statement "I'm not asking you a question, I'm just telling you I want to know why you killed those people" would clearly be an express question under *Miranda* and *Innis* because it invites a response, regardless of the interrogator's use of a lead-in statement. See *Innis*, 446 US at 302.

Turning to the unique details of the statements at issue in this case, several characteristics of Stiles's statements indicate that he was asking an express question of defendant. First, defendant and Stiles were the only two people in the interrogation room when Stiles made the statements. Thus, Stiles was obviously directing his statements to defendant. Second, when considered in context, the phrases "okay" and "all right" seem to invite defendant to respond by, at a minimum, acknowledging that he heard what Stiles had said. Third, after punctuating his statements with "okay," Stiles paused for several seconds, as if waiting for a response from defendant. When defendant did not respond, Stiles followed up by stating, "All right?" which, again, could be interpreted as inviting a response from defendant.

On the other hand, I agree with the majority that other characteristics of Stiles's statements weigh against the conclusion that the statements amounted to express questioning. Most notably, it is not unusual for people to use certain words or phrases repeatedly while speaking without intending for those words to have significant meaning. In fact, during the approximately

five-minute-long colloquy between Stiles and defendant, Stiles repeatedly used the phrases "okay" and "all right" to punctuate statements, apparently without intending to extract a response from defendant.

As the preceding discussion reveals, the totality of the circumstances surrounding Stiles's statements allows for persuasive arguments in support of differing conclusions regarding whether Stiles subjected defendant to express questioning. However, I will assume arguendo, for purposes of this appeal only, that defendant was not subjected to express questioning because I believe that even if Stiles's comments were not "express questions," the comments nevertheless amounted to the "functional equivalent" of express questioning for the reasons discussed later in this opinion.

The "functional equivalent" of express questioning encompasses "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 US at 301. An "incriminating response" is "any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Id.* at 301 n 5. *Innis* further explained that the requirement that the words or action be reasonably likely to elicit an incriminating response

> focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. [*Id.* at 301.]

However, the police "cannot be held accountable for the unforeseeable results of their words or actions . . . ." *Id.* at 302. Accordingly, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.*

The *Innis* Court made two additional important points regarding the definition of "interrogation." First, the Court stated that although the suspect's perception is the primary focus of the inquiry, the intent of the police is also relevant because "it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* at 301 n 7. Indeed, "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.*

Second, in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor . . . ." *Id.* at 302 n 8.

Several opinions provide some examples that assist in establishing the boundaries of "interrogation" under the "functional equivalent" analysis for *Miranda* purposes. For example, in *United States v Payne*, 954 F2d 199, 202 (CA 4, 1992), the court concluded that "mere declaratory descriptions of incriminating evidence do not invariably constitute interrogation for *Miranda* purposes." Likewise, *Acosta v Artuz*, 575 F3d 177, 191-192 (CA 2, 2009), cited several cases supporting the

premise that, generally, disclosure of the results of a lineup or other inculpatory evidence possessed by the police, without more, does not constitute interrogation under *Innis*. See, also, *United States v Moreno-Flores*, 33 F3d 1164, 1169 (CA 9, 1994) (holding that the defendant was not interrogated when police informed him that drugs had been seized and that he "was in serious trouble"), *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983) (finding no interrogation when an officer advised the defendant of the charges he was facing and described the events that resulted in the charge), and *Fleming v Metrish*, 556 F3d 520, 533 (CA 6, 2009) (permitting comments explaining the inculpatory evidence possessed by the police so that the suspect could "reassess his situation" and "make informed and intelligent assessments of [his] interests") (quotation marks and citation omitted) (alteration in original).

The common thread running through these cases is that the police generally do not interrogate a suspect for purposes of *Miranda* if the comments merely provide the suspect with additional information about the course of the investigation and allow the suspect to reconsider his or her decision to invoke the right to remain silent. I agree with the majority that these cases are helpful to the extent that they show that some limited communication with the suspect regarding the case after the invocation of the Fifth Amendment right to remain silent may be permissible under *Miranda*. However, the general principle established by these cases does not, alone, resolve this case because Stiles's expression of concern regarding the gun's location "did not provide defendant with information about the charges against him, about inculpatory evidence the police possessed, or about witness statements." *White*, 294 Mich App at 638 n 5 (SHAPIRO, J., dissenting). Nor did his comments "offer any new information that could

provide a basis for an intelligent reassessment of the defendant's decision to remain silent." *Id*. Accordingly, applying this line of cases to conclude that Stiles's comments were not the functional equivalent of interrogation would erroneously expand the analysis beyond its intended scope of applicability.

Although Stiles's comments do not fall into the categories of statements that are generally outside the scope of interrogation, I agree with the majority that this fact alone is not sufficient to label the comments "interrogation" under *Innis*. Rather, it is necessary to consider the *Innis* definition of "interrogation" in greater detail. Particularly important to deciding this case is (1) whether Stiles should have known that his comments were reasonably likely to elicit an incriminating response from defendant and (2) how defendant perceived the comments, regardless of Stiles's intent. See *Innis*, 446 US at 301; see, also, *Stewart v United States*, 668 A2d 857, 866 (DC, 1995) (explaining that applying *Innis* requires a court to "look[] at the facts from the point of view of what the police should have known would be the impact of the statements and, most importantly, how the suspect perceived them").

The defendant in *Innis* was suspected of a murder committed with a gun, which had not been recovered. The defendant, who was under arrest and had been given *Miranda* warnings, was riding in a police car with three officers when one officer commented to another officer that there were many handicapped children in the area where the defendant was arrested. The officer further commented that he hoped that none of the children found the gun and hurt themselves. The second officer expressed his agreement. The defendant overheard the officers' conversation and told the officers to turn the car around so that he could lead them to

the gun. The Court concluded that the officers' conversation did not amount to the functional equivalent of interrogation, explaining that the officers' comments occurred in the context of a "brief conversation" that "consisted of no more than a few offhand remarks." *Innis*, 446 US at 303. The *Innis* Court also noted that the officers' comments did not constitute a "lengthy harangue in the presence of the suspect," nor were the comments "particularly 'evocative.' " *Id.* Accordingly, *Innis* held that the suspect "was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him." *Id*.

In this case, the majority relies on its conclusion that the content of Stiles's comments was similar to the content of the officers' conversation in *Innis* to support reversing the trial court's suppression of defendant's incriminating statements. The majority emphasizes that, in *Innis* and in this case, the officers expressed concern regarding the whereabouts of a gun and the potential danger that it posed to others, and it notes that neither *Innis* nor this case presents a situation in which the officers engaged in a "lengthy harangue."

While the majority is correct that there are some similarities between the officers' statements in *Innis* and Stiles's comments in this case, those similarities are not determinative. Rather, those similarities are only some of the facts that must be considered in order to determine how defendant perceived Stiles's statements and whether Stiles should have known that his comments were reasonably likely to elicit an incriminating response. See *United States v Allen*, 247 F3d 741, 765 (CA 8, 2001) ("Determining whether particular statements or practices amount to interrogation depends on the circumstances of each case, particularly

whether the statements are objectively and reasonably likely to result in incriminating responses by the suspect, as well as the nature of the police statements and the context in which they are given."), vacated on other grounds 536 US 953 (2002). Thus, the mere fact that the statements have some similar content is not determinative: *all* the circumstances of each case must be considered when applying the principles enunciated in *Innis*.

The majority's singular focus on the similarities in the *content* of the statements in *Innis* and this case fails to give proper consideration to the *context* in which the statements were made. And, in failing to consider the import of the context in which Stiles made the statements at issue, the majority all but ignores the primary considerations of the *Innis* case: the suspect's perception of the officer's statements and whether the officer should have known that his comments were reasonably likely to elicit an incriminating response. Specifically, it is critical to recognize that, unlike the comments in *Innis*, Stiles's comments were made in a police interrogation room and were expressly directed to defendant, who was the only other person present when the statements were made. See *Allen*, 247 F3d at 765 (emphasizing the context in which the statements are made). This factor is significant in determining whether Stiles should have reasonably expected that defendant would make an incriminating response. Indeed, in *In re EG*, 482 A2d 1243, 1245 (DC, 1984), the court considered a situation in which an officer who was investigating an armed robbery arrested the defendant and, when no other officers were present, stated, "I wonder where the gun and money is." *In re EG* compared the officer's statements to the officers' statements in *Innis* and concluded "without reservation that [the officer] should have known that his statement was reasonably likely to

elicit an incriminating response . . . ." *Id.* at 1248. *In re EG* differentiated the officer's statements from the *Innis* officers' statements by noting that "no other person was present" and that "there was no understandable explanation for [the officer's] rhetorical question other than to elicit a response from [the suspect]." *Id. In re EG* reached this conclusion despite the officer's testimony that he did not expect a response to his statement, explaining that "the definition of interrogation 'focuses primarily upon the perceptions of the suspect, rather than the intent of the police.' " *Id.* at 1248 n 6, quoting *Innis*, 446 US at 301. Accordingly, regardless of whether Stiles subjectively expected defendant to respond to his comments, defendant could have reasonably perceived that, given the content and context of the comments, Stiles was seeking a response.

Similarly, two of the dissenting justices in *Innis*, who were "substantially in agreement with the Court's definition of 'interrogation,' " *Innis*, 446 US at 305 (Marshall, J., dissenting), concluded that the *Innis* officers' remarks "would obviously have constituted interrogation if they had been explicitly directed to respondent," *id.* at 306.[1] This is true because the difference between overhearing a conversation and being the intended recipient of a comment is significant. Specifically, one who overhears a conversation in which he or she is not involved is unlikely to perceive that conversation as seeking his or her input. Conversely,

[1] I disagree with the majority that Justice Marshall's *Innis* dissent is irrelevant. See *ante* at 206 n 9. Because Justice Marshall's dissent substantially *agreed* with the majority's definition of "interrogation," *Innis*, 446 US at 305 (Marshall, J., dissenting), both opinions applied the same legal framework and simply reached differing conclusions regarding the specific facts at hand. Thus, I believe that Justice Marshall's opinion, while not binding, is relevant and worthy of some consideration as this Court weighs the totality of the circumstances in this case.

when a comment is expressly directed at someone, the person to whom the comment is directed is reasonably likely to perceive that comment as seeking a response. Conversation does not, however, necessarily require that each participant in the conversation pose an explicit question in order for a response to be reasonably expected.

Rather than considering how the context affected defendant's perception of Stiles's statements and whether Stiles should have known that his comments were reasonably likely to elicit an incriminating response, the majority prefers to speculate regarding Stiles's subjective intent in making the statements and concludes that the statements merely reflected a "concern about the danger posed by the missing gun." *Ante* at 205 n 8. See, also, *ante* at 201 n 4 (speculating that Stiles intended for his comments to spur defendant to inform defendant's family of the gun's whereabouts).[2] The majority's analysis, however, fails to give proper weight to the primary principles of law established in *Innis*: "the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, *without regard to objective proof of the underlying intent of the police*." *Innis*, 446 US at 301 (emphasis added).[3]

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[2] Notably, the record is devoid of any support for the majority's speculation regarding Stiles's subjective intent in making the statements at issue.

[3] Although *Innis* recognized that the officer's intent "may well have a bearing" on the analysis, it also explained that the officer's intent is most relevant "where a police practice *is designed* to elicit an incriminating response from the accused [because] it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Innis*, 446 US at 301 n 7 (emphasis added). Thus, the majority's speculative conclusion that Stiles *did not* intend to elicit an incriminating response is of little relevance because Stiles nevertheless should have known that his statement was reasonably likely to elicit an

Likewise, the majority engages in a monumental effort to minimize the coercive atmosphere that defendant faced. For example, in attempting to distinguish this case from *In re EG*, the majority speculates that Stiles made the statements at issue out of "a genuine and legitimate concern about the danger posed by the missing gun," whereas the officer in *In re EG* had no similar motive for his statements. *Ante* at 205 n 8. However, the officer in *In re EG* was in the process of arresting a person who was suspected of using a gun to commit a crime *with a partner*. Because the officer in *In re EG* did not immediately find a gun, it was possible that the defendant's partner had the gun and the officer's personal safety was in immediate danger. Thus, the officer arguably had an even more pressing and objectively verifiable "concern about the danger posed by the missing gun" than did Stiles. Nevertheless, *In re EG* held that the officer's statements amounted to interrogation under *Innis*. Accordingly, I find unpersuasive the majority's attempt to distinguish *In re EG* on this basis.[4]

More importantly, however, the majority's parsing of the factual circumstances to distinguish *In re EG* from this case is irrelevant because the court in that case did not rely on *any* of the circumstances noted by the majority here in support of its conclusion that the officer's statements amounted to the functional equiva-

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incriminating response. See *In re EG*, 482 A2d at 1248 n 6 (concluding that the officer's statement amounted to interrogation even though the officer testified that he did not expect a response to his statement).

[4] The majority's conclusion that Stiles made the statements at issue "during a completely civil conversation with defendant," *ante* at 206 n 8, is equally unpersuasive because that conclusion fails to recognize the reality of defendant's circumstances. I believe that it is far more realistic and reasonable to conclude that most people would not perceive a one-on-one "discussion" with a homicide detective in a windowless police interrogation room to be a completely civil conversation.

lent of interrogation. What is relevant is that the court in *In re EG* stated that the situation was "[u]nlike the situation in *Innis*" because "no other person was present" when the officer made the comments. *In re EG*, 482 A2d at 1248. *In re EG* concluded on the basis of that fact that the officer's comments were "precisely [the] type of tactic . . . [that] is prohibited by *Miranda*" and, thus, the functional equivalent of interrogation under *Innis*. *Id*.

In re EG's application of *Innis* is correct because, despite the majority's unwillingness to consider it, the primary focus of an *Innis* analysis must be "upon the *perceptions of the suspect*, rather than the intent of the police." *Innis*, 446 US at 301 (emphasis added). Thus, no matter how noble the officer's intent, if the officer should have known that it was reasonably likely that the suspect would perceive the statements as seeking a response that requires the suspect to divulge incriminating information, the officer's statements are the functional equivalent of interrogation.

Similarly, the majority concludes that Stiles's comments were, at most, "subtle compulsion" because the comments were less "evocative" than the officers' comments in *Innis*. In support of this conclusion, the majority relies on the fact that Stiles made no mention of handicapped children or God. Again, this view of Stiles's statements ignores the *context* in which they were made; specifically, that the comments were unquestionably directed to defendant. As previously explained, depending on the context, a statement clearly directed to a specific person is reasonably likely to elicit a response from that person. Thus, while the *content* of Stiles's statement may not have been particularly "evocative," Stiles should have known that, given the *context* in which the statement was made, it was rea-

sonably likely that defendant would perceive the statement as seeking to evoke a response.

Additionally, Stiles did not simply express his desire that no one else be harmed by the gun and then leave the room. Rather, Stiles pressed defendant by adding "okay" and, after a pause, further adding "all right." Although it is conceivable that these words did not amount to express questions for the reasons previously discussed, defendant could reasonably have perceived the words, along with the pause between them, as seeking a response on his part. The majority apparently rejects this possibility and instead assumes that Stiles was merely ensuring that defendant heard and understood his comments regarding the danger that the gun posed. See *ante* at 201-202. The majority fails to consider the next logical step in its analysis, however. Specifically, if Stiles was ensuring that defendant heard his statement, one must ask why Stiles made that effort. The most likely answer is that Stiles hoped that defendant would respond by divulging the gun's location. Thus, even if Stiles's motivation was purely altruistic as the majority speculates, he should have nevertheless known that his statement was reasonably likely to elicit an incriminating response from defendant. Accordingly, the statement satisfies the definition of the functional equivalent of interrogation from *Innis* because a suspect's constitutionally protected rights cannot be cast aside simply because the questioning officer's subjective intent may have been laudable.

The nature of Stiles's comments is also relevant to determining how defendant perceived the comments and whether Stiles should have known that his comments were reasonably likely to elicit an incriminating response from defendant. For example, *Arizona v Mauro*, 481 US 520, 529; 107 S Ct 1931; 95 L Ed 2d 458

(1987), noted that *Miranda* and *Innis* held that subjecting a suspect to "compelling influences" or "psychological ploys" were techniques of persuasion that amount to interrogation when used in a custodial setting. *Mauro* also emphasized that

> [i]n deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards* [*v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. [*Id*. at 529-530.]

Mauro's analysis was based on *Innis*, which stated that "*Miranda* also included in its survey of interrogation practices the use of *psychological ploys*, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.' " *Innis*, 446 US at 299, quoting *Miranda*, 384 US at 450 (emphasis added) (alteration in original). Also, the *Mauro* Court explained that *Innis*

> reviewed the police practices that had evoked the *Miranda* Court's concern about the coerciveness of the interrogation environment. The questioned practices included . . . *a variety of psychological ploys* . . . . None of these techniques involves express questioning, and yet the Court found that any of them, coupled with the interrogation environment, was likely to subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination. [*Mauro*, 481 US at 526 (quotation marks and citations omitted; emphasis added).]

Thus, the majority is incorrect that "*Mauro* simply noted that the defendant in that case had *not* been subjected to 'psychological ploys.' " *Ante* at 204 n 7. Rather, *Mauro* held that the defendant had not been interrogated precisely because the defendant was not subjected to psychological ploys. See *Mauro*, 481 US at

529 (stating that the defendant was not subjected to psychological ploys and concluding, "[t]hus, [the defendant's] volunteered statements cannot properly be considered the result of police interrogation"). Indeed, other jurisdictions have interpreted *Miranda*, *Innis*, and *Mauro* as holding that psychological ploys may constitute interrogation, depending on the circumstances of the case. See, e.g., *Commonwealth v Larkin*, 429 Mass 426, 431 n 4; 708 NE2d 674 (1999) (noting that the functional equivalent of express questioning has been construed as "including 'psychological ploys' likely to elicit [an incriminating] response"), citing *Mauro*, 481 US at 526.[5]

In this case, Stiles's statements, which were expressly directed to defendant, played to the likelihood that defendant would respond to an expression of concern for the safety of others. Thus, the nature of Stiles's statements had the characteristics of a psychological ploy that exerted a compelling influence on defendant because the comments implied that defendant was the only person who knew where the gun was located and, thus, implied that defendant had a respon-

[5] See, also, *State v Northern*, 262 SW3d 741, 753 (Tenn, 2008) ("[I]n a custodial setting, certain psychological ploys . . . are 'techniques of persuasion, no less than express questioning' which 'amount to interrogation.' "), quoting *Innis*, 446 US at 299, and citing *Miranda*, 384 US at 450; *Edmonds v State*, 955 So 2d 787, 807 (Miss, 2007) (Diaz, P.J., concurring) (concluding that the police conduct at issue was " 'precisely the kind of psychological ploy that *Innis*'s definition of interrogation was designed to prohibit' "), quoting *Nelson v Fulcomer*, 911 F2d 928, 935 (CA 3, 1990) (citations omitted); *People v Rivas*, 13 P3d 315, 319 (Colo, 2000) ("Practices identified as the functional equivalents of interrogation generally employ compelling influences or psychological ploys in tandem with police custody to obtain confessions."); and *State v Lockhart*, 298 Conn 537, 590; 4 A3d 1176 (2010) (Palmer, J., concurring) ("[I]nterrogation methods used by the police . . . often include sophisticated psychological ploys and techniques . . . ."), citing Garrett, *The substance of false confessions*, 62 Stan L Rev 1051, 1060 (2010).

sibility to make that information known so that others would not be harmed.[6] The only way that defendant could make that information known, however, was to give an incriminating statement in response to Stiles's statements. Thus, Stiles's statements used what *Miranda* identified as one of the hallmarks of interrogation: "[t]he aura of confidence in [defendant's] guilt [that] undermines [defendant's] will to resist." *Miranda*, 384 US at 455. Indeed, because the comments were expressly directed to defendant, Stiles placed defendant in a situation in which defendant "merely confirm[ed] the preconceived story the police [sought] to have him describe," i.e., that defendant knew the location of the gun because he had used the gun to commit the murder.[7] *Id*. Accordingly, Stiles should have

[6] The majority argues that my interpretation of this psychological ploy is too attenuated to rise to the level of interrogation under *Innis*, see *ante* at 202-203; however, *all* psychological forms of interrogation rely on a human trait that is common to most people but not necessarily exhibited by *all* people. For example, *Miranda*, 384 US at 450, concluded that police tactics that "minimize the moral seriousness of the offense" or "cast blame on the victim or on society" are psychological ploys that may constitute interrogation practices depending on the circumstances. Surely, not all suspects would respond to such tactics, but the tactics nevertheless may constitute interrogation because they play to traits that are common to many, but not all, people. In my view, because concern for the safety of others is also a common human trait, the same is true of Stiles's comment. And when the compelling influence of Stiles's statement is combined with the custodial setting and other factors discussed throughout this opinion, I believe that defendant was subjected to the functional equivalent of questioning because the totality of the custodial circumstances caused defendant to make an incriminating statement "that would not [have been] given in an unrestrained environment." *Mauro*, 481 US at 530.

[7] This aspect of Stiles's statements illustrates another significant difference between this case and *Innis*. Because the officers in *Innis* were merely conversing amongst themselves regarding their concern about the whereabouts of the gun, the *Innis* defendant was not placed in a situation in which he merely needed to confirm the officers' preconceived belief that he was guilty. Rather, as the *Innis* Court held, the officers' comments

known that his comments were reasonably likely to elicit an incriminating response because it was reasonably likely that defendant would perceive the comments as compelling a response in order to protect others, particularly because Stiles expressly directed his statements to defendant.[8] Finally, other courts have recognized that a defendant's personal characteristics or relationship with the questioning officer might influence how that defendant perceives a police officer's statements. For example, in *Stewart*, 668 A2d at 866, the defendant invoked his right to remain silent and, several hours later, a detective who had attended the same church as the defendant for many years took the

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did not compel *any* response from the defendant. Conversely, in this case, not only could Stiles's statement have been reasonably perceived by defendant as seeking a response given that the statement was expressly directed to him, the statement could also have exerted a compelling influence on defendant to merely confirm Stiles's preconceived conclusion that defendant had committed the crime.

[8] Contrary to the majority's interpretation of my opinion, this portion of my analysis does not conclude that defendant exhibited an "unusual" or "peculiar" susceptibility to a certain form of persuasion. As previously explained, like many psychological interrogation techniques that rely on a human trait that is common to most people, Stiles's comments appealed to a common characteristic: concern for others. Rather than consider this possibility as part of a complete consideration of totality of the circumstances, the majority prefers to employ broad stereotypes, such as its belief that all suspects charged with homicide are cold-blooded killers. The majority's approach is erroneous because, if this were true, Stiles would not have bothered to make the statement at issue. Indeed, if Stiles had no reason to "fathom[]" that defendant harbored any concern for the safety of others given that "defendant had just been arrested for shooting another man to death for drugs," *ante* at 202-203, why would Stiles bother to make the statement? The majority fails to consider that, as defendant's incriminating statement suggests, he made an extremely poor decision to perpetrate a robbery, but the shooting was not the intended result. A poor decision that led to a deadly, but unintended, result does not automatically sap defendant of his humanity. Thus, the majority's analysis fails to consider the important factual intricacies of this case.

defendant to a jail cell. The detective told the defendant not to feel bad about the situation and that the other members of the church would not judge him and would be a support group for him. Several hours after the detective made the religion-themed statements to the defendant, the detective again visited the defendant and the defendant confessed. *Stewart* held that the religion-themed statements amounted to unlawful interrogation and rejected the prosecution's argument that the detective's statements were spontaneous, casual, and purely of a personal nature. *Id.* The *Stewart* court explained that the detective was "an experienced homicide detective . . . capable of exploiting an opportunity." *Id*. Accordingly, "[n]o conversation concerning a criminal investigation between such a detective and a suspect can be said to be 'purely personal.' " *Id*. Rather, the *Stewart* court determined that the "conversation can only be characterized as the first preparatory step of someone experienced in conducting interrogations." *Id*. Similarly, *In re EG*, 482 A2d at 1248 n 6, noted the defendant's youthfulness as one of the circumstances supporting the conclusion that the officer should have known that his statements were reasonably likely to elicit a response, and *United States v Rivera-Ruiz*, unpublished opinion of the United States District Court for the District of Minnesota, issued May 14, 2002 (Docket No. CR 02-57 ADMRLE), held that "[t]he [d]efendant's foreign status and likely unfamiliarity with U.S. constitutional rights" were relevant to determining how the defendant perceived the officer's statements.

In this case, defendant was 17 years old when he was arrested, and he had no prior criminal convictions. Although any person in police custody might view the questioning officer as an authority figure and thus feel compelled to respond to the officer's statements, defen-

dant's youth and inexperience with the criminal justice system are relevant factors in determining how defendant perceived Stiles's comments. Because these factors, combined with the fact that Stiles's comments implied that defendant had a responsibility to protect others, increased the likelihood that defendant would feel compelled to respect and comply with Stiles as an authority figure, I would conclude that Stiles should have known that his comments were reasonably likely to elicit an incriminating response.

In summary, despite the similarities between the content of Stiles's comments in this case and the *Innis* officers' statements, I believe that several important factors distinguish this case from *Innis*. First, Stiles expressly directed his statements to defendant; thus, it was more likely that defendant would perceive the statements as seeking a response. Likewise, Stiles should have known that by expressly directing the comments to defendant, it was reasonably likely that defendant would respond. Second, Stiles's statements had the characteristics of a "psychological ploy" that exerted a "compelling influence" on defendant because the statements played to the likelihood that defendant would feel compelled to protect others. Third, several of defendant's individual personal characteristics increased the likelihood that he would perceive Stiles's comments as requiring a response.

Accordingly, from the totality of the circumstances, I would conclude that it was not "unforeseeable" that Stiles's comments would result in an incriminating response from defendant. *Innis*, 446 US at 302. Rather, defendant could have reasonably perceived that Stiles expected a response, and Stiles should have known that his comments were "reasonably likely to elicit an incriminating response from [defendant]." *Id*. at 301. As a result,

I believe that defendant was improperly subjected to the functional equivalent of interrogation after invoking his Fifth Amendment right against compelled self-incrimination. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order suppressing defendant's incriminating statements.

MARY BETH KELLY, J. (*dissenting*). I respectfully dissent. I believe that Detective Brett Stiles engaged in the "functional equivalent" of express questioning by exploiting defendant's youth, a characteristic that made him particularly susceptible to Stiles's compulsive techniques. Because this constituted "interrogation" and defendant had invoked his right to remain silent, I would reverse the judgment of the Court of Appeals and suppress defendant's statement.

It is a violation of the principles announced in *Miranda v Arizona* to interrogate a suspect after he or she invokes the right to remain silent.[1] An "interrogation" occurs when an individual in custody is subjected to either "express questioning" or its "functional equivalent."[2] As either express questioning or its functional equivalent, "interrogation" requires "a measure of compulsion above and beyond that inherent in custody itself," and it generally must consist of more than mere "subtle compulsion."[3] *Rhode Island v Innis* explained that the "functional equivalent" prong of interrogation involves "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should* know are

[1] *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

[3] *Id.* at 300, 303 (quotation marks and citation omitted).

reasonably likely to elicit an incriminating response from the suspect."[4] In determining whether police words or actions amount to the functional equivalent of express questioning, we focus on the perceptions of the suspect, rather than the intent of the police.[5] However, any knowledge that the police may have concerning a defendant's unusual susceptibility to a particular form of persuasion may be an important factor in determining whether the police should have known their conduct would elicit an incriminating response.[6]

In circumstances such as those presented here, a defendant's youth might make him or her particularly vulnerable to police interrogation tactics and constitute the type of unusual susceptibility contemplated in *Innis*. The United States Supreme Court has spoken extensively about the unique characteristics of minors, recognizing that they are generally wanting in maturity, more susceptible to outside influences, and " 'often lack[ing] the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them . . . .' "[7] These characteristics describe minors generally as a class and are readily apparent, indeed "self-evident," to all adult observers.[8] Moreover, these commonsense observations about the nature of adoles-

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[4] *Id.* at 301 (emphasis added).

[5] *Id.* The intent of the police is relevant only insofar as it bears "on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* at 301 n 7.

[6] *Id.* at 302 n 8.

[7] *JDB v North Carolina*, 564 US___, ___; 131 S Ct 2394, 2403; 180 L Ed 2d 310 (2011), quoting *Bellotti v Baird*, 443 US 622, 635; 99 S Ct 3035; 61 L Ed 2d 797 (1979); see also *Eddings v Oklahoma*, 455 US 104, 115; 102 S Ct 869; 71 L Ed 2d 1 (1982) (recognizing youth as a "time and condition of life when a person may be most susceptible to influence and to psychological damage").

[8] *JDB*, 564 US at ___; 131 S Ct at 2403; see also *Roper v Simmons*, 543 US 551, 569; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

cents have been corroborated by developments in psychology and brain science.[9] Given the unique characteristics of minors, they have long been afforded a special regard in the law, subjected to unique standards in areas such as contract enforcement, the ability to marry, and even the ability to vote and to serve on juries.[10]

In the custodial-interrogation context, the unique attributes of minors require courts to exercise "special care" in their scrutiny of the record.[11] Courts should be mindful that, as compared to an adult, a juvenile suspect faces a more acute risk of succumbing to the inherent pressures of custodial interrogation such that the juvenile might " 'speak where he would not otherwise do so freely.' "[12] A suspect's age may shape the suspect's reasonable perception of whether he or she is in police "custody"[13] and affect the suspect's response to police questioning and conduct.[14]

Because juveniles often lack the wherewithal to resist police pressures, they thus become uniquely susceptible

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[9] *Graham v Florida*, 560 US ___, ___; 130 S Ct 2011, 2026; 176 L Ed 2d 825 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

[10] *JDB*, 564 US at ___; 131 S Ct at 2403-2404; *Roper*, 543 US at 569.

[11] *Haley v Ohio*, 332 US 596, 599; 68 S Ct 302; 92 L Ed 224 (1948); see also *Gallegos v Colorado*, 370 US 49, 54; 82 S Ct 1209; 8 L Ed 2d 325 (1962) (recognizing that a teenager, "no matter how sophisticated," may not be "compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions").

[12] *JDB*, 564 US at ___; 131 S Ct at 2401, quoting *Miranda*, 384 US at 467.

[13] See *JDB*, 564 US at ___; 131 S Ct at 2403 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.").

[14] *Haley*, 332 US at 599 (concluding police conduct "which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens").

to police interrogative efforts, including subtly compulsive techniques, and should reasonably be expected to respond to those efforts. Police officers interacting with a minor suspect must be charged with knowledge of the particular vulnerabilities of minors because youthful characteristics are "self-evident to anyone who was a child once himself, including any police officer or judge."[15] To allow the police to exploit the susceptibilities of minors who have invoked the right to remain silent, i.e., to allow the interrogation of a suspect after he or she invokes his right to remain silent, would run afoul of both *Innis* and *Miranda*.[16] As such, when a custodial interrogation involved a minor suspect who asserted his or her right to remain silent, courts considering whether the minor was subjected to the functional equivalent of interrogation must be especially mindful of the unique susceptibility that results from youth and the role that the defendant's age played in the defendant's perception of the circumstances.

In this case, Stiles should have recognized that defendant's age made him especially susceptible to subtle compulsive efforts and that such conduct would likely elicit an incriminating response. Given defendant's age of 17 years[17] and lack of any criminal record,

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[15] *JDB*, 564 US at ___; 131 S Ct at 2403.

[16] *Innis*, 446 US at 300-302; *Miranda*, 384 US at 473-474 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

[17] The majority emphasizes that *JDB*, 564 US at ___; 131 S Ct at 2399, involved a 13-year-old defendant, suggesting that the unique attributes of adolescents recognized by the United States Supreme Court do not apply to 17-year-old minors. Contrary to the majority's suggestion, the Supreme Court also discussed many of the distinguishing characteristics of adolescents in *Roper*, 543 US at 556, a case involving a defendant who committed murder when he was 17-years-old. Given the continued vulnerability of older teenagers, it can reasonably be supposed that the

it would have been readily apparent that defendant lacked the experience and perspective to make decisions in his best interests or to avoid succumbing to police pressure. Rather than "scrupulously honor[]" defendant's unequivocal invocation of his right to remain silent,[18] Stiles subjected the minor suspect to continued police pressure, which included references to violence, attempts to earn defendant's trust, and appeals to defendant's conscience:

> [*Stiles*]: Okay. [T]his is what they call the acknowledgment and waiver paragraph [and] I'm going to read this to you. If you wish to talk to me, I'm going to need you to sign and date [the] form. Even though you sign and date the form, you still have your rights to stop at any time you wish. Do you understand that?
>
> [*Defendant*]: No. No thank you sir. I'm not going to sign it.
>
> [*Stiles*]: Okay. Okay. Sounds good.
>
> [*Defendant*]: I don't even want to speak.
>
> [*Stiles*]: I understand. I understand Kadeem.
>
> Okay then. The only thing I can tell you Kadeem, is good luck man.
>
> Okay. Don't take this personal. It's not personal between me and you, I think I may have had one contact with you on the street. Okay. I've got to do my job. And I understand you've got to [do] what you've got to do to protect your best interests. Okay.
>
> The only thing that I can tell you is this, and I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay?
>
> All right?

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protections afforded minors as a result of their unique characteristics apply to 17-year-olds such as defendant.

[18] *Miranda*, 384 US at 479.

[*Defendant*]: I didn't even mean for it to happen like that. It was a complete accident.

[*Stiles*]: I understand. I understand.

But like I said, you, uhh, you get your attorney, man.

Hey, look dude, I don't think you're a monster, all right? I don't think that. You could have came down to me and turned yourself in and there ain't no damn way I'd beat you up.

[*Defendant*]: Yeah.

[*Stiles*]: Okay, man?

You all set, you straight with me?

Who knows you're here? Who knows of your family? Because I know a lot of your family in town now.

[*Defendant*]: ([U]nintelligible reply).

I know that I didn't mean to do it. I guarantee that, I know I didn't mean to do it.[19]

Considering the entirety of the exchange, several comments appear designed to foster an atmosphere in which defendant would be reasonably likely to make an incriminating response.[20] Particularly, Stiles initially

[19] The interrogation was recorded on a DVD. Defendant included a transcript of the interrogation in his motion to suppress his statements. Given that the prosecution "[a]greed to the transcript" in its response to the motion, I quote defendant's transcription here, including his use of punctuation.

[20] In analyzing the exchange, the majority focuses exclusively on the significance of the *Innis*-like reference to the gun's location and Stiles's related expression of concern for the safety of others, ignoring the larger context in which this statement occurred. Believing that the only relevant portion of the exchange involves Stiles's reference to the gun's location, the majority disputes whether a 17-year-old is more susceptible to an appeal to his or her conscience. But the colloquy must be regarded in its entirety. In its entirety, the appeal to defendant's conscience was coupled with references to violence and attempts to earn defendant's trust through expressions of understanding and references to defendant's family. It was to that *entire* exchange that the youthful defendant

attempted to put defendant at ease, to portray himself as a neutral party rather than an adversary in an interrogation. He wished defendant "good luck" and told him: "Don't take this personal. It's not personal between me and you . . . ." He also assured defendant that "I understand you've got to [do] what you've got to do to protect your best interests." Having presented himself as reasonable and understanding, Stiles invited defendant to make an incriminating response, telling defendant, "I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay?" Examining the remarks from the viewpoint of a teenager facing an authority figure in an interrogation room, I believe it reasonably foreseeable that the type of subtle coercive techniques Stiles used would prompt defendant to provide an incriminating response. As would be expected, defendant incriminated himself by stating, "I didn't even mean for it to happen like that. It was a complete accident."

Even after defendant demonstrated his youthful vulnerability to subtle compulsion, Stiles continued the interview, again presenting himself as a reasonable individual in whom defendant could confide, telling defendant, "I understand. I understand," and assuring defendant that he did not view him as "a monster." The detective then interjected a reference to violence into the conversation, telling defendant: "Hey, look dude, I don't think you're a monster, all right? I don't think that. You could have came down to me and turned yourself in and there ain't no damn way I'd beat you up." Such references to violence in the isolation of an interrogation room would reasonably increase the anxiety experienced by a youthful suspect. At the same time,

succumbed, not merely the isolated appeal to his conscience through the single question with regard to the location of the gun.

Stiles also sought to establish ties with defendant, professing a familiarity with defendant's family members in town and asking defendant: "Who knows you're here? Who knows of your family? Because I know a lot of your family in town now." Not surprisingly, the overwhelmed adolescent again responded with an incriminating statement, telling Stiles: "I know that I didn't mean to do it. I guarantee that, I know I didn't mean to do it."

When examined in their entirety, Stiles's remarks included a number of police tactics to which a vulnerable youth would be readily susceptible. The colloquy involved efforts to establish a rapport with defendant, including references to his family, while in the same conversation, Stiles also managed to heighten the inherent stress of a custodial situation by referring to violence. It was in this context that Stiles made the most obvious overture to elicit an incriminating response from defendant: the remark about the gun's location. While Stiles's remarks might not be reasonably likely to elicit an incriminating response from an adult, all these comments considered together, and in context, made it reasonably likely that the minor defendant in this case would respond in an incriminating manner. Consequently, because defendant's youthful susceptibility to compulsion would have been readily apparent and Stiles should have known that his remarks were reasonably likely to elicit an incriminating response, I would hold that defendant was subjected to interrogation after he invoked his right to remain silent and I would suppress his statement.

MCCORMACK, J., took no part in the decision of this case.

PRICE v HIGH POINTE OIL COMPANY, INC

Docket No. 143831. Argued November 15, 2012 (Calendar No. 1). Decided March 21, 2013.

Beckie Price brought an action in the Clinton Circuit Court against High Pointe Oil Company, Inc., claiming, among other things, noneconomic damages for the mental anguish, emotional distress, and psychological injuries that she sustained when High Pointe negligently pumped 400 gallons of fuel oil into the basement of her house. The incident created an environmental hazard that required the razing of the house. Before the jury trial, High Pointe moved for summary disposition, in part on the issue of noneconomic damages, arguing that noneconomic damages resulting from real property damage were not compensable. The court, Randy L. Tahvonen, J., denied that part of High Pointe's motion, concluding that noneconomic damages could be recovered in a negligence action. The jury awarded Price $100,000 for noneconomic damages, after which High Pointe moved for judgment notwithstanding the verdict and remittitur. The court denied the motion and High Pointe appealed. The Court of Appeals, BECKERING, P.J., and FORT HOOD and STEPHENS, JJ., affirmed, concluding that a plaintiff may recover mental anguish damages naturally flowing from damage to or the destruction of real property. 294 Mich App 42 (2011). The Supreme Court granted High Pointe's application for leave to appeal. 491 Mich 870 (2012).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court *held*:

Michigan common law has long provided that the appropriate measure of damages in cases involving the negligent destruction of property is the cost of replacement or repair of the property. Because that rule is sound, any change in the rule must come by legislative alteration.

1. The common-law rule with respect to damages recoverable in an action alleging the negligent destruction of property is that if the injury is permanent or irreparable, the measure of damages is the difference in the property's market value before and after the injury, but if the injury is reparable and the expense of making

repairs is less than the value of the property, the measure of damages is the cost of making repairs. Because replacement and repair costs reflect economic damages, the logical implication of this rule is that the measure of damages excludes noneconomic damages. No previous case in the history of Michigan's common law has approvingly discussed the recovery of noneconomic damages for the negligent destruction of property. Further, recent Court of Appeals precedent has disallowed recovery of damages for emotional injuries suffered as a consequence of personal property damage. There was no legally relevant basis that would logically justify prohibiting the recovery of noneconomic damages for the negligent destruction of personal property but allow it for the negligent destruction of real property.

2. A common-law rule remains the law until modified by the Michigan Supreme Court or the Legislature. Alteration of the common law by the Court should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules. While the destruction of property or property damage will often engender considerable mental distress, the present rule denying recovery for that distress is rational and justifiable as a matter of reasonable public policy. Given the lack of any compelling argument for altering the common law, retention of the rule was appropriate.

Judgment of the Court of Appeals reversed and case remanded to the trial court for entry of summary disposition in High Pointe's favor.

Justice CAVANAGH took no part in the decision of this case because of a familial relationship with counsel of record.

Justices MCCORMACK and VIVIANO took no part in the decision of this case.

DAMAGES — NONECONOMIC DAMAGES — NEGLIGENCE — DESTRUCTION OF OR DAMAGE TO PROPERTY.

The common-law rule in cases involving the negligent destruction of or damage to property is that the appropriate measure of damages is the cost of replacement or repair of the property; noneconomic damages are not recoverable for the negligent destruction of or damage to property.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *James F. Graves* and *Stephen H. Sinas*), and *Speaker Law Firm, PLLC* (by *Steven A. Hicks*), for Beckie Price.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh*), for High Pointe Oil Company, Inc.

Amici Curiae:

Clark Hill PLC (by *Cynthia M. Filipovich* and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

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

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

MARKMAN, J. The issue in this case is whether noneconomic damages are recoverable for the negligent destruction of real property. No Michigan case has ever allowed a plaintiff to recover noneconomic damages resulting solely from the negligent destruction of property, either real or personal. Rather, the common law of this state has long provided that the appropriate measure of damages in cases involving the negligent destruction of property is simply the cost of replacement or repair of the property. We are not persuaded of the need for change and therefore continue to adhere to this rule. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of summary disposition in defendant's favor.

I. FACTS AND HISTORY

In 1975, plaintiff and her now ex-husband built a house in DeWitt, Michigan. The house was originally heated by an oil furnace located in the basement, but in 2006 plaintiff replaced the oil furnace with a propane furnace. Plaintiff canceled her contract with defendant

oil company's predecessor when the propane furnace was installed. Although the oil furnace was removed, the oil fill pipe remained.

Somehow, in November 2007, plaintiff's address was placed on defendant's "keep full list." True to the name of the list, while plaintiff was at work, defendant's truck driver pumped nearly 400 gallons of fuel oil into plaintiff's basement through the oil fill pipe before realizing his mistake and immediately calling 911. Plaintiff's house and many of her belongings were destroyed. Between defendant's and plaintiff's insurers, the site was remediated, a new house was built on the property in a different location, plaintiff's personal property was cleaned or replaced, and plaintiff was reimbursed for all temporary-housing-related expenses. It is undisputed that plaintiff was fully compensated for her economic losses.

Nevertheless, plaintiff filed suit in August 2008, alleging claims for negligence, gross negligence, negligent infliction of emotional distress, nuisance, trespass, and a private claim under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. However, plaintiff's only claim to survive to trial was for the recovery of noneconomic damages for defendant's negligent destruction of her real property. After trial and over defendant's objection, a jury found in favor of plaintiff in the amount of $100,000 for past noneconomic damages. Defendant moved for judgment notwithstanding the verdict and remittitur, arguing that plaintiff had failed to present sufficient proofs to support the verdict. The trial court denied the motion, and defendant appealed. The Court of Appeals affirmed in a published decision, explaining:

> Noneconomic damages are generally recoverable in tort claims, and we are not convinced that noneconomic damages stemming from damage to or destruction of real property

> must or should be excepted from that general rule. We conclude that in negligence actions, a plaintiff may recover mental anguish damages naturally flowing from the damage to or destruction of real property. [*Price v High Pointe Oil Co, Inc*, 294 Mich App 42, 60; 817 NW2d 583 (2011).]

Defendant applied for leave to appeal in this Court. We granted leave and subsequently heard oral argument. *Price v High Pointe Oil Co, Inc*, 491 Mich 870 (2012).

II. STANDARD OF REVIEW

Whether noneconomic damages are recoverable for the negligent destruction of real property presents a question of law, which this Court reviews de novo. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 143; 793 NW2d 633 (2010).

III. ANALYSIS

The question in this case is whether noneconomic damages are recoverable for the negligent destruction of real property. Absent any relevant statute, the answer to that question is a matter of common law.

A. COMMON LAW

As this Court explained in *Bugbee v Fowle*, the common law " 'is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes[.]' " *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936), quoting *Kansas v Colorado*, 206 US 46, 97; 27 S Ct 655; 51 L Ed 956 (1907). The common law, however, is not static. By its nature, it adapts to changing circumstances. See Holmes, *The Common Law* (Mineola, New York: Dover Publications, Inc., 1991), p 1 (noting that the common

law is affected by "[t]he felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy" and that it "embodies the story of a nation's development through many centuries"). And as this Court stated in *Beech Grove Investment Co v Civil Rights Comm*:

> It is generally agreed that two of the most significant features of the common law are: (1) its capacity for growth and (2) its capacity to reflect the public policy of a given era. . . .
>
> * * *
>
> "The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but it is a flexible body of principles which are designed to meet, and are susceptible of adaption to, among other things, new institutions, public policies, conditions, usages and practices, and changes in mores, trade, commerce, inventions, and increasing knowledge, as the progress of society may require. So, changing conditions may give rise to new rights under the law . . . ." [*Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 429-430; 157 NW2d 213 (1968), quoting 15A CJS, Common Law, § 2, pp 43-44.]

The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances. *In re Arbitration Between Allstate Ins Co & Stolarz*, 81 NY2d 219, 226; 597 NYS2d 904; 613 NE2d 936 (1993) (noting that the common law evolves through the "incremental process of common-law adjudication as a response to the facts presented");[1] see also *People v Aaron*, 409 Mich 672,

[1] See also Kestin, *The bystander's cause of action for emotional injury: Reflections on the relational eligibility standard*, 26 Seton Hall L R 512,

727; 299 NW2d 304 (1980) ("Abrogation of the felony-murder rule is not a drastic move in light of the significant restrictions this Court has already imposed. Further, it is a logical extension of our decisions . . . ."); *Woodman v Kera LLC*, 486 Mich 228, 267-268; 785 NW2d 1 (2010) (MARKMAN, J., concurring in part and dissenting in part).

The common-law rule with respect to the damages recoverable in an action alleging the negligent destruction of property was set forth in *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470; 247 NW 720 (1933). *O'Donnell* provides:

> "If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of [the] property, [the] measure of damages is [the] cost of making repairs." [*Tillson v Consumers Power Co*, 269 Mich 53, 65; 256 NW 801 (1934), quoting *O'Donnell*, 262 Mich at 471 (syllabus).][2]

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512 (1996) ("Growth in the common law is incremental, often scarcely noticeable in the short run, but inexorable when viewed in the long term."); *Davis v Moore*, 772 A2d 204, 238 (DC, 2001) (Ruiz, J., dissenting) ("It cannot be forgotten that the incremental pace at which common law develops, coupled with the increasing importance of statutory law, ensures that cases where truly 'new' rules of common law are announced . . . will not frequently occur.").

[2] *Tillson* quoted *O'Donnell*'s syllabus. The portion of the opinion from which the statement in the syllabus was derived provided:

> As the case must go back for a new trial, on account of the errors pointed out, we also call attention to another alleged error. The court instructed the jury that, if it found that the injury to plaintiff's property was caused by defendant's negligence, the damages should represent the difference between the market value of the house at the date of the injury and that value it would have had if the property had remained undamaged. This is the measure of recovery only where the injury is permanent. No instruction was given as to what the measure of damages should be in case the jury found the injuries were reparable, nor did

Accord *William R Roach & Co v Blair*, 190 Mich 11, 16-17; 155 NW 696 (1916) (approving as being in accordance with the "general rule" the trial court's articulation of damages as " 'the fair cash value at said time and place of said property which was destroyed by said fire, and the diminution in value of property injured and not destroyed' "); *Davidson v Michigan C R Co*, 49 Mich 428, 431; 13 NW 804 (1882) ("[I]n the case of domestic animals injured, the proper rule of damages, as in the case of other perishable chattels, should usually be the reduced value at the time. . . . [T]he difference between the value before and after the accident will enable the owner to be fully indemnified."); *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 328; 343 NW2d 536 (1983) (citing *Davidson* for the conclusion that the proper measure of damages was the difference in market value of a horse after it was injured from its preinjury market value); *Fite v North River Ins Co*, 199 Mich 467, 471; 165 NW 705 (1917) (indicating the primacy of market value in assessing damages).

Michigan common law has continually followed the *O'Donnell* rule. See *Tillson*, 269 Mich at 65; *Jackson Co Rd Comm'rs v O'Leary*, 326 Mich 570, 576; 40 NW2d 729 (1950); *State Hwy Comm'r v Predmore*, 341 Mich 639, 642; 68 NW2d 130 (1955); *Wolverine Upholstery Co*

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defendant make any showing as to the cost of full restoration and repair of the house. Apparently, plaintiff tried the case on the theory that the damage was permanent and irreparable. Nevertheless, if defendant shows that the property can be repaired and restored to the condition it would have been in had it not been damaged by the subsidence, and also gives proper testimony as to the cost of the repairs, the court should make it clear to the jury that the question as to the permanency of the damage, and, if reparable, the cost of repairs, is one of fact for them to decide, if they conclude that defendant was responsible for the damages. [*O'Donnell*, 262 Mich at 476-477, going on to cite *Berkey v Berwind-White Coal Mining Co*, 229 Pa 417, 428; 78 A 1004 (1911).]

v Ammerman, 1 Mich App 235, 242; 135 NW2d 572 (1965); *Bayley Products, Inc v American Plastic Products Co*, 30 Mich App 590, 598; 186 NW2d 813 (1971) ("It is the settled law of this state that the measure of damages to real property, if permanently irreparable, is the difference between its market value before and after the damage."); *Baranowski v Strating*, 72 Mich App 548, 562; 250 NW2d 744 (1976); *Bluemlein v Szepanski*, 101 Mich App 184, 192; 300 NW2d 493 (1980); *Strzelecki v Blaser's Lakeside Indus of Rice Lake, Inc*, 133 Mich App 191, 193-194; 348 NW2d 311 (1984); see also *People v Hamblin*, 224 Mich App 87, 94; 568 NW2d 339 (1997) (analogizing to civil property-loss cases, including *Baranowski*, in order to determine how to measure damages in a criminal case); 2 Michigan Law of Damages & Other Remedies (3d ed), § 19.18, p 19-13 ("[T]he measure of damages for injury to real property generally is the difference between the market value of the property before and after the injury to the property."); 7 Michigan Civil Jurisprudence (2009 rev), § 50, p 379 ("The measure of damages for negligent injury to real property, if permanent and irreparable is the difference between its market value before and after the damage."). Accordingly, the long-held common-law rule in Michigan is that the measure of damages for the negligent destruction of property is the cost of replacement or repair.[3] Because replacement and repair costs reflect *economic* damages, the logical implication of this rule is

[3] A substantially similar, market-based approach to damages is employed by a number of other states, for example:

(1) Alabama: "The proper measure of compensatory damages in a tort action based on damage to real property is the difference between the fair market value of the property immediately before the damage and the fair market value immediately after the damage." *Birmingham Coal & Coke Co, Inc v Johnson*, 10 So 3d 993, 998 (Ala, 2008) (citations and quotation marks omitted).

(2) Colorado: "In cases involving damage to property, . . . the ordinary measure of damages is the diminution of market value of the property." *Goodyear Tire & Rubber Co v Holmes*, 193 P3d 821, 827 (Colo, 2008).

(3) Georgia: "[A]s a general rule the measure of damages in actions for real property is the difference in value before and after the injury to the premises[.]" *Royal Capital Dev, LLC v Maryland Cas Co*, 291 Ga 262, 264; 728 SE2d 234 (2012) (citation omitted).

(4) Idaho: "If land is taken or the value thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction . . . ." *Nampa & Meridian Irrigation Dist v Mussell*, 139 Idaho 28, 33; 72 P3d 868 (2003) (citation and quotation marks omitted).

(5) Kansas: "The ordinary measure of damages to real property is the difference in value immediately before and after the damage and, in the event of total destruction, the fair market value at the time of the destruction." *Evenson v Lilley*, 295 Kan 43, 52; 282 P3d 610 (2012).

(6) New Mexico: "[T]he market value for lost or destroyed property is the proper measure of damages . . . ." *Castillo v Las Vegas*, 2008 NMCA 141, ¶ 31; 145 NM 205, 214; 195 P3d 870 (NM App, 2008).

(7) Oklahoma: "[W]here damages are of a permanent nature, the measure of damage is the difference between the actual value immediately before and immediately after the damage is sustained." *Schneberger v Apache Corp*, 1994 OK 117, ¶ 10; 890 P2d 847, 849 (Okla, 1994) (citations and quotation marks omitted).

(8) Pennsylvania: "The proper measure of damages in a case where the injury to the property was permanent is the market value of the property immediately before the injury." *Oliver-Smith v Philadelphia*, 962 A2d 728, 730 (Pa Cmwlth, 2008).

(9) South Carolina: "[T]he general rule is that in case of an injury of a *permanent* nature to real property . . . the proper measure of damages is the diminution of the market value by reason of that injury . . . ." *Yadkin Brick Co, Inc v Materials Recovery Co*, 339 SC 640, 645; 529 SE2d 764 (SC App, 2000) (citation and quotation marks omitted).

(10) Texas: "As a rule, [the recoverable value of property] is measured by the property's market value or the cost of repairing it." *City of Tyler v Likes*, 962 SW2d 489, 497 (Tex, 1997).

that the measure of damages excludes *noneconomic* damages and the latter are not recoverable for the negligent destruction of property.[4] See also 4 Restate-

[4] A number of other states also preclude the recovery of noneconomic damages for the negligent destruction of property, for example:

(1) Alabama: "[P]laintiffs cannot recover for mental anguish or emotional distress unless they suffered physical injury or were in the 'zone of danger.' " *Birmingham*, 10 So 3d at 999.

(2) Alaska: "The general rule is that where a tortfeasor's negligence causes emotional distress without physical injury, such damages may not be awarded." *Hancock v Northcutt*, 808 P2d 251, 257 (Alas, 1991).

(3) Maryland: "[A] plaintiff cannot ordinarily recover for emotional injuries sustained solely as a result of negligently inflicted damage to the plaintiff's property." *Dobbins v Washington Suburban Sanitary Comm*, 338 Md 341, 351; 658 A2d 675 (1995).

(4) Nevada: "[T]he better rule is to allow recovery only in cases which pertain to emotional distress arising from harm to another person, and not in cases, such as the one before us, which pertain to emotional distress arising from property damage." *Smith v Clough*, 106 Nev 568, 569-570; 796 P2d 592 (1990).

(5) New Mexico: "[A] plaintiff may not recover for emotional distress based solely on a claim for negligent damage to property." *Castillo*, 2008 NMCA at ¶ 21; 145 NM at 210.

(6) New York: Damages for mental anguish are not recoverable absent "competent evidence of contemporaneous or consequential physical harm[.]" *Iannotti v City of Amsterdam*, 225 AD2d 990, 990; 639 NYS2d 537 (NY App, 1996).

(7) Oklahoma: "[E]motional distress as a consequence of an intentional tort is distinguishable from distress resulting from breach of contract or negligence, which requires a showing of physical injury." *Cleveland v Dyn-A-Mite Pest Control, Inc*, 2002 OK Civ App 95, ¶ 52; 57 P3d 119, 131 (2002) (citation and quotation marks omitted).

(8) Oregon: "[P]sychic and emotional injuries" are not recoverable where the "plaintiff suffered no physical injury from [the] defendants' alleged negligence and [where the plaintiff] has not shown that [the] defendants' conduct was anything more than negligent[.]" *Hammond v Central Lane Communications Center*, 312 Or 17, 20; 816 P2d 593 (1991).

ment Torts, 2d, § 911 comment e, p 475 ("Compensatory damages are not given for emotional distress caused merely by the loss of . . . things . . . ."); 1 Dobbs, Law of Remedies (2d ed, 1993), Damages-Equity-Restitution, § 5.15(1), p 876 ("In general, the owner of damaged property cannot recover damages for emotional distress as an element of damage to the property."); 22 Am Jur 2d, Damages, § 255, pp 238-239; 38 Am Jur 2d, Fright, Shock, Etc, § 19, p 31 ("Subject to some exceptions, generally, under ordinary circumstances, there can be no recovery for mental anguish suffered by a plaintiff in connection with an injury to his or her property."); 2 Restatement Torts, 2d, § 313, pp 113-115 (implying that damages for emotional distress are not recoverable in cases concerning negligently inflicted injury to property);[5] 4 Restatement

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(9) Texas: "[M]ental anguish based solely on negligent property damage is not compensable as a matter of law." *Likes*, 962 SW2d at 497.

[5] Section 313 of the Restatement Second of Torts concerns "Emotional Distress Unintended." It provides:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
>
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in *Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person*, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other. [2 Restatement Torts, 2d, § 313, p 113 (emphasis added).]

As the comments to subsection (2) indicate, the basis for allowing the recovery for emotional distress in this context is that those actions

Torts, 2d, § 911 comment e, p 474 ("Even when the subject matter has its chief value in its value for use by the injured person, if the thing is replaceable, the damages for its loss are limited to replacement value, less an amount for depreciation."); 28 ALR2d 1070, § 8, p 1093 ("In simple negligence cases involving personal property, the courts have been reluctant to authorize the allowance of damages for mental anguish or disturbance allegedly caused by the defendant's wrongful acts.").

Lending additional support to this conclusion is the simple fact that, before the Court of Appeals' opinion below, *no* case ever in the history of the Michigan common law has approvingly discussed the recovery of noneconomic damages for the negligent destruction of property. Indeed, no case has even broached this issue except through the negative implication arising from limiting damages for the negligent destruction or damage of property to replacement and repair costs. Put another way, despite the fact that throughout the course of our state's history, many thousands of houses and other real properties have doubtlessly been negligently destroyed or damaged, and despite the fact that surely in a great many, if not a majority, of those cases the residents and owners of those properties suffered considerable emotional distress, there is not a single Michigan judicial decision that expressly or impliedly supports the recovery of noneconomic damages in these circumstances.[6] Thus, supplementing the affirmative judicial decisions that we have cited in support of the

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"threaten[] the plaintiff with *bodily harm* . . . ." *Id.* at 114 (emphasis added). Accordingly, when there is nothing threatening the plaintiff with bodily harm, for instance when a claim involves only property damage, a defendant is not liable for unintended emotional distress.

[6] Indeed, *O'Donnell*, *Baranowski*, and *Strzelecki* all involved negligent damage to houses, while *Tillson*, *Bayley*, and *Bluemlein* involved negligent damage to other privately owned real property.

limiting principles of the common law for the calculation of property damages is the absence of even a single affirmative judicial decision in support of the contrary proposition, a proposition that one would expect to have become commonplace within the law if it had ever existed. However, this particular dog has been perpetually silent and has never barked.

Moreover, the Court of Appeals has decided two relatively recent cases concerning injury to *personal* property in which noneconomic damages were disallowed. In *Koester v VCA Animal Hosp*, 244 Mich App 173; 624 NW2d 209 (2000), the plaintiff dog owner sought noneconomic damages in a tort action against his veterinarian following the death of his dog resulting from the veterinarian's negligence. The trial court granted the defendant's motion for summary disposition, holding that "emotional damages for the loss of a dog do not exist." *Id.* at 175. On appeal, the Court of Appeals affirmed, noting that pets are personal property under Michigan law and explaining that there "is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage." *Id.* at 176.

Later, in *Bernhardt v Ingham Regional Med Ctr*, 249 Mich App 274; 641 NW2d 868 (2002), the plaintiff visited the defendant hospital to bring home her adopted, newborn son. Before washing her hands, the plaintiff removed her jewelry, which consisted of her grandmother's 1897 wedding ring (which was also her wedding ring) and a watch purchased in 1980 around the time of her brother's murder. The plaintiff accidentally forgot the jewelry in the washbasin and left the hospital. Upon realizing her mistake, the plaintiff contacted the defendant and was advised that she could retrieve the jewelry from hospital security. However,

when she tried to retrieve the jewelry, it could not be located. The plaintiff sued, and the defendant moved for summary disposition, arguing that the plaintiff's damages did not exceed the $25,000 jurisdictional limit of the trial court. The plaintiff countered that her damages exceeded that limit because the jewelry possessed great sentimental value. The trial court granted the defendant's motion. On appeal, the Court of Appeals affirmed, citing *Koester*, 109 Mich App at 176, for the proposition that there "is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage," *Bernhardt*, 249 Mich App at 279. *Bernhardt* concluded:

> In the present case, the two items of jewelry have a market value that can easily be ascertained. Hence, fair market value is the measure of damages. Because the items have a fair market value, there is no need to resort to an alternative measure of damages to compensate plaintiff for her loss. [*Id.* at 281.]

In support of its conclusion, *Bernhardt* quoted the following language from the Restatement Second of Torts:

> If the subject matter cannot be replaced, however, as in the case of a destroyed or lost family portrait, the owner will be compensated for its special value to him, as evidenced by the original cost, and the quality and condition at the time of the loss. . . . In these cases, however, damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of the things, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential elements of clothing. [*Id.* at 281, quoting 4 Restatement Torts, 2d, § 911, comment e, pp 474-475 (quotation marks omitted).]

While *Koester* and *Bernhardt* both involved negligent injury to *personal* property, they speak of property generally.[7] Although the Court of Appeals in the instant case seeks to draw distinctions between personal and real property, neither that Court nor plaintiff has explained how any of those distinctions, even if they had some pertinent foundation in the law, are relevant with regard to the propriety of awarding noneconomic damages.[8] In short, while it is doubtlessly true that

[7] *Koester* and *Bernhardt* stated that there is no Michigan precedent permitting the recovery of noneconomic damages resulting from property damage. Those statements are not limited to *personal* property damage. For example, *Bernhardt* cited the Restatement of Torts, which provides that "[c]ompensatory damages are not given for emotional distress caused merely by the loss of the *things* . . . ." *Bernhardt*, 249 Mich App at 281 (citation and quotation marks omitted). A house may be a home, but it is also a thing, albeit a thing to which many people develop emotional attachment. But like the jewelry in *Bernhardt*, a house has "a market value that can easily be ascertained." *Id.* at 281. Moreover, in *Wolverine*, 1 Mich App at 242, the Court of Appeals expressly applied the rule from *O'Donnell*, a real-property case, to personal property. See also *Strzelecki*, 133 Mich App at 194 (citing *Wolverine* for the proposition that the *O'Donnell* rule applies "as well to damages for personal property injured through negligence").

[8] In justifying its holding, the Court of Appeals identified the following differences between real and personal property: (1) trespass to land, unlike trespass to chattels, does not require an actual showing of damage, *Price*, 294 Mich App at 55; (2) breach of contract for the sale of real property includes the right to specific performance, *id.* at 56; (3) "[a]uthors and poets alike wax philosophical about the unique value of a home," *id.*; and (4) the destruction of a house causes "the stress and upheaval of displacement and the need to alternate shelter," *id.* at 57. However, none of these differences is relevant to whether noneconomic damages should be available for the negligent destruction of real property: (1) allowing for nominal damages in a real-property trespass claim, and not a trespass-to-chattels claim, is merely a recognition in the law that a trespass to land can occur without causing actual damage, whereas a trespass to chattel actually deprives the owner of the chattel and, by necessity, causes actual damage; (2) specific performance remedies may be granted in cases involving both personal and real property, see *Richardson v Lamb*, 253 Mich 659, 663; 235 NW 817 (1931); (3) authors

many people are highly emotionally attached to their houses, many people are also highly emotionally attached to their pets,[9] their heirlooms, their collections, and any number of other things. But there is no legally relevant basis that would logically justify prohibiting the recovery of noneconomic damages for the negligent killing of a pet or the negligent loss of a family heirloom but allow such a recovery for the negligent destruction of a house.[10] Accordingly, *Koester* and *Bernhardt* underscore *O'Donnell*'s exclusion of noneconomic damages for negligent injury to real and personal property.

Finally, we would be remiss if we did not address *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966) (concerning a medical malpractice claim in which the plaintiff's ovary and fallopian tube were removed without her consent), which the Court of Appeals cited as providing the "general rule" for the recovery of damages in tort actions. *Sutter* stated:

> The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tort-feasor is liable for all injuries resulting directly from

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and poets wax philosophical—or poetic—about many things, but these waxings do not define the common law; and (4) the costs of relocating and rebuilding a house—obtaining "alternate shelter" and attendant personal upheavals—define the measure of what are largely *economic* costs and were covered by defendant, defendant's insurer, and plaintiff's insurer. We do not question that there is personal stress attendant to the suffering of any tort, but such stress can as easily accompany the destruction or damage of personal property as of real property.

[9] Indeed, *Koester*, 244 Mich App at 175, recognized the fact that "domesticated pets have value and sentimentality associated with them which may not compare with that of other personal property . . . ."

[10] As defense counsel pointed out at oral argument, it seems anomalous that under the Court of Appeals' theory, while plaintiff could not recover damages for her emotional attachment to a family portrait that hung on the wall in her house, she could recover for emotional attachment to the wall itself. The Court of Appeals' distinctions between real and personal property are ultimately arbitrary and unsustainable.

> his wrongful act, whether foreseeable or not, provided 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. Remote contingent, or speculative damages are not considered in conformity to the general rule. *Van Keulen & Winchester Lumber Co. v. Manistee and Northeastern Railroad Co*., 222 Mich 682 [193 NW 289 (1923)]; *Woodyard v. Barnett*, 335 Mich 352 [56 NW2d 214 (1953)]; and *Fisk v. Powell*, 349 Mich 604 [84 NW2d 736 (1957)]. See, also *McLane, Swift & Co. v. Botsford Elevator Co.*, 136 Mich 664 [99 NW 875 (1904)], and *Cassidy v. Kraft-Phenix Cheese Corp.*, 285 Mich 426 [280 NW 814 (1938)]. [*Id*.]

Although *Sutter* articulates a "general rule," it is a "general rule" that has never been applied to allow the recovery of noneconomic damages in a case involving only property damage,[11] and it is a "general rule" that must be read in light of the more narrow and specific "general rule" of *O'Donnell*.[12]

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[11] None of the cases cited by *Sutter* in support of its "general rule" involved noneconomic damages. *Van Keulen*, 222 Mich 682 (whether and to what extent the defendant was liable for failing to notify a consignee that delivered lumber had not been kiln-dried); *Woodyard*, 335 Mich 352 (whether the defendant was liable for the plaintiff's inability to complete his beet harvest); *Fisk*, 349 Mich 604 (whether the defendants were liable for the plaintiffs' partial crop failure); *McLane*, 136 Mich 664 (whether the defendant's failure was a proximate cause of the plaintiff's loss of oats); *Cassidy*, 285 Mich 426 (whether the defendant's refusal to enter into a written contract removed the plaintiff's claim from the statute of frauds).

[12] *Valentine v Gen American Credit, Inc*, 420 Mich 256, 261; 362 NW2d 628 (1984), explained that emotional harm attendant to economic loss is insufficient to warrant noneconomic damages *even where a plaintiff would not be made whole absent such damages*:

> The denial of mental distress damages, although the result is to leave the plaintiff with less than a full recovery, has analogy in the law. The law does not generally compensate for all losses suffered. Recovery is denied for attorney's fees, for mental anguish not accompanied by physical manifestation, and "make-whole" or full recovery has been denied where the cost of performance exceeds

The development of the common law frequently yields "general rules" from which branch more specific "general rules" that apply in limited circumstances. Where tension exists between those rules, the more specific rule controls.[13] See *Moning v Alfono*, 400 Mich 425, 442-449; 254 NW2d 759 (1977) (acknowledging the "general standard of conduct" in a negligence case but allowing the jury to consider "one of the many specific rules concerning particular conduct that have evolved in the application of the general standard of care"); see also *Beech Grove*, 380 Mich at 430 (" '[C]hanging conditions may give rise to new rights under the law, and, also, where the reason on which existing rules of the common law are founded ceases, the rules may cease to have application.' "), quoting 15A CJS, Common Law, § 2, pp 43-44. With respect to this case, although *Sutter* articulated a general rule, *O'Donnell* articulated a more specific "general rule," applicable in negligence actions in which there is only property damage. Accordingly, because this case involves only property damage, the *O'Donnell* rule, not the *Sutter* rule, controls.[14]

> the value to the promisee. The courts have not, despite "make whole" generalizations regarding the damages recoverable, attempted to provide compensation for all losses. Instead, specific rules have been established that provide for the calculation of the damages recoverable in particular kinds of actions. [Citations omitted.]

The *O'Donnell* rule is precisely such a specific rule in an action for the negligent destruction of property.

[13] This tension does not suggest that the more general rule is incorrect, only that it must yield to the more specific rule in the appropriate circumstances. That is the case for *Sutter*'s rule; that is, while *Sutter* provided an appropriate "general rule" for tort actions generally, *O'Donnell* provided an exception to that rule that has been specifically adapted to tort actions involving only property damage.

[14] Although *Sutter* was decided some years after *O'Donnell*, the "general rules" articulated in these cases have each been restated repeatedly

B. ALTERING THE COMMON LAW

Because the Court of Appeals determined that the "general rule" is that "in a tort action, the tort-feasor is liable for *all* injuries,"[15] the Court of Appeals contended that it was not altering the common law but, rather, "declin[ing] to extend" to real property the personal property "exception" set forth in *Koester* and *Bernhardt*.[16] *Price*, 294 Mich App at 54-55 (quotation marks and citation omitted). However, as previously mentioned, the Court of Appeals' opinion constitutes the first and only Michigan case to support the recovery of noneconomic damages for the negligent destruction of

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over the years without conflict (until this case). This history underscores that the two "general rules" here operate in parallel and are complementary.

[15] The Court of Appeals did not acknowledge *Valentine*. It addressed the *O'Donnell* rule—by reference to *Strzelecki* and *Baranowski*—but determined that application of that rule to the instant case would be inappropriate because the cases in which that rule has been applied "addressed the measure of damages for *economic* loss suffered as a result of the destruction of real property" and did not include "a discussion of noneconomic damages." *Price*, 294 Mich App at 53. This ignores *Wolverine* (and *Strzelecki*'s citation of *Wolverine*), which applied the *O'Donnell* rule to damages for personal property. Moreover, in our judgment, the absence of discussion regarding noneconomic damages, as explained earlier in this opinion, supports, rather than undermines, our conclusion that noneconomic damages are not recoverable. Not only did both *Strzelecki* and *Baranowski* involve damage to houses, but one would think that decades-long restatements by the judiciary of this state that tort damage to property is recompensed by x + y would at some point logically communicate that z is not also included.

[16] Contrary to the analysis of the Court of Appeals in this case, *Koester*, 244 Mich App at 176, explained that it was declining to create new tort liability:

> In essence, plaintiff requests that we create for pet owners an independent cause of action for loss of companionship when a pet is negligently injured by a veterinarian. Although this Court is sympathetic to plaintiff's position, we defer to the Legislature to create such a remedy.

property.[17] See 2 Michigan Law of Damages & Other Remedies (3d ed), § 19.18.[18] Accordingly, contrary to the Court of Appeals' own characterization and for the reasons discussed in part III(A) of this opinion, the Court of Appeals' holding represents an alteration of the common law. With that understanding, we address whether the common law *should* be altered.

"This Court is the principal steward of Michigan's common law," *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2005), and it is "axiomatic that our courts have the constitutional authority to change the common law in the proper case," *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998). This authority is traceable to Const 1963,

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[17] It is also worth noting that none of the cases cited by the Court of Appeals in this case involved only property damage. Indeed, with the exception of *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970), none of the cases cited by the Court of Appeals involved property damage at all. *Sutter*, 377 Mich at 83-84, and *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492, 493-494; 665 NW2d 484 (2003), both involved claims for bodily injury resulting from medical malpractice. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 241-242; 531 NW2d 144 (1995), involved a claim for emotional distress resulting from a retaliatory discharge, and *Daley*, 384 Mich at 13, involved a claim for emotional distress resulting from fright. Moreover, *Stevens v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2007 (Docket No. 272329), and *Bielat v South Macomb Disposal Auth*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147)—the unpublished opinions the Court of Appeals cited as persuasive authority—both involved trespass-nuisance claims.

[18] The treatise cites the Court of Appeals' decision as the only exception to the *O'Donnell* rule:

> Note that the Michigan Court of Appeals has held that a plaintiff may seek recovery for noneconomic damages in a negligence action for mental anguish naturally flowing from the damage to or destruction of real property. [2 Michigan Law of Damages & Other Remedies (3d ed), § 19-18, citing *Price*, 294 Mich App 42.]

art 3, § 7, which states, "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Thus, as this Court has explained, "the common-law rule remains the law until modified by this Court or by the Legislature." *Longstreth v Gensel*, 423 Mich 675, 686; 377 NW2d 804 (1985). However, this Court has also explained that alteration of the common law should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules. *Henry*, 473 Mich at 83 ("[O]ur common-law jurisprudence has been guided by a number of prudential principles. See Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to 'avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences,' *id*. at 307 . . . ."); see also *Woodman*, 486 Mich at 231 (opinion by YOUNG, J.) ("[M]odifications [of the common law] should be made with the utmost caution because it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule."); *id.* at 268 (MARKMAN, J., concurring in part and dissenting in part) (explaining that the common law develops incrementally); *North Ottawa*, 457 Mich at 403 n 9 (providing that common law should only be changed "in the proper case").[19] As this emphasis on incrementalism suggests,

[19] Similarly, *Koester*, 244 Mich App at 176-177, explained:

> There are several factors that must be considered before expanding or creating tort liability, including, but not limited to, legislative and judicial policies. In this case, there is no statutory, judicial, or

when it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change. This approach ensures continuity and stability in the law.

With the foregoing principles in mind, we respectfully decline to alter the common-law rule that the appropriate measure of damages for negligently damaged property is the cost of replacement or repair. We are not oblivious to the reality that destruction of property or property damage will often engender considerable mental distress, and we are quite prepared to believe that the particular circumstances of the instant case were sufficient to have caused exactly such distress. However, we are persuaded that the present rule is a rational one and justifiable as a matter of reasonable public policy. We recognize that might also be true of alternative rules that could be constructed by this Court. In the final analysis, however, the venerability of the present rule and the lack of any compelling argument that would suggest its objectionableness in light of changing social and economic circumstances weigh, in our judgment, in favor of its retention. Because we believe the rule to be sound, if change is going to come, it must come by legislative alteration.[20] A number of factors persuade us that the longstanding character of

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> other persuasive authority that compels or permits this Court to take the drastic action proposed by plaintiff. Case law on this issue from sister states is not consistent, persuasive, or sufficient precedent. We refuse to create a remedy where there is no legal structure in which to give it support. However, plaintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations, including societal sentiment . . . .

[20] Although this Court is vested with the power to alter the common law, as already explained, such alteration should not be undertaken lightly. As counseled in *People v Kevorkian*, 447 Mich 436, 482 n 60; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.), quoting Justice Cardozo's *The Nature of the Judicial Process*:

the present rule is not simply a function of serendipity or of judicial inertia, but is reflective of the fact that the rule serves legitimate purposes and values within our legal system.

First, one of the most fundamental principles of our economic system is that the market sets the price of property. This is so even though every individual values property differently as a function of his or her own particular preferences. Inherent in this principle is that any property an individual owns is presumably *valued by that individual* at or above its market rate. Otherwise, he or she presumably would not have purchased the property or continue to own it. Just as an individual typically does not pay for this surplus value, the law does not necessarily compensate that individual where that surplus value has been lost.[21]

Second, economic damages, unlike noneconomic damages, are easily verifiable, quantifiable, and mea-

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> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains. [Quotation marks and citations omitted.]

Thus, this Court does not alter the common law at its unchecked discretion, much less at its whim. Rather, we are bound to tradition and stability and continuity. By virtue of its overtly political and representative nature, the Legislature is bound by different considerations. The barriers standing before this Court's alteration of the common law are significantly higher than those facing the Legislature.

[21] Concomitantly, even if an individual values his or her property below the market rate, the law does not reduce his or her tort damages by that amount.

surable. Thus, when measured only in terms of economic damages, the value of property is easily ascertainable. Employing market prices in calculating compensation for property damage eliminates the need to engage in subjective determinations of property value and enables the legal system to undertake commonplace and precise determinations of value. This explains why, at least where the plaintiff has not sustained physical injury, the cost of the property's replacement or repair has been the traditional standard for making a plaintiff "whole" under the law. See *Valentine v Gen American Credit, Inc*, 420 Mich 256, 261; 362 NW2d 628 (1984); *Bernhardt*, 249 Mich App at 279. This is so despite the fact that nearly every case involves *some* measure of emotional harm—if only from the stress of litigation—to victimized parties.

Third, limiting damages to the economic value of the damaged or destroyed property limits disparities in damage awards from case to case. Disparities in recovery are inherent in legal matters in which the value of what is in dispute is neither tangible nor objectively determined, but rather intangible and subjectively determined. Whereas under the present rule, all plaintiffs suffering an identical harm to their properties are compensated on a uniform basis, under the Court of Appeals' rule, there would be as many levels of compensation as there are plaintiffs because no two plaintiffs would likely react to the damage or destruction of their properties in exactly the same fashion. Indeed, both objective and subjective disparities would result. Objective disparities would arise because, even if noneconomic harms were precisely quantifiable, identical injuries to identical properties could lead to severe mental distress for one person, while causing only minor annoyance for another. Subjective disparities would arise because noneconomic harms *cannot* be precisely quan-

tified, so we must normally rely on juries to determine (1) whether noneconomic harms were caused, (2) the extent of such harms, and (3) the monetary value of such harms. The disparity in assessing damages by different fact-finders would presumably compound with each step in this chain of conjecture.

Fourth, the present rule affords some reasonable level of certainty to businesses regarding the potential scope of their liability for accidents caused to property resulting from their negligent conduct. As explained earlier in this opinion, under the Court of Appeals' rule, those businesses that come into regular contact with real property—contractors, repairmen, and fuel suppliers, for example—would be exposed to the uncertainty of not knowing whether their exposure to tort liability will be defined by a plaintiff who has an unusual emotional attachment to the property or by a jury that has an unusually sympathetic opinion toward those emotional attachments. Insurers would have a similarly difficult time calculating the extent of the risks against which they are insuring. Schwartz & Laird, *Non-economic damages in pet litigation: The serious need to preserve a rational rule*, 33 Pepp L R 227, 261 (2006) ("When wild-card non-economic damages are added to the equation, however, actuaries cannot accurately predict the likely costs of lawsuits."), citing Huss, *Valuation in veterinary malpractice*, 35 Loy U Chi L J 479, 532 (2004).

Once again, it is not our view that the common-law rule in Michigan cannot be improved, or that it represents the best of all possible rules, only that the rule is a reasonable one and has survived for as long as it has because there is some reasonable basis for the rule and that no compelling reasons for replacing it have been set forth by either the Court of Appeals or plaintiff. We

therefore leave it to the Legislature, if it chooses to do so at some future time, to more carefully balance the benefits of the current rule with what that body might come to view as its shortcomings.[22]

IV. CONCLUSION

The issue in this case is whether noneconomic damages are recoverable for the negligent destruction of real property. No Michigan case has ever allowed a plaintiff to recover noneconomic damages resulting solely from the negligent destruction of property, either real or personal. Rather, the common law of this state has long provided that the appropriate measure of damages in cases involving the negligent destruction of property is simply the cost of replacement or repair of the negligently destroyed property. We continue today to adhere to this rule and decline to alter it. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of summary disposition in defendant's favor.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

CAVANAGH, J., took no part in the decision of this case because of a familial relationship with counsel of record.

MCCORMACK and VIVIANO, JJ., took no part in the decision of this case.

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[22] Having reached this conclusion, we need not address defendant's additional claims on appeal.

ELBA TOWNSHIP v GRATIOT COUNTY DRAIN COMMISSIONER

Docket No. 144166. Argued January 9, 2013 (Calendar No. 6). Decided April 9, 2013.

Elba Township brought an action in the Gratiot Circuit Court against the Gratiot County Drain Commissioner seeking to enjoin the commissioner from consolidating the drainage districts associated with the No. 181-0 drain and its tributary drains. Elba Township argued that the consolidation proceedings had violated the Drain Code, MCL 280.1 *et seq*., because the No. 181-0 drain petition for consolidation lacked the statutorily required number of freeholder signatures and the notice of the hearing by the board of determination had been deficient. David Osborn, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray (the Osborn plaintiffs) intervened in the action, similarly seeking declaratory and injunctive relief and claiming that the petition was defective and that the notice of the meeting of the board of determination was defective, resulting in a violation of their due process rights. With regard to the due process claim, the Osborn plaintiffs' primary complaint was that some of the property that would be affected by the drainage project lay outside the townships listed in the notice, although the notice stated that it was being sent to persons liable for an assessment. The drain commissioner moved for summary disposition, arguing that the appropriate number of signatures had been gathered and that the notice given appropriately informed those affected by the proposed consolidation of the date, time, and place of the board-of-determination hearing. Elba Township and the Osborn plaintiffs filed a cross-motion for summary disposition. The court, Randy L. Tahvonen, J., granted the drain commissioner's motion, finding that under MCL 280.191, only 5 freeholder signatures were required on the petition rather than the 50 signatures the township claimed were required under MCL 280.441. Elba Township and the Osborn plaintiffs appealed. The Court of Appeals, M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ., affirmed the trial court's exercise of equitable jurisdiction, but reversed on the merits. 294 Mich App 310 (2011). The Supreme Court granted the drain commissioner's application for leave to appeal. 491 Mich 924 (2012).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices CAVANAGH, MARY BETH KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

The remedy for a failure to comply with the requirements of the Drain Code is certiorari review. Courts may exercise equitable jurisdiction over disputes involving a failure to follow the requirements of the Drain Code only if the failure is so egregious that it implicates constitutional concerns.

1. A party aggrieved by any part of the proceedings in establishing any drain and levying taxes for the drain may seek certiorari review under MCL 280.161. A writ of certiorari (which under MCR 3.302(c) has been replaced by the superintending control order) for any error occurring before or in the final order of determination must be issued within 10 days after a copy of the final order is filed in the office of the drain commissioner, and for any error occurring after the final order of determination, within 10 days after the day of review, or if an appeal has been taken, within 10 days after the filing of the report of the board of review. Under MCL 280.161, if no certiorari is brought within the time prescribed by statute, the drain will be deemed to have been legally established, and the taxes for the drain legally levied, and the legality of the drain and the taxes may not thereafter be questioned in any suit at law or equity. Nevertheless, Michigan courts have historically been permitted to exercise equitable jurisdiction when a plaintiff alleges a constitutional infirmity in the proceedings surrounding a drainage project. A failure to follow the requirements of the Drain Code will not warrant the exercise of equitable jurisdiction unless the failure is so egregious that it implicates constitutional concerns, which will almost always involve the deprivation of property without due process of law. The remedy for failure to comply with the technical requirements of the Drain Code is certiorari review, and any error in this case concerning the signature requirements for the petition was amenable to correction on certiorari review. Accordingly, certiorari was the exclusive avenue of review for that claim, and both lower courts erred by reaching the merits of the signature-requirement issue.

2. True questions of due process may be heard in equity because they implicate the constitutional exception to MCL 280.161. To comport with due process, notice, when required, must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. In this case, while it was within the lower courts' equitable jurisdiction to address the

notice issue, due process did not require that any notice be given regarding the meeting of the board of determination because the meeting did not pertain to deprivation of life, liberty, or property. Rather, it pertained to the propriety of the drainage project under the Drain Code, which requires that the project be necessary and conducive to public health, convenience, or welfare. Property owners who might be assessed for a drainage project are not constitutionally entitled to notice regarding proceedings to determine the necessity and conduciveness of a drainage project; they are constitutionally entitled, however, to notice regarding assessment proceedings for the drainage project. Plaintiffs thus were entitled to notice that the subsequent day of review concerning apportionment of benefits of the project would be held, and they received that notice.

Court of Appeals' judgment reversed; trial court order granting summary disposition in favor of defendant reinstated.

Justice VIVIANO took no part in the decision of this case.

1. DRAINS — DRAIN CODE — VIOLATIONS — CERTIORARI REVIEW — EQUITABLE REMEDIES.

The remedy for failure to comply with the technical requirements of the Drain Code is certiorari review; a failure to follow the requirements of the Drain Code will not warrant the exercise of equitable jurisdiction unless the failure is so egregious that it implicates constitutional concerns (MCL 280.1 *et seq*.).

2. DRAINS — DRAINAGE PROJECTS — DUE PROCESS.

After a petition for maintenance or improvement of a drain or the consolidation of drainage districts is submitted, the county drain commissioner may appoint a board of determination to determine whether the maintenance or improvement or the consolidation is necessary and conducive to public health, convenience, or welfare; property owners who might be assessed for a drainage project are not constitutionally entitled to notice regarding a hearing on the necessity and conduciveness of the drainage project; they are constitutionally entitled, however, to notice regarding assessment proceedings for the drainage project (US Const, Am XIV; Const 1963, art 1, § 17; MCL 280.1 *et seq*.).

Smith Bovill, P.C. (by *David B. Meyer* and *Elian E. H. Fichtner*), for Elba Township, David L. Osborn, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray.

Clark Hill PLC (by *James E. Brenner* and *Douglas R. Kelly*) and *Fahey Schultz Burzych Rhodes PLC* (by *Stacy L. Hissong* and *Stephen J. Rhodes*) for the Gratiot County Drain Commissioner.

Amici Curiae:

The Hubbard Law Firm, P.C. (by *Michael G. Woodworth*, *Andria M. Ditschman*, and *N. Banu Colak*), for the Michigan Association of County Drain Commissioners.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association.

MARKMAN, J. The issues presented here are (1) whether the lower courts properly exercised equitable jurisdiction with regard to this case and, if so, (2) whether the Drain Code requires 5 or 50 signatures for a drainage-district consolidation petition, and (3) whether the notice given regarding a drainage "board of determination" hearing satisfied the constitutional requirements of due process. We conclude that the lower courts improperly exercised equitable jurisdiction over the signature-requirement question but properly exercised such jurisdiction over the question of notice. The former question is purely statutory and, as such, there were no grounds on which the lower courts could properly exercise equitable jurisdiction. Though the exercise of equitable jurisdiction over the latter question was proper, we conclude that constitutional due process did not entitle plaintiffs to receive notice of the "board of determination" hearing. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition for defendant.

I. DRAIN CODE

The first drain laws were enacted before Michigan became a state. See 2 Territorial Laws, Act of March 30, 1827, § 19, p 325. Amended frequently during the nineteenth and early twentieth centuries, our drain laws have historically served the public purposes of promoting the productive use of the state's land resources and combatting the spread of water- and mosquito-borne diseases, such as cholera and malaria. See 1846 RS, ch 131, § 1 (stating that before a ditch may be constructed through an individual's land against his will, the township board must inquire whether the "marsh, swamp or other lands [to be drained by the ditch] are a source of disease to the inhabitants, and whether the public health will be promoted by draining the same"); Kaplowitz & Popp, *Occupying the same wetland: Michigan's Drain Code and the federal Clean Water Act*, 77 U Det Mercy L R 779, 781-785 (2000). In light of the importance of these functions, those governmental officials charged at various stages of our state's history with overseeing the construction and maintenance of drains have been accorded fairly sweeping powers subject only to limited judicial review. The present Drain Code (the Code), based in large part on these early statutes, retains these characteristics. MCL 280.1 *et seq*. That the Code is based on these early statutes is likely also one of the reasons why the Code constitutes one of the more arcane portions of Michigan statutory law. See *Eyde v Lansing Twp*, 109 Mich App 641, 645; 311 NW2d 438 (1981) ("[T]he Drain Code of 1956 [is] an exceedingly complex statute, the provisions of which apparently are known by few in the profession and understood by far fewer.") (citations and quotation marks omitted) (emphasis omitted). Thus, before pro-

ceeding to the facts and procedural history of this case, we first discuss applicable portions of the Code.

Under the Code, a "drain" is essentially any watercourse (whether natural or artificial, above or below ground) and the structures or mechanical equipment used to control the flow of that watercourse (excluding certain power-generating dams and the flowage rights used in connection therewith). MCL 280.3. A "drainage district" is the area in which the drain operates. It is "a body corporate with power to contract, to sue and to be sued, and to hold, manage and dispose of real and personal property, in addition to any other powers conferred upon it by law." MCL 280.5. But the distinction between a drain and a drainage district is not as clear as this definitional scheme might suggest. In fact, the two terms are often used interchangeably. Both the Court of Appeals and litigants at times use the terms interchangeably, and even the Drain Code itself sometimes fails to distinguish between the two concepts. See, e.g., MCL 280.446 (discussing consolidation of a "drain" with a "consolidated drain" in chapter 19 of the Drain Code, entitled "Consolidated Districts").

When an existing drain needs maintenance or improvement, property owners "whose lands shall be liable to an assessment for benefits of such work" may petition for the work to be done. MCL 280.191. If consolidation of drainage districts is sought, property owners whose lands lie within the districts that would be consolidated may also petition for consolidation. MCL 280.441(1). In either situation, after the petition is submitted, the county drain commissioner "may appoint a board of determination composed of 3 disinterested property owners," MCL 280.72(1) and MCL 280.441(1), to determine, in the case of proposed maintenance or improvement, whether the maintenance or

improvement would be "necessary and conducive to public health, convenience, or welfare," MCL 280.72(3), or in the case of proposed consolidation, the "necessity of the consolidation," MCL 280.441(1), and whether the consolidation would likewise be "conducive to public health, convenience, or welfare," MCL 280.441(3).[1]

If the "board of determination" (the Board) makes the requisite findings of necessity and conduciveness, then, in the case of a consolidation of drainage districts, an order of consolidation is given to the county drain commissioner, who files the order and gives the new consolidated district a name or number. MCL 280.441(3). In the case of drain maintenance or improvement, once the Board has made its findings, the county drain commissioner then files a final order of determination specifying the precise work to be done. MCL 280.151. The drain commissioner also then apportions the benefit created by the maintenance and improvement among the benefitted properties on a percentage basis.[2] MCL 280.151. "All apportionments of benefits . . . shall be upon the principle of benefits derived." MCL 280.152. The assessment of taxes to pay for the drain work is then based on these percentage apportionments. MCL 280.151.

Once this apportionment process is complete, each person who owns property within the district to be

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[1] MCL 280.72 deals with the process by which *new drains* may be sought and established. But MCL 280.191, which deals with the process by which *maintenance and improvement* of drains may be sought and effected, provides that the MCL 280.72 requirements for a "board of determination" finding of necessity and conduciveness govern proceedings under MCL 280.191 as well.

[2] The commissioner also determines at this time the percentages of the cost of the project that will be assessed against any "township, city, or village," any "highway then under control of the county or district road commissioners," and any "state trunk line highway." MCL 280.151.

assessed is given notice that a public meeting (i.e., a day of review) will be held to review the apportionment of benefits.[3] MCL 280.154(3) and MCL 280.191. Anyone aggrieved by the apportionment may "appeal therefrom and . . . make an application to the probate court . . . for the appointment of a board of review . . . ." MCL 280.155. A party aggrieved by any part of "[t]he proceedings in establishing any drain and levying taxes therefor" can also seek certiorari review.[4] MCL 280.161. But

> [a] writ of certiorari for any error occurring before or in the final order of determination shall be issued within 10 days after a copy of such final order is filed in the office of the drain commissioner . . . , and for any error occurring after such final order of determination, within 10 days after the day of review, or if an appeal has been taken within 10 days after the filing of the report of the board of review. [MCL 280.161.]

No other avenue of review is contemplated by the statute. "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity[.]" *Id.* But by long-established precedent, discussed more thoroughly later in this opinion, aggrieved parties nevertheless have been permitted to

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[3] MCL 280.191 provides that, after the final order of determination has been filed, and if the apportionment is not "the same as the last recorded apportionments," then "the commissioner shall proceed as provided in [MCL 280.151 to MCL 280.161], including the notice of and the holding of a day of review." Otherwise, no day of review is necessary.

[4] Though the Drain Code provides for "certiorari," under MCR 3.302(C), "[a] superintending control order replaces the writ[] of certiorari . . . when directed to a lower court or tribunal." To maintain consistency with the statute and historical caselaw, however, "certiorari" is used throughout this opinion.

challenge drain proceedings in equity on the sole bases of fraud or constitutional infirmity.

II. FACTS AND HISTORY

The No. 181-0 drain is a major, established drain located in Gratiot County. It is fed by dozens of established tributary drains, each of which lies within its own separately established drainage district. Each of these tributary-drain drainage districts in turn lies within the boundaries of the separately established No. 181-0 drain drainage district. This appeal involves a challenge to maintenance and improvements on the No. 181-0 drain and several of its tributaries, along with the consolidation of all the tributary-drain drainage districts and the No. 181-0 drain drainage district into a single new drainage district.

In March 2009, Dennis Kellogg filed with defendant, the Gratiot County Drain Commissioner (the Commissioner), a petition signed by five property owners from North Star Township. The Kellogg petition sought the consolidation, maintenance, or improvement of the "#181-0 Drain and all established tributary drains located and established in the Townships of Northstar, Washington & Elba, in the County of Gratiot, State of Michigan." Prior to receiving the Kellogg petition, the Commissioner had received two petitions for consolidation, maintenance, or improvement of two drains that are tributaries to the No. 181-0 drain. A petition for consolidation, maintenance, or improvement of yet another tributary drain to the No. 181-0 drain was received after the Kellogg petition. In response to these petitions, and with the advice of a consultant hired to study the situation, the Commissioner determined that the best course of action was to undertake a major maintenance and improvement project involving

No. 181-0 and several of its tributaries and to consolidate all the separate drainage districts into a new No. 181 consolidated drainage district. The Commissioner appointed a Board to hear evidence and determine the propriety of the proposed actions, and the Board held a hearing on May 4, 2010.[5]

All municipalities located within the No. 181-0 drain drainage district—including plaintiff Elba Township—were notified of the date, time, and place of the hearing. Additionally, a notice was sent to all the individual property owners and published in the *Gratiot County Herald*. It stated:

> *Notice Is Hereby Given* to you as a person liable for an assessment that the Board of Determination . . . will meet on Tuesday, May 4, 2010 at 10:00 A.M., o'clock in the forenoon, North Star Township Hall located at 2840 E. Buchanan Road, North Star Township, Michigan to hear all interested persons and evidence and to determine whether the drain in *Drainage District No. 181-10*[6] *Wolf & Bear known as the #181-10 Wolf & Bear Drain*, as prayed for in the Petition for consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, *and all established*

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[5] Because the May 4, 2010 hearing was held as part of the May 4, 2010 Board meeting, this opinion refers to the May 4, 2010 proceedings variously as a "hearing" and a "meeting."

[6] The discrepancy between the notice, which refers to the No. 181-10 drain, and the petition, which referred to the No. 181-0 drain, has never been satisfactorily explained by the parties. That the drainage system was ultimately consolidated into a new drain known simply as No. 181 further complicates an already byzantine drain-and-drainage-district identification scheme. On one hand, some information indicates that the reference to No. 181-10 in the notice was a clerical error. According to the Commissioner, "[t]he Notice printed '#181-10' because it was generated by commonly-used assessing software. The '10' references 2010, which was the latest year of assessment." On the other hand, plaintiffs indicate that No. 181-10 was the original focal point of the project and was a tributary to the No. 181-0 drain.

> *tributary drains, located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington, Sections 1, 12, 23 and 24, County of Gratiot, State of Michigan*.[7] Petition further shows that . . . said consolidating, clearing out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway of the drains is necessary and conducive to the public health and welfare of Elba, North Star and Washington Township(s). Dated March 23, 2009 . . . and for the protection of the public health of the following: Elba, North Star and Washington Township(s).
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> * * *
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> You Are Further Notified, that persons aggrieved by the decisions of the Board of Determination may seek judicial review in the Circuit Court for the County of Gratiot within ten (10) days of the determination. [Emphasis altered.]

At the meeting, the Board voted 2-1 to approve the project as necessary and conducive to public health, convenience, or welfare. Following the meeting, the Board prepared and filed an "ORDER OF NECESSITY" with the Commissioner's office. The order listed the "#181-10 drain and all established tributary drains, located and established in the township(s) of Elba, sections 18 & 19, North Star sections 25, 26, 27, 28, 29, 32 and 36, Washington, sections 1, 12, 23 and 24, County of Gratiot, State of Michigan . . . ."

The Commissioner filed a final order of determination for the project on December 22, 2010.[8] On Janu-

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[7] That this crucial portion of the notice is not a grammatically functional sentence makes interpretation of the notice more difficult.

[8] Other events transpired between the Board's filing of its initial order of necessity and the Commissioner's filing of his final order of determination. In September 2010, the Commissioner sent out notifications of at-large assessments to all municipalities located within the new No. 181 consolidated-drain drainage district. According to the Commissioner,

ary 5, 2011, the Commissioner mailed to each property owner in the new No. 181 consolidated-drain drainage district notice that a day of review would be held regarding the apportionment of benefits from the project. The day of review was held on February 14, 2011. No appeal to the probate court for a board of review was taken, nor was certiorari review sought.

The present lawsuit was commenced after the initial Board proceedings but before the Commissioner filed the final order of determination. On November 8, 2010, Elba Township (Elba) filed a complaint against the Commissioner in the Gratiot Circuit Court. Elba alleged that the consolidation violated the Drain Code because the petition for the action had been signed by only 5 property owners, rather than the 50 that Elba contended the Code required. Elba also asserted that the notice of the May 4, 2010 Board hearing was defective and therefore did not comport with due process. The Commissioner moved for summary disposition. Then, David Osborn, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray (collectively, the Osborn plaintiffs) moved to intervene as of right.[9] These individual property owners filed a complaint alleging that the notice

after the notices were mailed, he determined that adding more land to the new drainage district might be necessary. Thus, in November 2010, he issued a notice of "RECONVENED BOARD OF DETERMINATION." Included in the notice this time around was a list of all 47 drainage districts consolidated at the May 4, 2010 hearing "known as the No. 181 Consolidated Drain in the Townships of Elba, Fulton, Hamilton, Newark, North Star and Washington . . . ." The notice provided that the reconvened hearing would be held on November 11, 2010, to determine the necessity of adding lands to the No. 181 consolidated-drain drainage district. The Commissioner sent the notice of the reconvened hearing to all the municipalities and individual property owners within the drainage district. The hearing was held and the additional land added by way of a revised order of necessity.

[9] Osborn moved to intervene individually and as trustee of the Osborn Trust.

issued regarding the May 4, 2010 Board meeting failed to properly inform them that their property was part of the proposed project and thus the Commissioner had violated the Drain Code and their due process rights. The motion to intervene was granted, and the Commissioner then moved for summary disposition of the Osborn plaintiffs' claims as well. Elba and the Osborn plaintiffs (collectively, plaintiffs) filed a cross-motion for summary disposition in their favor. The trial court granted summary disposition for the Commissioner on both the signature and notice issues.

The Court of Appeals affirmed the trial court's exercise of jurisdiction but reversed on the merits. It held that a proper reading of the Drain Code required 50 signatures for a consolidation petition and that the information contained in the notice of the May 4, 2010 hearing was misleading and thus violative of due process. Though the Drain Code severely circumscribes the avenues of relief available to plaintiffs, the Court of Appeals held that the signature deficiency allowed it to exercise equitable jurisdiction because the failure to secure the needed signatures meant that there was an "entire lack of jurisdiction" on the part of the Commissioner to undertake the project. *Elba Twp v Gratiot Co Drain Comm'r*, 294 Mich App 310, 341; 812 NW2d 771 (2011). The Commissioner applied for leave to appeal here. We granted leave and heard oral argument. *Elba Twp v Gratiot Co Drain Comm'r*, 491 Mich 924 (2012).

III. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny summary disposition. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). Whether due process has been afforded is a constitutional issue that is reviewed de novo. *People v Wilder*, 485 Mich 35, 40;

780 NW2d 265 (2010). Likewise, whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). Questions of statutory interpretation are also reviewed de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Though our review of the issues presented is thus de novo, we are also mindful of our previous declaration that, in general, "[w]e . . . are not inclined to reverse [drain] proceedings . . . absent [a] showing of very substantial faults." *In re Fitch Drain No 129*, 346 Mich 639, 647; 78 NW2d 600 (1956).

IV. ANALYSIS

A. PETITION SIGNATURES

Plaintiffs first contend that they are entitled to relief because the Kellogg petition, which served as the basis for the "board of determination" meeting at which the maintenance, improvement, and consolidation project was authorized, was signed by only 5 property owners, not the 50 that plaintiffs say are mandated by the Drain Code. There are three sections of the Drain Code directly relevant to this issue. The first, MCL 280.191, addresses maintenance and improvement of county drains. It states, in part:

> When a drain or portion thereof . . . needs cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway, or requires structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain, or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements, or connections to existing drains, or needs 1 or more branches added thereto, any *5 or at least 50% of the*

> *freeholders* if there are less than 5 freeholders whose lands shall be liable to an assessment for benefits of such work, may make petition in writing to the commissioner setting forth the necessity of the proposed work . . . . [MCL 280.191 (emphasis added).]

Absent from MCL 280.191 is any reference to "consolidation." The second section, MCL 280.441, addresses consolidation of drainage districts. It states, again in part:

> Two or more drainage districts located . . . in the same drainage basin or in adjoining basins, may consolidate and organize as a single drainage district upon the filing of a petition for consolidation with the drain commissioner of the county setting forth the reason for the proposed consolidation. . . . The petition shall be signed by at least *50 property owners* within the proposed consolidated drainage district. If in the proposed consolidated drainage district there are less than 100 property owners, the petition shall be signed by at least 50% of the property owners in the proposed consolidated drainage district. [MCL 280.441(1) (emphasis added).]

The Code thus provides distinct signature requirements for drain maintenance and improvement on one hand and drainage-district consolidation on the other. But MCL 280.194 muddles this apparent dichotomy a bit:

> In any petition filed under this chapter it shall not be necessary for the petitioners to describe said drain other than by its name or to describe its commencement, general route and terminus. For any work necessary to be done in cleaning out, widening, deepening, straightening, *consolidating*, extending, relocating, tiling or relocating along a highway, or for providing structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain or needs supplementing by the construction of

> 1 or more relief drains which may consist of new drains or extensions, enlargements or connections to existing drains, or needs 1 or more branches added thereto, and for any and all such proceedings, *only 1 petition and proceeding shall be necessary*. [Emphasis added.]

The trial court concluded that MCL 280.194 and MCL 280.441 were irreconcilable, that the former provision prevailed, and that therefore only five signatures are required when a petition, like the one at issue, deals with consolidation as well as some other maintenance or improvement delineated in MCL 280.194. The Court of Appeals disagreed. It determined that, when a combined consolidation and maintenance-or-improvement petition is at issue, the 50-signature requirement remains as to the consolidation.

Both lower courts, in our judgment, erred by reaching the merits of this issue. As previously stated, MCL 280.161, governing the certiorari process, stipulates that "[i]f no certiorari be brought within the [prescribed time frame], the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity[.]" It is undisputed that plaintiffs did not seek certiorari and that the time for doing so has expired. The statute contemplates that, once the period during which certiorari may be sought has passed, no other avenue of relief is available to challenge drain proceedings. But this Court has consistently refused "to accept the proposition that certiorari is an exclusive remedy under the drain law . . . ." *Pere Marquette R Co v Auditor General*, 226 Mich 491, 494; 198 NW 199 (1924). Indeed, a review of our prior jurisprudence demonstrates that we have historically exercised equitable jurisdiction, in spite of the prohibition in MCL 280.161, when a plaintiff alleges a constitutional infir-

mity[10] in the proceedings surrounding a drainage project.[11] See, e.g., *Blades v Genesee Co Drain Dist No 2*, 375 Mich 683, 693; 135 NW2d 420 (1965) (stating that it was appropriate to exercise equitable jurisdiction notwithstanding the certiorari process when denial of "such opportunity is no more nor less than a denial of constitutionally guaranteed due process"); *Fuller v Cockerill*, 257 Mich 35, 39; 239 NW 293 (1932) (permitting a challenge to drain proceedings because those proceedings violated the constitution); *Crandall v McElheny*, 146 Mich 191, 192; 109 NW 261 (1906) ("Unless there is some constitutional objection to the application of [the predecessor of MCL 280.161] . . . , it prevents the maintenance of this suit.").[12]

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[10] Neither plaintiffs nor the Commissioner challenge the validity of this exception to the MCL 280.161 prohibition.

[11] We have also, in the past, indicated that exercise of equitable jurisdiction notwithstanding the Drain Code's prohibition may be appropriate in cases of fraud. See, e.g., *Detroit Beach Betterment Committee v Monroe Co Drain Comm'r*, 355 Mich 292, 295; 93 NW2d 922 (1959) (noting that the complaint contained "no allegations of fraud with respect to the drain commissioner's actions and proceedings entitling plaintiffs to a review in equity"); *Hudlemyer v Dickinson*, 143 Mich 250, 256; 106 NW 885 (1906) ("If fraud in the proceedings is alleged and pointed out . . . such charges may be investigated [in equity].") (quotation marks omitted). But because plaintiffs do not allege fraud here, we do not pass on the validity of this exception, if indeed it even constitutes a distinct exception to the MCL 280.161 prohibition.

[12] Though many of these cases were decided under earlier iterations of MCL 280.161 (which was not codified as such until 1956), all the earlier iterations contained language regarding the exclusivity of certiorari review that was substantially similar to the current statute. The earliest version of this statute, enacted in 1897, provided that "[i]f no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity[.]" 1897 PA 254, ch V, § 3. This language remained unchanged until 1927, when it was amended to its current form: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established *and the taxes therefore legally levied*, and *the legality of said drain and the*

In *Clarence Twp v Dickinson*, 151 Mich 270; 115 NW 57 (1908), the township in which a drain was to be extended and several property owners whose lands were within the assessment district for the proposed drainage project brought a suit in equity, contending that the project amounted to the construction of a new drain. Under the statute in place at the time, a petition urging construction of a new drain was to be signed by five persons liable for an assessment for benefits from the project. The petition under which the project at issue was initiated had been signed by only three such persons. Concluding that equitable relief is available to plaintiffs challenging drainage proceedings in only extremely narrow circumstances, we stated that a "lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution." *Clarence Twp*, 151 Mich at 272. Regarding the petition-signature requirement, we held:

> The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its non-observance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit. [*Id.* at 273.]

We relied heavily on *Clarence Twp* in *Stellwagen v Dingman*, 229 Mich 159, 161-162; 200 NW 983 (1924), in which we held that the alleged failure of a petition to "correctly stat[e] the purpose for which the cleaning out

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taxes therefor shall not thereafter be questioned in any suit at law or equity[.]" 1927 PA 331, ch VI, § 11 (emphasis added).

of the drain was needed" did not rise to the level of a constitutional violation allowing the exercise of equitable jurisdiction.

The slightly earlier case of *Strack v Miller*, 134 Mich 311; 96 NW 452 (1903), is to the same effect. In *Strack*, the plaintiff sought to enjoin the construction of a new drain on the grounds of insufficient petition signatures. The relevant statute, it was contended, required that 5 of the 10 signatories to the petition requesting the work own land that would be liable for an assessment of benefits, but only 4 of the 10 signatories to the petition at issue fit that description. We held that such a claim was insufficient "to call for the interposition of a court of equity." *Id.* at 313. Rather, the plaintiffs' proper course would have been to seek certiorari review under the statute. The certiorari statute, we said, offers

> an opportunity to have a speedy hearing upon any question of jurisdiction or any question of irregularity. If the complainant had shown to the probate court that the application [to construct the drain] was fatally defective, the proceeding could have then been ended. The same result could have been reached before a board of review. This could have been accomplished without so much delay and expense as is involved in a chancery proceeding. [*Id.*]

We are presented here with a situation virtually identical to *Clarence Twp* and *Strack*. Per *Strack*, plaintiffs could easily have brought their signature complaint by way of certiorari review, at which time, had they been able to show the court that the petition "was fatally defective, the proceeding could have then been ended" and their grievance would have been satisfactorily addressed. *Id.* Their claim may not now be reviewed in equity because whether a consolidation petition must be signed by 5 property owners under MCL 280.191 and MCL 280.194 or by 50 pursuant to

MCL 280.441 is, in the words of *Clarence Twp*, a "purely statutory" question regarding a "purely statutory" requirement. *Clarence Twp*, 151 Mich at 273.

Upon concluding that MCL 280.441 was applicable here and thus that 50 signatures were required for the consolidation petition, the Court of Appeals, apparently overlooking our decisions in *Clarence Twp*, *Strack*, and *Stellwagen*, went on to determine whether the exercise of equitable jurisdiction was appropriate. "Without the requisite number of signatures attached to the . . . petition," the Court of Appeals stated, "the Drain Commissioner had no authority or jurisdiction to act, and the proceedings establishing the No. 181 Consolidated Drainage District were void." *Elba Twp*, 294 Mich App at 341. Thus, the Court of Appeals concluded the trial court had properly exercised equitable jurisdiction over the matter. *Id*. In so concluding, the Court of Appeals neglected our holding in *Clarence Twp*, reaffirmed in *Fuller*, that "[t]he lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution." *Fuller*, 257 Mich at 39 (citation and quotation marks omitted). Even if there was a signature error, such error did not result in a lack of jurisdiction arising out of a violation of the Constitution.

It simply cannot be that every failure by the Commissioner or others to comply with the detailed requirements of the Drain Code deprives the Commissioner of jurisdiction in such a way as to permit invocation of the equitable jurisdiction of the judiciary. If this were the case, the exclusivity of certiorari review as set forth in MCL 280.161 would not only be restricted by our caselaw, but it would be of little general force. *Clarence Twp*, *Strack*, and *Stellwagen* make clear that an error regarding the number of petition signatures does not implicate the Constitution. Though in some sense a

public official lacks jurisdiction every time he acts in a way contrary to statutes prescribing the procedures he must follow in carrying out his authority, "[t]here is a difference between a want of jurisdiction and a mistake in jurisdiction, or an error in the exercise of jurisdiction." *Altermatt v Dillman*, 269 Mich 177, 182; 256 NW 846 (1934). A failure to follow each and every requirement of the Drain Code does not warrant the exercise of equitable jurisdiction unless the failure is so egregious that it implicates constitutional concerns, which will almost always involve the deprivation of property without due process of law.[13] See *id.* at 186 (concluding, after discussing several drain cases in which equitable jurisdiction had been exercised, that in all the cases, the "taking of property without due process of law" was at issue).

At this point, the objection might be raised that, as long as property rights are imperiled by the action, every failure to follow the letter of the Drain Code amounts to a constitutional violation because it constitutes a denial of due process of law. But it must be remembered that the Drain Code, in fact, provides a remedy for failure to comply with its technical requirements-- certiorari review. The availability of this remedy precludes a finding in circumstances such as a failure to meet a statutory signature requirement that deprivation of due process has occurred. Cf. *Patrick v Shiawassee Co Drain Comm'r*, 342 Mich 257, 263; 69 NW2d 727 (1955) (concluding that when the drain commissioner extended a project beyond the scope

[13] Drainage-project proceedings like the instant ones do not result in a deprivation of property implicating due process rights until the property owner has actually been assessed for the project. Thus the rule, discussed in the next subsection of this opinion, see part IV(B), that due process does not even require *notice* of such proceedings until the assessment stage.

permitted by the order of determination, exercise of equitable jurisdiction was appropriate because there was no adequate opportunity to request certiorari review of the issue).

In this case, the Court of Appeals reasoned that the exercise of equitable jurisdiction was appropriate in part because the signature error alleged here was not amenable to correction on certiorari review. We disagree. If there was an error, it was in fact easily correctable through certiorari review. MCL 280.161 provides that if "material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside." Surely this would have been an appropriate and adequate remedy here. Indeed, this is the very relief sought by plaintiffs. As we stated in *Strack*, certiorari is the exclusive avenue of review for such a claim.[14] See *Strack*, 134 Mich at 313.

B. NOTICE

Plaintiffs also contend that the notice issued regarding the May 4, 2010 Board meeting was defective and

[14] In determining that the exercise of equitable jurisdiction was appropriate here, the Court of Appeals relied in part on our decision in *Grand Rapids & I R Co v Round*, 220 Mich 475; 190 NW 248 (1922). In *Round*, we said that a drain petition failed to confer jurisdiction because it did not allege, as required by the statute in place at the time, that the signatures on the petition included at least 1/3 of the property owners whose lands were traversed by the drain in question. But *Round* was *brought as a petition for certiorari*; it was not an attempt to invoke equity. Contrary to the Court of Appeals' analysis, then, *Round* actually underscores that such errors are properly addressed through certiorari review. Additionally, *Round* did not assert that the error at issue amounted to a lack of jurisdiction that *arose out of a violation of the Constitution* and thus does not imply that an exercise of equitable jurisdiction would have been appropriate. Indeed, this requirement from *Clarence Twp* and *Fuller*, coupled with the reaffirmation of the *Strack* and *Clarence Twp* principle in *Stellwagen*-- which was decided after *Round*-- demonstrates that an error like that found in *Round* is insufficient to permit the intervention of equity.

amounted to a violation of their constitutional right to due process. Their primary complaint regarding the notice is that some of the property that would be affected by the proposed project lay outside the townships listed in the notice.[15] This, plaintiffs argue, led some property owners who stood to be assessed for the project but whose property did not lie within the listed townships to conclude that, despite the opening language of the notice, which stated that it was being sent to persons "liable for an assessment," their interests would not be affected by the proceedings at the May 4, 2010 Board meeting. Thus, they argue, notice to these persons regarding the meeting was ineffective and their constitutional right to due process was violated.

Unlike the signature issue, true questions of due process may be heard in equity because they implicate the constitutional exception to MCL 280.161. See *Blades*, 375 Mich at 693-694 (concluding that an argument that an assessment was arbitrarily and wrongly imposed was a due-process claim that could be heard in equity); *Altermatt*, 269 Mich at 186 (summarizing relevant caselaw and concluding that drain proceedings that amount to "taking of property without due process of law" confer jurisdiction on courts of equity); *Fuller*, 257 Mich at 38-39 (concluding that an exercise of equitable jurisdiction was appropriate when the defendants were "wholly without authority" to construct a drain because "the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort").

To comport with due process, notice, when required, must be " 'reasonably calculated, under all the circum-

[15] The notice enumerated only those townships through which the No. 181-0 drain actually runs.

stances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). To be sure, the notice sent to plaintiffs in this case was no model of clarity. But before analyzing the reasonableness of the notice, we must ask the threshold question whether plaintiffs were constitutionally entitled to *any* notice of the May 4, 2010 Board meeting. We conclude that they were not.

Under Michigan's Constitution, "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The United States Constitution similarly provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV. The May 4, 2010 Board meeting was held to determine the "necessity" of the proposed drainage project. See MCL 280.72(3) and MCL 280.441(1). Simply put, the meeting did not pertain to deprivation of life, liberty, or property, and thus the due process right to notice was not implicated.[16] The meeting dealt only with whether the drainage project was *necessary* under the terms of the Drain Code and thus whether it should proceed. As such, due process did not require that *any* notice be given.

Chicago, M, St P, & P R Co v Risty, 276 US 567; 48 S Ct 396; 72 L Ed 703 (1928), bears a striking resemblance to the present case. In *Risty*, the plaintiffs, receivers of a

[16] Indeed, at the May 4, 2010 meeting, the Board was performing an essentially legislative function-- determining whether to authorize a public-works project. See *Blankenburg v City of Northfield*, 462 NW2d 417, 419 (Minn App, 1990) (holding that a hearing on the feasibility of extension of sewer and water lines constitutes "a legislative function").

railway company, sought to enjoin the apportionment and assessment of benefits against their land for the maintenance of a drain constructed under South Dakota's agricultural drainage statutes. South Dakota law at the time, like our own Code, prescribed a bifurcated system under which an initial determination as to whether the drainage project would be "conducive to the public health, convenience, or welfare, or necessary or practical for draining agricultural lands" was followed by separate proceedings regarding the apportionment of benefits and assessment of costs against property owners. *Id.* at 574 (citation and quotation marks omitted). The plaintiffs challenged the constitutionality of the proceedings "on the ground that the notice of the hearing on the petition for the establishment of the drainage project fell short of constitutional requirements," asserting that, because the notice of the hearing on necessity described only the route to be taken by the proposed drain "and the tract of country likely to be affected thereby in general terms," it was insufficient "notice to any land owner other than those through whose land the drainage ditch is to be constructed." *Id.* at 573 (quotation marks omitted). The United States Supreme Court rejected the argument, holding:

> Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if land owners who may be assessed are later afforded a hearing upon the assessment itself. [*Id.* at 574.][17]

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[17] *Risty* implies that due process may require notice of the establishment of an "assessment district." An "assessment district" of the type referred to in *Risty* should not be confused with the establishment (or, as here, consolidation) of a "drainage district" under our Drain Code. *Risty* explains that inclusion of lands within an "assessment district" as contemplated in that case "depended wholly upon [the lands'] being benefited by the proposed improvements" and therefore being assessed to fund the project. *Risty*, 276 US at 575. By contrast, there is no indication

Citing *Risty*, the United States Supreme Court held in *Utley v St Petersburg*, 292 US 106, 109; 54 S Ct 593; 78 L Ed 1155 (1934), that "[t]here is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land, or in proceedings for collection afterwards."[18] (Citations omitted.)

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in the Drain Code that inclusion within a drainage district means that a specific parcel of land will certainly be benefited by and assessed for the costs of a given project. To the contrary, "[a]ll apportionments of benefits . . . shall be upon the principle of benefits derived." MCL 280.152. As *Risty* itself said, "It is enough if land owners who may be assessed are later afforded a hearing upon the assessment itself." *Risty*, 276 US at 574.

This understanding of *Risty* is supported by prior precedent of both this Court and the United States Supreme Court. In *Voigt v Detroit*, 184 US 115; 22 S Ct 337; 46 L Ed 459 (1902), the plaintiff, a Michigander challenging an assessment of taxes against his property to pay for the construction of a road, contended that the Fourteenth Amendment had been violated because he was not given notice of, or an opportunity to contest, the setting of the boundaries of the district within which property owners would be assessed to pay for the road because of the benefit they received from the project. He was, however, given the opportunity to contest the individual assessment ultimately levied against his property. This Court affirmed the trial court's dismissal of the complaint. The United States Supreme Court in turn affirmed our decision, holding, with regard to the Michigan statute that created this system of assessment, that "[i]t would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law." *Id.* at 122.

[18] *Goodrich v Detroit*, 184 US 432; 22 S Ct 397; 46 L Ed 627 (1902), is to the same effect. There, the plaintiffs were ultimately assessed to pay for part of a road project in Detroit. They asserted that their right to due process had been violated where the statute at issue provided that, regarding the initial proceedings to determine whether the project would go forward, notice only had to be given to those property owners whose property would be condemned in order to build the street. Those who might be assessed were not given notice. This Court affirmed the trial court's dismissal of the plaintiffs' claim, and the United States Supreme Court affirmed, reasoning:

Our own precedents are in accord with this position. The plaintiff in *Roberts v Smith*, 115 Mich 5; 72 NW 1091 (1897), owned property subject to assessment for a drainage project. He contended that the drain law in place at the time violated constitutional due process because it did not afford him an opportunity "to contest the public necessity for the drain . . . ." *Id.* at 8. We rejected the argument, noting that the drain law "provide[d] for notice of the assessment, and an opportunity to be heard thereon." *Id.* We later reaffirmed this principle in *Hinkley v Bishop*, 152 Mich 256, 259-260; 114 NW 676 (1908), in which we stated that "persons liable to be assessed for benefits" have "no constitutional right to be heard upon the necessity for the drain," citing *Roberts*. At the same time, we granted relief to some of the *Hinkley* plaintiffs because they had not been properly noticed regarding the *assessment* proceedings. *Id*. at 262, 264-266.

Therefore, plaintiffs were not constitutionally entitled to notice regarding the hearing on the necessity and conduciveness of the drainage project.[19] They *were*

> It might be argued upon the same lines [as those advanced by the plaintiffs] that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice. [*Id.* at 438.]

[19] Plaintiffs were, however, statutorily entitled to notice of the "board of determination's" hearing on necessity and conduciveness. But the notice they received regarding that hearing met the statutory requirements. MCL 280.72(2), applicable via the terms of MCL 280.191, requires, regarding individual property owners, that "[t]he drain commis-

constitutionally entitled to notice regarding assessment. That is, under the present circumstances, they were entitled to notice that the day of review would be held. They received such notice. Plaintiffs' complaints regarding the notice issued for the May 4, 2010 hearing, even assuming they had merit, were remedied in the notice issued for the February 14, 2011 day of review. For these reasons, plaintiffs' claim of inadequate notice fails.

V. CONCLUSION

The lower courts improperly exercised equitable jurisdiction over the signature-requirement issue given that the matter did not arise from a violation of the Constitution. The lack of jurisdiction that will warrant relief in equity must arise from a violation of the Constitution. Because the exercise of equitable jurisdiction over the signature-requirement issue was improper, we do not reach the issue whether the Drain Code requires 5 or 50 signatures for a drainage-district consolidation petition. Finally, though it was within the lower courts' equitable jurisdiction to address the notice issue, we conclude that constitutional due process did not entitle plaintiffs to receive notice of the "board of determination" hearing. Though constitutional due process entitles affected property owners to notice of

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sioner . . . send notice, by first class mail, of the time, date, and place of the meeting, to each person whose name appears on the last city, village, or township tax assessment roll as owning land within the special assessment district, at the address shown on the roll." Regarding townships, notice "shall be served . . . on the clerk of each township, . . . personally or by registered mail, at least 10 days before the meeting." MCL 280.72(2). There is no indication that these provisions were not complied with here. Further, for reasons already explained, a purely statutory defect would not amount to a *constitutional* violation. The proper remedy for any error in this regard would have been certiorari review.

proceedings concerning assessments for the costs of a drainage project, there is no parallel right to notice of proceedings to determine whether the project will be undertaken in the first place. For these reasons, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition in favor of the Commissioner.

YOUNG, C.J., and CAVANAGH, MARY BETH KELLY, ZAHRA, and MCCORMACK, JJ., concurred with MARKMAN, J.

VIVIANO, J., took no part in the decision of this case.

McPHERSON v McPHERSON

Docket No. 144666. Argued January 10, 2013. Decided April 11, 2013.

Ian McPherson brought an action in the Oakland Circuit Court against Christopher McPherson, Progressive Michigan Insurance Company, and others, seeking payment of personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*. Plaintiff developed a neurological disorder as a result of injuries sustained in a 2007 motor vehicle accident while he was a passenger in a vehicle driven by Christopher McPherson. Subsequently, in 2008, while driving a motorcycle, he experienced a seizure consistent with that disorder, lost control of the motorcycle, crashed into a parked car, and sustained a severe spinal cord injury that left him quadriplegic. Plaintiff claimed entitlement to no-fault benefits for the spinal cord injury, asserting that the 2008 spinal cord injury arose out of the 2007 accident for purposes of MCL 500.3105(1). Progressive moved for partial summary disposition. The court, Rae Lee Chabot, J., denied the motion. On leave granted, the Court of Appeals, METER and GLEICHER, JJ. (K. F. KELLY, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued January 10, 2012 (Docket No. 299618). Progressive applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 493 Mich 853 (2012).

In a memorandum opinion signed by Chief Justice YOUNG and Justices MARKMAN, MARY BETH KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

Under MCL 500.3105(1), a provider of personal protection insurance benefits is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. An injury arises out of the use of a motor vehicle as a motor vehicle when the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." Given that plaintiff's spinal cord was injured in the 2008 motorcycle crash, which was caused by his seizure, which was caused by his neurological disorder, which was caused by his use of a motor vehicle as a motor vehicle in 2007, the spinal cord injury was

simply too remote and too attenuated from the earlier use of a motor vehicle to permit a finding that the causal connection between the 2008 injury and the 2007 accident was more than incidental, fortuitous, or "but for." The facts alleged by plaintiff were insufficient to support a finding that the first injury caused the second injury in any direct way. Absent the intervening motorcycle accident, plaintiff's spinal cord injury would not have occurred as a direct result of the neurological disorder. The trial court erred by failing to grant summary disposition in favor of Progressive, and the Court of Appeals erred by affirming that decision.

Court of Appeals' judgment reversed; case remanded for entry of summary disposition in favor of Progressive.

Justice CAVANAGH, dissenting, would not have granted summary disposition in favor of Progressive. Because it is undisputed that Progressive is responsible for first party no-fault benefits related to the 2007 motor vehicle accident and plaintiff's physician attributed the symptoms that plaintiff experienced in 2008 to the disorder that arose out of the 2007 motor vehicle accident, plaintiff's fall during his 2008 seizure was not an intervening cause. Rather, it was an inextricable aspect of his seizure disorder, and any injuries sustained during the loss of consciousness and fall in 2008 arose out of the 2007 motor vehicle accident that caused the seizure disorder.

Justice VIVIANO took no part in the decision of this case.

Merrill H. Gordon for Ian McPherson.

Garan Lucow Miller, P.C. (by *James L. Borin*, *Daniel Saylor*, and *Robert D. Goldstein*), for Progressive Michigan Insurance Company.

MEMORANDUM OPINION. Plaintiff developed a neurological disorder as a result of injuries sustained in a 2007 motor vehicle accident. Subsequently, in 2008, while driving a motorcycle, he experienced a seizure consistent with that disorder, lost control of the motorcycle, crashed into a parked car, and sustained a severe spinal cord injury that left him quadriplegic. Plaintiff did not assert that he was entitled to no-fault benefits

for the spinal cord injury as a result of the *2008* crash.[1] Rather, he claimed that he was entitled to no-fault benefits for the spinal cord injury as a result of the *2007* accident, asserting that the spinal cord injury "ar[ose] out of" the 2007 accident for purposes of MCL 500.3105(1). Defendant Progressive Michigan Insurance Company moved unsuccessfully for partial summary disposition in the trial court, and the Court of Appeals affirmed on leave granted.[2] We ordered and heard oral argument on whether to grant Progressive's application for leave to appeal or take other peremptory action.[3]

Given that there is no dispute regarding the material facts and that the parties agree that the 2007 accident involved the use of a motor vehicle as a motor vehicle and that plaintiff is entitled to personal protection insurance (PIP) benefits from Progessive for all injuries "arising out of" that accident, including the neurological disorder, the only question here is whether the *spinal cord injury* plaintiff suffered in the 2008 crash "ar[ose] out of" the 2007 accident for purposes of MCL 500.3105(1).

Pursuant to MCL 500.3105(1), a PIP provider is liable "to pay benefits for accidental bodily injury

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[1] Plaintiff apparently anticipated that he could not recover no-fault benefits from the 2008 crash because a motorcycle is not a "motor vehicle" for purposes of the no-fault act, MCL 500.3101(2)(e), and none of the exceptions that allow recovery in an accident involving a parked motor vehicle seem applicable, see MCL 500.3106.

[2] *McPherson v McPherson*, unpublished opinion per curiam of the Court of Appeals, issued January 10, 2012 (Docket No. 299618). Progressive argued below that plaintiff could not recover first-party no-fault benefits because he had no insurance for his motorcycle. This was the basis for a Court of Appeals dissent. Progressive now concedes that there was, in fact, insurance for the motorcycle and has abandoned this argument.

[3] *McPherson v McPherson*, 493 Mich 853 (2012).

arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531 (2005), this Court explained this causal requirement:

> [A]n insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . ." It is not *any* bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle.
>
> Regarding the degree of causation between the injury and the use of the motor vehicle that must be shown, this Court has established that an injury arises out of the use of a motor vehicle as a motor vehicle when "the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Thornton v Allstate Ins Co*, 425 Mich 643, 659 (1986).

In this case, the causal connection between the 2008 spinal cord injury and the 2007 accident is insufficient to satisfy the "arising out of" requirement of MCL 500.3105(1).[4] Plaintiff did not injure his spinal cord while using the vehicle in 2007. Rather, he injured it in the 2008 motorcycle crash, which was caused by his seizure, which was caused by his neurological disorder, which was caused by his use of a motor vehicle as a

[4] Plaintiff's focus on the "causal genesis" of the injury is particularly misplaced. The question under *Thornton* is not whether the use of a motor vehicle constitutes the "causal genesis" of an injury, but whether the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." This not only requires that the motor vehicle be used "as a motor vehicle" in the incident that gives rise to the injury, but also that the accidental bodily injury "aris[e] out of" that vehicular use.

motor vehicle in 2007. Under these circumstances, we believe that the 2008 injury is simply too remote and too attenuated from the earlier use of a motor vehicle to permit a finding that the causal connection between the 2008 injury and the 2007 accident "is more than incidental, fortuitous, or 'but for.' " *Thornton*, 425 Mich at 659.[5]

We reject plaintiff's argument that *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578; 751 NW2d 51 (2008), is relevant to this case. The Court of Appeals held in *Scott* that summary disposition was premature because the plaintiff had raised a genuine issue of material fact whether her hyperlipidemia occurred as a direct result of an injury she had received in an automobile accident or was attributable to other factors. That is, the issue was whether the evidence was sufficient to support a finding that the first *injury* caused the second *injury* in a direct way. In this case, plaintiff claims as fact that his spinal cord injury occurred as a result of the neurological disorder from the first accident in combination with the intervening motorcycle accident. The facts alleged by plaintiff are insufficient to support a finding that the first injury caused the second injury in any direct way. Rather, the facts alleged by plaintiff only support a finding that the first *injury*

[5] The dissent erroneously focuses on the existence of a causal connection between the "seizure" and the "fall," rather than on the causal connection between the 2008 spinal cord injury and the 2007 accident. *Post* at 302 ("Because plaintiff's fall was an inextricable aspect of his seizure, I believe that plaintiff can satisfy MCL 500.3105(1)."). Although we agree with the dissent that for purposes of this appeal it is assumed as fact that plaintiff's second seizure and resultant fall came about as a result of the neurological disorder suffered in the first accident, it does not follow, as the dissent concludes, that "the 2008 *injuries* were an inextricable result of [plaintiff's] seizure disorder" as well. *Post* at 302 (emphasis added). Indeed, had plaintiff been in bed or on the couch when he had the seizure, the "inextricable" injury would not have occurred.

directly caused the second *accident*, which in turn caused the second injury. Thus, the second injury alleged by plaintiff is too attenuated from the first accident to permit a finding that the second injury was directly caused by the first accident. Though we are troubled by *Scott*'s use of a causal-connection standard this Court has never recognized—that "[a]lmost any causal connection will do," *id.* at 586—it is nonetheless clearly distinguishable from this case because plaintiff admits that, absent the intervening motorcycle accident, his spinal cord injury would not have occurred as a direct result of the neurological disorder.

Because plaintiff's spinal cord injury had only this limited causal connection to the use of a motor vehicle in 2007, the injury did not arise out of the use of a motor vehicle for purposes of MCL 500.3105(1). Accordingly, the trial court erred by failing to grant Progressive summary disposition on that basis, and the Court of Appeals erred by affirming that decision. In lieu of granting Progressive's application for leave to appeal, we reverse the judgment of the Court of Appeals and remand for entry of summary disposition in favor of Progressive.

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

CAVANAGH, J. (*dissenting*). I respectfully dissent because I believe that plaintiff is able to satisfy the requirement in MCL 500.3105(1) that his 2008 injuries "ar[ose] out of" his 2007 motor vehicle accident.

As the majority explains, there is no dispute that plaintiff's 2007 accident involved the use of a motor vehicle as a motor vehicle and that Progressive Michigan Insurance Company is statutorily obligated under

MCL 500.3105(1) to provide personal protection insurance (PIP) benefits for all injuries "arising out of" that accident, including plaintiff's seizure disorder.

This Court has explained that coverage under MCL 500.3105(1) is available "only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). Thus, the motor vehicle must be the "instrumentality" of the injury. *Id*. at 660.

Thornton's application is relatively straightforward when faced with an acute injury. For example, if an insured suffers a broken arm while involved in a motor vehicle accident, it is clear that the motor vehicle was the instrumentality of the broken arm because that injury occurred at the moment of the accident. Accordingly, the causal connection between the broken arm and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for."

Although slightly more difficult, applying *Thornton*'s logic to some chronic injuries is also fairly straightforward. For example, if an insured suffered a kidney injury in a motor vehicle accident and, after a period of time, required a kidney transplant because of the continuing deterioration of the kidney, it is clear that the need for the transplant, although separated from the accident by time, would nevertheless constitute a progression of the injury that occurred in the accident. Accordingly, the causal connection between the need for the kidney transplant and the use of the motor vehicle as a motor vehicle would be more than incidental, fortuitous, or "but for."

This case, however, presents a difficult issue because of the chronic, yet intermittent, nature of the injury that plaintiff suffered in the 2007 motor vehicle acci-

dent. Accordingly, in order to properly apply *Thornton* and MCL 500.3105(1), it is necessary to understand the nature of a seizure disorder.

According to his physician, shortly after the 2007 accident plaintiff suffered a grand mal seizure. The physician testified that "posttraumatic seizure can happen at any time. You can have head trauma today, you can have a seizure from posttrauma [sic] two days later, you can have it a year later, you can have it the rest of your life." According to the Mayo Clinic, grand mal seizures have two phases—tonic and clonic—that exhibit different symptoms. In the tonic phase, "[l]oss of consciousness occurs, and the muscles suddenly contract and *cause the person to fall down*." Mayo Clinic, Grand Mal Seizure <http://www.mayoclinic.com/health/grand-mal-seizure/DS00222/DSECTION'symptoms> (accessed April 2, 2013) (emphasis added). In the clonic phase, "[t]he muscles go into rhythmic contractions, alternately flexing and relaxing. Convulsions usually last for less than two minutes." *Id.*

Thus, a person with a seizure disorder may go long periods without exhibiting any signs of the disorder. However, even during those nonsymptomatic periods, the person nevertheless has a seizure disorder, and in plaintiff's case, the seizure disorder arose out of the use of a motor vehicle as a motor vehicle. Unlike an insured with a kidney injury whose condition consistently and predictably worsens over time, plaintiff's injury has resulted in sudden, unpredictable symptomatic episodes. And during those sudden symptomatic episodes, plaintiff's seizure disorder causes him to unexpectedly lose consciousness and muscle control and fall down.

As the majority's analysis demonstrates, the intermittent nature of plaintiff's seizure disorder lends itself to the conclusion that any subsequent injury is caused

by an intervening accident rather than the seizure disorder itself. Specifically, the majority focuses on the activity that plaintiff was engaged in when he suffered the 2008 seizure and concludes that the motorcycle accident was an intervening event that caused plaintiff's 2008 injury. However, once the nature of a seizure disorder is properly understood, I believe the majority's analysis is incorrect. Plaintiff's fall during his 2008 seizure was not an intervening cause; rather, it was an inextricable aspect of his seizure disorder, and any injuries sustained during the loss of consciousness and fall arose out of the motor vehicle accident that caused the seizure disorder. Simply put, loss of consciousness and falling down is part of a seizure. While I agree that the severity of the person's injuries may be exacerbated depending on what the person is doing at the time of a seizure, that does not change the fact that a seizure disorder caused the person to unexpectedly fall and suffer an injury. Stated differently, plaintiff's seizure disorder cannot be separated from his 2008 fall and attendant injuries in any meaningful way. Because plaintiff's fall was an inextricable aspect of his seizure, I believe that plaintiff can satisfy MCL 500.3105(1).

In summary, I think that the 2007 motor vehicle accident bore more than an incidental, fortuitous, or "but for" connection to plaintiff's 2008 injuries because plaintiff's 2008 injuries are directly related to the seizure disorder, i.e., the 2008 injuries were an inextricable result of his seizure disorder. Accordingly, I dissent from the majority's decision to grant summary disposition in favor of Progressive.

VIVIANO, J., took no part in the decision of this case.

WHITMAN v CITY OF BURTON

Docket No. 143475. Argued November 15, 2012 (Calendar No. 5). Decided May 1, 2013.

Bruce Whitman brought an action in the Genesee Circuit Court against the city of Burton and the mayor of the city, Charles Smiley, alleging that defendants had violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., when the mayor declined to reappoint plaintiff as police chief for the city in November 2007. Plaintiff alleged that he was not reappointed because, in early 2004, he had threatened to pursue criminal charges against the mayor if the city did not comply with a city ordinance and pay plaintiff for the unused sick, personal, and vacation leave time he had accumulated in 2003. Defendants maintained that plaintiff, along with other city administrators, had agreed to forgo any payout for accumulated leave in order to avoid a severe budgetary shortfall and that plaintiff was not reappointed because the mayor was dissatisfied with many aspects of plaintiff's performance as chief of police. A jury returned a verdict in favor of plaintiff. The court, Geoffrey L. Neithercut, J., entered a judgment consistent with the verdict and thereafter denied defendants' motion for judgment notwithstanding the verdict (JNOV) or a new trial. Defendants appealed. The Court of Appeals, O'CONNELL, P.J., and SAAD, J. (BECKERING, J., dissenting), reversed the circuit court's denial of defendants' motion for JNOV and remanded the case for further proceedings, concluding that plaintiff's claim was not actionable under the WPA because, in threatening to pursue criminal charges, plaintiff had acted to advance his own financial interests and not out of an altruistic motive of protecting the public. 293 Mich App 220 (2011). The Supreme Court granted leave to appeal. 491 Mich 913 (2012).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices CAVANAGH, MARKMAN, and ZAHRA, the Supreme Court *held*:

The WPA protects an employee against an employer's retaliatory employment actions when the employee is engaged in protected activity. To establish a prima facie case under the WPA, a plaintiff must show that (1) he or she was engaged in protected activity as

defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action. The statutory language does not address an employee's primary motivation, nor does it imply or suggest that any motivation must be proved as a prerequisite to bringing a claim. Therefore, there is no statutory basis for imposing a primary-motivation requirement, and judicial imposition of that requirement would violate the fundamental rule of statutory construction, which precludes judicial construction and interpretation when the statutory language is clear and unambiguous. In *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604 (1997), the Supreme Court considered an employee's primary motivation for pursuing a claim under the WPA and concluded that because the employee had not threatened to report her employer out of an altruistic motive of protecting the public, there was no causal connection between the employee's discharge and her protected activity. *Shallal*, however, did not hold that an employee's motivation is a factor in determining whether the employee engaged in protected activity. To the extent that *Shallal* has been interpreted as requiring a specific motive, any language to that effect is disavowed as dicta. In this case, plaintiff engaged in conduct protected under the WPA when he reported the mayor's violation of the local ordinance to the mayor himself, to a city administrator, and to the city attorney. To recover under the WPA, plaintiff therefore had to establish a causal connection between this protected conduct and the adverse employment decision by demonstrating that defendants took the adverse employment action because of plaintiff's protected activity. However, because the Court of Appeals did not address the issue of causation when it held that plaintiff's WPA claim failed as a matter of law, this question had to be resolved on remand for the purpose of determining whether the circuit court's denial of defendants' motion for JNOV was proper.

Reversed and remanded to the Court of Appeals for consideration of the remaining issues on appeal.

Justices MCCORMACK and VIVIANO took no part in the decision of this case.

MASTER AND SERVANT — LABOR RELATIONS — WHISTLEBLOWERS' PROTECTION ACT — PRIMA FACIE CASE.

To establish a prima facie case under the Whistleblowers' Protection Act, MCL 15.361 *et seq*., a plaintiff must show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action; a plaintiff's motivation is not relevant to the

> issue whether the plaintiff has engaged in protected activity, and proof of primary motivation is not a prerequisite to bringing a claim under the act.

Tom R. Pabst, *Michael A. Kowalko*, and *Jarrett M. Pabst* for plaintiff.

Plunkett Cooney (by *Ernest R. Bazzana*) for defendants.

Amici Curiae:

Peter M. Bade, Corporation Counsel, and *John Postulka*, Assistant Corporation Counsel, for the city of Flint.

Garan Lucow Miller, P.C. (by *Rosalind Rochkind*), for the Michigan Municipal League, the Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan.

Bogas, Koncius & Croson, PC (by *Charlotte Croson*), for the Michigan Association for Justice.

MARY BETH KELLY, J. This case involves the proper interpretation of the Whistleblowers' Protection Act (WPA),[1] which protects an employee against an employer's retaliatory employment actions, including discharge, when the employee is engaged in protected activity. Specifically, we address whether this Court's decision in *Shallal v Catholic Social Services of Wayne County*[2] requires an employee engaging in protected conduct to have, as his or her primary motivation for engaging in that conduct, a desire to inform the public on matters of public concern, rather than personal vindictiveness.

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[1] MCL 15.361 *et seq*.

[2] *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997).

Nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's *primary* motivation be a desire to inform the public of matters of public concern. Rather, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim. To the extent that *Shallal* has been interpreted to mandate those requirements, it is disavowed. Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to that Court for consideration of all remaining issues, including whether the causation element of MCL 15.362 has been met.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Bruce Whitman, was employed by defendant city of Burton as the chief of police from the time of his appointment in March 2002 until November 2007 when codefendant Charles Smiley, the mayor of Burton (the Mayor), declined to reappoint him. Whitman thereafter brought this action under the WPA, claiming that the Mayor's decision not to reappoint him was prompted by Whitman's repeated complaints to the Mayor and the city attorney that the refusal to pay Whitman's previously accumulated unused sick and personal leave time would violate a Burton ordinance.

Burton Ordinances 68-25C, § 8(I) (Ordinance 68C)[3] allows for unelected administrative officers, including

[3] It appears that Burton's ordinance numbering and policy regarding unused leave time have changed since the time of the trial of this case. Because those changes are not relevant to our analysis, this opinion refers to the ordinance numbering and language as it was introduced during trial.

Whitman, to be compensated for unused sick, personal, and vacation time on an annual basis.[4] Because of significant budgetary problems in March 2003, the Mayor and the city department heads made a "gentleman's agreement" to forgo payments of unused sick, personal, and vacation time as a budget-cutting measure, which was acknowledged in a memorandum dated March 18, 2003. Although the agreement was memorialized, the city officials did not amend or rescind the ordinance allowing compensation for the unused days. On March 20, 2003, Whitman sent a letter to the Mayor objecting to the austerity measures outlined in the March 18th memorandum.

Despite receiving notice that he would not receive compensation for the unused leave time, Whitman continued to accumulate unused vacation, personal, and sick days throughout 2003. In January 2004, Whitman undertook a series of actions to secure payment for his 2003 unused days, repeatedly asserting that the city was acting in violation of Ordinance 68C. Specifically, on January 9, 2004, Whitman sent a letter to the Mayor requesting payout for his 2003 unused days. In pertinent part, Whitman's letter stated, "To ignore issues specified in that ordinance would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur."

On January 12, 2004, Whitman attended a staff meeting and advised that he had spoken to the city attorney about the issue, and that refusing to pay

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[4] Ordinance 68C provided, in pertinent part:

> Administrative Officers may accumulate unused sick/personal days until a 90 day accumulation has been created. Vacation days and unused holidays may also be credited for purpose of the accumulation. At the option of any administrative officer, any unused sick and/or personal, and/or vacation days may be paid in January in the year after which they are accumulated.

employees for unused days was an ordinance violation that needed to be addressed. On January 15, 2004, Whitman wrote a letter to Dennis Lowthian, an administrative officer for the city who had been acting as a spokesperson for all of the administrators. In this letter, Whitman reiterated his concerns, stating, "I cannot allow them to violate the ordinance by 'forcing waivers' of ordinance given rights. I believe it is my job as a police officer to point the violation out and I will pursue it as far as it needs to go."

On January 23, 2004, Whitman once again wrote the city attorney, reasserting that the failure of the city to pay him for unused days was a violation of the ordinance. Whitman stated, "[T]his is a violation of the ordinance . . . . If I need to re address [sic] through the council I will, if you have any input on resolving this I would appreciate it or I will be forced to pursue this as a violation of the law and will address it as such." On January 29, 2004, the city relented and, on the advice of the city attorney that failure to pay Whitman would be in violation of Ordinance 68C, authorized payments for all unused days to Whitman and all other officers who had requested it.

It was this series of actions that Whitman claims served as the catalyst for the Mayor's decision not to reappoint him in 2007. According to Whitman, the Mayor's conduct after the city's authorization of payment for his unused vacation and sick days further substantiates the validity of his WPA claim. Whitman alleges that in a letter dated June 7, 2004, the Mayor stated that he was considering removing Whitman as police chief, specifically citing Whitman's actions in pursuing compensation for his unused vacation and sick days as a basis for the Mayor's claim that he could not trust Whitman. During a meeting that took place later that same day, Whitman claims that the

Mayor was very angry at him and yelled, "[Y]ou tried to put me in jail" over the Ordinance 68C issue. Whitman also claims that the Mayor angrily pointed his finger at him, stating, "I demand total allegiance to me from my administrators[.]" A coworker who was present during that meeting took handwritten notes that stated, "Mayor = No Trust — 68-C (vacation) — lack of communication[.]"

Following his reelection in 2007, the Mayor declined to reappoint Whitman. Shortly thereafter, the Mayor attended a meeting with members of the police department. Several officers in attendance at this meeting reported that the Mayor stated that he and Whitman "got off on the wrong foot" because of the Ordinance 68C issue and that Whitman's conduct relating to the ordinance got them off to a "bad start." There were also allegations by officers who stated that after the meeting, the Mayor had indicated that "it all goes back to" the Ordinance 68C issue, and that the Mayor had not been happy with Whitman since shortly after his appointment because of the Ordinance 68C issue.

Defendants deny that the Mayor's decision to appoint another police chief in 2007 was in any way related to Whitman's complaints about the Ordinance 68C violation, asserting that the decision was the result of the Mayor's dissatisfaction with Whitman's performance. Specifically, defendants claim there were numerous reasons for Smiley's decision not to reappoint Whitman, including Whitman's alleged inadequate discipline of officers who inappropriately stopped the Mayor after the Mayor visited a local bar, Whitman's alleged e-mailing of inappropriate messages using the city's computer, Whitman's alleged discrimination against a female officer, and Whitman's alleged forgery of a signature on a budget memo. Whitman, however, asserts that his personnel file demon-

strates that his performance as a police chief was good, that he had received numerous awards, and that there were never any disciplinary actions against him. Whitman further alleges that any performance issues cited by the Mayor were merely a pretext.[5]

Whitman thereafter brought this WPA action against both the city of Burton and the Mayor in his individual capacity. At trial, the jury found that Whitman had engaged in protected conduct and that his protected conduct made a difference in the Mayor's decision not to reappoint him as police chief. The jury awarded Whitman total damages in the amount of $232,500.00, and the circuit court subsequently entered a judgment in that amount. Defendants then moved for judgment notwithstanding the verdict (JNOV) or for a new trial, which the circuit court denied.

The Court of Appeals reversed in a split published opinion,[6] with the majority holding, as a matter of law, that Whitman's claim was not actionable under the WPA because, "in threatening to inform the city council or prosecute the mayor for a violation of Ordinance 68-C, plaintiff clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern."[7] On the basis of its belief that a "*critical inquiry*" in determining the validity of a claim under the WPA "is whether the employee acted in good faith and with 'a desire to inform the public on matters of public concern . . . ,' "[8] the Court of Appeals concluded that Whit-

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[5] See *Debano-Griffin v Lake Co*, 493 Mich 167, 176; 828 NW2d 634 (2013).

[6] *Whitman v City of Burton*, 293 Mich App 220; 810 NW2d 71 (2011).

[7] *Id*. at 228-229.

[8] *Id*. at 230, quoting *Shallal*, 455 Mich at 621 (emphasis added; citation and quotation marks omitted).

man had "acted entirely on his own behalf" such that "[u]nder these facts, no reasonable juror could conclude that plaintiff threatened to prosecute defendants 'out of an altruistic motive of protecting the public.' "[9]

Accordingly, the Court of Appeals reversed the circuit court's denial of defendants' motion for JNOV and remanded the case for further proceedings. The majority did not decide any of the remaining issues, including causation. This Court granted leave to appeal.[10]

II. STANDARD OF REVIEW

This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo.[11] 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.[12] To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself.[13] If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.[14] 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

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[9] *Whitman*, 293 Mich App at 231, quoting *Shallal*, 455 Mich at 622.

[10] We ordered the parties to brief "whether *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604 (1997), correctly held that the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, as opposed to personal vindictiveness." *Whitman v City of Burton*, 491 Mich 913 (2012).

[11] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011); *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 361; 802 NW2d 33 (2011).

[12] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[13] *Id*.

[14] *Id*.

nugatory.[15] Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.[16]

III. ANALYSIS

A. THE WPA

The WPA was first enacted by the Michigan Legislature in 1980 to "provide protection to employees who report a violation or suspected violation of state, local, or federal law . . . ."[17] The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations,[18] thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law.

The relevant portion of the WPA, MCL 15.362, provides as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

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[15] *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[16] *Sun Valley*, 460 Mich at 236.

[17] Preamble, 1980 PA 469.

[18] *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997).

To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action.[19] Additionally, MCL 15.362 makes plain that protected conduct does not include reports made by an employee that the employee knows are false, or reports given because the employee is requested to participate in an investigation by a public body.

Defendants argue that in order to assert an actionable claim under the WPA, an employee's primary motivation for engaging in protected conduct must be "a desire to inform the public on matters of public concern." However, MCL 15.362 does not address an employee's "primary motivation," nor does the statute's plain language suggest or imply that *any* motivation must be proved as a prerequisite for bringing a claim. Further, the WPA does not suggest or imply, let alone mandate, that an employee's protected conduct must be motivated by "a desire to inform the public on matters of public concern" as a prerequisite for bringing a claim. Therefore, we hold that, with regard to the question whether an employee has engaged in conduct protected by the act, there is no "primary motivation" or "desire to inform the public" requirement contained within the WPA. Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one. To do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous.[20]

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[19] *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998); *Shallal*, 455 Mich at 610.

[20] *Sun Valley*, 460 Mich at 236.

B. *SHALLAL*

In *Shallal*, this Court reviewed the requirements of the WPA in a case in which the plaintiff, Janette Shallal, attempted to use the WPA as an extortionate tool in order to frustrate her employer's decision to terminate her for poor performance and misconduct. Shallal was employed as an adoption department supervisor for Christian Social Services (CSS), a nonprofit social service agency that provided adoption services. During her employment, Thomas Quinn was appointed as president of the agency. Approximately one year after Quinn's appointment, Shallal learned of allegations that Quinn had been drinking on the job and misusing the agency's funds. While Shallal discussed these allegations with various coworkers, at no time did she report Quinn's violations to the board of directors or to any other responsible body.

Shallal's termination was precipitated by her inadequate response to a report of child abuse pertaining to an adoption that she had previously supervised, which ultimately resulted in catastrophic injuries to the child. Upon learning of the child's injuries, Shallal notified the Department of Social Services (DSS), which faulted both Shallal's poor performance and CSS's institutional practices. DSS did not, however, recommend Shallal's dismissal. Indeed, according to Shallal, similar errors did not result in the discharge of other employees. DSS officials then met with Quinn to discuss their findings, and Quinn subsequently addressed the matter with Shallal. Their discussion became heated, with "Shallal stat[ing] her intention to report Quinn's abuses of alcohol and agency funds if he failed to, in her words, 'straighten up.' "[21] Ultimately, Quinn made the decision

[21] *Shallal*, 455 Mich at 607-608.

to discharge Shallal, citing the DSS's findings as cause for her termination and accusing her of gross misconduct and negligence in supervising the adoption of the child.

Shallal thereafter brought suit claiming that these facts gave rise to a WPA claim, but the circuit court granted summary disposition in favor of CSS because Shallal had failed to show that she was "about to report" a violation.[22] The Court of Appeals affirmed on this basis, holding that there was no immediacy to Shallal's threatened reporting of Quinn given that those threats were conditioned on Quinn's continued misconduct.[23] This Court disagreed, concluding that Shallal had presented sufficient evidence to create a question of fact with regard to whether she was about to report a violation and, thus, whether she had engaged in protected activity. Because this Court concluded that Shallal's "express threat to the wrongdoer that she would report him if he did not straighten up, especially coupled with her other actions, was more than ample to conclude that reasonable minds could find that she was 'about to report' a suspected violation of the law to the DSS,"[24] it reversed that aspect of the lower courts' decisions.

However, despite ruling that Shallal had engaged in protected activity, this Court affirmed the grant of summary disposition to CSS on the alternative basis of causation. That is, this Court determined that Shallal was unable to set forth a prima facie case under the WPA because she "failed to establish a causal connection between her actions and her firing."[25] To support this holding, this Court observed that many courts have

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[22] MCL 15.362.

[23] *Shallal*, 455 Mich at 608-609.

[24] *Id*. at 621.

[25] *Id*.

held that an employee's bad faith will preclude recovery under a whistleblower statute. It then cited, among others, federal case *Wolcott v Champion International Corp*[26] for the proposition that "[t]he primary motivation of an employee pursuing a whistleblower claim 'must be a desire to inform the public on matters of public concern, and not personal vindictiveness.' "[27] This Court then explained:

> Where, however, an employee . . . keeps the matter quiet for more than a year, eventually revealing it not to the appropriate authorities or even to others for the purpose of preventing public injury, but rather for some other limited and private purpose, however laudable that purpose may appear to the employee, no such protection is afforded. [Otherwise] we would be discouraging disclosure and correction of unlawful or improper acts by encouraging employees to "go along" and then keep quiet reserving comment or disclosure until a time best suited to the advancement of their own interests.[28]

Determining that Shallal had "used her own situation to extort [CSS] not to fire her," this Court held that there was no causal connection between Shallal's firing and the protected activity when "no reasonable juror could conclude that [Shallal] threatened to report Quinn out of an altruistic motive of protecting the public."[29] Because Quinn's decision to fire Shallal preceded Shallal's threat to report him, and Shallal was aware that she was going to be fired before threatening to report Quinn, this Court concluded that Shallal "[could not] use the whistleblowers' act as a shield against being fired . . . ."[30]

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[26] *Wolcott v Champion Int'l Corp*, 691 F Supp 1052 (WD Mich, 1987).

[27] *Shallal*, 455 Mich at 621, quoting *Wolcott*, 691 F Supp at 1065.

[28] *Shallal*, 455 Mich at 621 (citation and quotation marks omitted; alteration in original).

[29] *Id*. at 622.

[30] *Id*.

C. THE COURT OF APPEALS' APPLICATION OF *SHALLAL*

In this case, despite the marked absence of any motivational element in the language of MCL 15.362, the Court of Appeals majority held that, "as a matter of law, plaintiff could not recover damages under the WPA" given that, in threatening to report the Mayor's violation of Ordinance 68C, "plaintiff clearly intended to advance his own financial interests" and "did not pursue the matter to inform the public on a matter of public concern."[31] In reaching this conclusion, the majority relied on *Shallal*, which the majority interpreted as holding that, "[i]n order to effectuate the purpose of the WPA . . . , when considering a retaliation claim under the act, *a critical inquiry* is whether the employee acted in good faith and with 'a desire to inform the public on matters of public concern . . . .' "[32] We disagree with the Court of Appeals' analysis because it is not supported by the statutory text of MCL 15.362 nor does it accurately characterize this Court's holding in *Shallal*.

As previously noted, in *Shallal*, this Court did consider generally a whistleblower's primary motivation for pursuing a claim under the WPA and, relying on federal caselaw that applied Michigan's WPA, we concluded that Shallal was precluded from using the WPA to insulate herself from termination "*where she knew she was going to be fired before threatening to report her supervisor*."[33] Therefore, it was because Shallal's prior knowledge of her impending termination incited her subsequent threat to report Quinn that this Court held that no reasonable juror could conclude that Shallal's

[31] *Whitman*, 293 Mich App at 228-229.

[32] *Id*. at 230, quoting *Shallal*, 455 Mich at 621 (emphasis added; citation and quotation marks omitted).

[33] *Shallal*, 455 Mich at 622 (emphasis added).

threat was causally connected to her firing. There is, however, nothing in the plain language of MCL 15.362 that supports a broader requirement that in order to establish a viable claim under the WPA, a plaintiff must proceed under the WPA "out of an altruistic motive of protecting the public."[34]

Defendants argue that the "altruistic motive" requirement articulated in the Court of Appeals opinion in this case is consistent with the WPA's underlying purpose of providing protection to the public. Yet the Court of Appeals relied on *Shallal* to judicially engraft onto MCL 15.362 the requirement that a plaintiff's motivation for engaging in protected activity be altruistic, i.e., to prevent injury to the public, and not self-serving, i.e., for the plaintiff's own personal gain. Indeed, the Court of Appeals majority's opinion is replete with references to Whitman's self-serving motivations, which, according to the Court of Appeals, rendered his WPA claim nonactionable.[35] However, this Court has explained that the WPA meets its objective of protecting the public

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[34] *Id*.

[35] For example, the Court of Appeals stated that Whitman could not recover damages under the WPA because his threat to report the Mayor was "clearly intended to advance his own financial interests" and that "when considering a retaliation claim under the act, a critical inquiry is whether the employee acted in good faith . . . ." *Whitman*, 293 Mich App at 228-229, 230. The Court of Appeals also stated that Whitman's claim is not actionable under the WPA because he was decidedly "acting . . . in the thoroughly personal and private interest of securing a monetary benefit in order to maintain his 'life style,' " Whitman's "complaint amounted to a private dispute over [his] entitlement to a monetary employment benefit," "plaintiff acted entirely on his own behalf," and "nowhere in the voluminous record is there any indication that good faith or the interests of society as a whole played any part in plaintiff's [threatened] decision to go to the authorities." *Id*. at 230-231 (citation and quotiation marks omitted; alteration in original).

> by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.[36]

Therefore, as long as a plaintiff demonstrates a causal connection between the protected activity and the adverse employment action, the plaintiff's subjective motivation for engaging in the protected activity in the first instance is not relevant to whether the plaintiff may recover under the act.

In sum, and contrary to the Court of Appeals majority's interpretation, *Shallal* does not hold that an employee's motivation is a factor in determining whether the employee was engaged in protected activity. Indeed, it bears repeating that having a specific primary motivation is neither a prerequisite for bringing a WPA claim nor a factor to be considered in determining whether a plaintiff had engaged in protected conduct. Accordingly, the statement in *Shallal* that "[t]he primary motivation of an employee pursuing a whistleblower claim 'must be a desire to inform the public on matters of public concern, and not personal vindictiveness,' "[37] and *Shallal*'s suggestion that the employee must act "out of an altruistic motive of protecting the public" are disavowed as dicta.

D. APPLICATION

In this case, it is undisputed that the Mayor decided to withhold payment of unused sick, personal, and vacation time in violation of Ordinance 68C, a decision

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[36] *Dolan*, 454 Mich at 378-379.

[37] *Shallal*, 455 Mich at 621-622, quoting *Wolcott*, 691 F Supp at 1065.

to which Whitman objected. It is also undisputed that Whitman reported the Mayor's violation of Ordinance 68C to the Mayor himself, city administrator Lowthian, and the city attorney, and that following Whitman's reporting of this violation, he was discharged. Finally, Whitman did not knowingly make a false report given that the evidence reveals that the Mayor did in fact violate Ordinance 68C, nor is there any indication that a public body requested that Whitman participate in an investigation. Accordingly, Whitman engaged in conduct protected under the WPA.

To recover under the WPA, Whitman must therefore establish a causal connection between this protected conduct and the adverse employment decision by demonstrating that his employer took adverse employment action *because of* his protected activity.[38] At trial, Whitman presented evidence that his reporting of the Ordinance 68C violation made a difference in the Mayor's decision not to reappoint him and the Mayor, in turn, presented evidence to the contrary. However, because the Court of Appeals did not address the issue of causation when it held that Whitman's WPA claim failed as a matter of law, this question must be resolved on remand for the purpose of determining whether the circuit court's denial of defendants' motion for JNOV was proper.

IV. CONCLUSION

We hold that the Court of Appeals majority erred in finding that as a "matter of law, plaintiff could not recover damages under the WPA" because he "did not pursue the matter to inform the public on a matter of public concern."[39] Our review of the WPA, in particular

[38] See *Debano-Griffin*, 493 Mich 167.

[39] *Whitman*, 293 Mich App at 228-229.

MCL 15.362, reveals that nothing in the statutory language addresses an employee's motivation for engaging in protected conduct, nor does any language mandate that the employee's primary motivation for pursuing a claim under the act be a desire to inform the public of matters of public concern. Accordingly, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and proof of any specific motivation is not a prerequisite to bringing a claim under the WPA. To the extent that *Shallal* has been interpreted to mandate a specific motive, any language to that effect is disavowed as dicta unrelated to the essential holding of the case regarding the causal connection between the protected activity and the adverse employment decision.

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of all remaining issues on which that court did not formally rule, including whether the causation element of MCL 15.362 has been met.[40]

YOUNG, C.J., and CAVANAGH, MARKMAN, and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

MCCORMACK and VIVIANO, JJ., took no part in the decision of this case.

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[40] The Court of Appeals shall consider the causation issue in light of this Court's recent decision in *Debano-Griffin*, 493 Mich 167.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition September 19, 2012:

PEOPLE v OSBORNE, No. 144737; Court of Appeals No. 307054. 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 September 19, 2012:

GRANGE INSURANCE COMPANY OF MICHIGAN v LAWRENCE, No. 145206; reported below: 296 Mich App 319. The parties shall include among the issues to be briefed (1) whether a person, and in particular the minor child of divorced parents, can have two domiciles for the purpose of determining coverage under MCL 500.3114(1) of the Michigan no-fault act; (2) whether, in answering the first issue, a court order determining the minor's custody has any effect; and (3) whether an insurance policy provision giving preclusive effect to a court-ordered custody arrangement is enforceable.

The Family Law and Probate and Estate Planning 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 Case Pending on Application for Leave to Appeal Entered September 19, 2012:

KENNEY v BOOKER, No. 145116; Court of Appeals No. 304900. 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 submit supplemental briefs within 42 days of the date of this order addressing (1) what standards should govern whether to grant habeas corpus relief; (2) whether a claim of insufficient evidence in the context of a parole hearing may provide a basis for habeas corpus relief; (3) whether evidence that a parolee "should have known" of the presence of an item is sufficient to establish possession of that item where possession of the item constitutes a violation of parole; and (4) what standard of review applies to factual decisions by the Parole Board. The parties should not submit mere restatements of their application papers.

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 September 19, 2012:

PEOPLE v IDRIS YOUNG, No. 143579; Court of Appeals No. 297858.

PEOPLE v SWEET, No. 144128; Court of Appeals No. 304598.

PEOPLE v SWEET, No. 144161; Court of Appeals No. 304599.

PEOPLE v LACEY, No. 144192; Court of Appeals No. 306072.

DEPARTMENT OF TRANSPORTATION v CBS OUTDOOR, INC, No. 144440; Court of Appeals No. 297016.

DETROIT INTERNATIONAL BRIDGE COMPANY v DEPARTMENT OF TRANSPORTATION, No. 144442; Court of Appeals No. 298276.

LUCIO v GREAT LAKES CASUALTY INSURANCE COMPANY, No. 144603; Court of Appeals No. 299786.

CONSTANTINO v CITIZENS INSURANCE COMPANY OF AMERICA, No. 144687; Court of Appeals No. 300961.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v PIONK, No. 144698; Court of Appeals No. 307258.

PEOPLE v KEVIN JONES, No. 144702; Court of Appeals No. 307309.

PEOPLE v LOCKETT and PEOPLE v TADARIUS JOHNSON, Nos. 144724 and 144725; reported below: 295 Mich App 165.

PEOPLE v TADARIUS JOHNSON, No. 144730; reported below: 295 Mich App 165.

PEOPLE v MCCLAIN, No. 144891; Court of Appeals No. 301040.

GOODENOW v PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, No. 144956; Court of Appeals No. 301553.

In re SASAK, No. 144981; Court of Appeals No. 301696.

Rehearing Denied September 19, 2012:

HOFFNER v LANCTOE, No. 142267. Reported at 492 Mich 450.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant rehearing.

Leave to Appeal Granted September 21, 2012:

HILLSDALE COUNTY SENIOR SERVICES CENTER, INC v HILLSDALE COUNTY, No. 144630; Court of Appeals No. 301607. The parties shall address (1) whether the Michigan Tax Tribunal has jurisdiction, pursuant to MCL 205.731, over the plaintiffs' claim for mandamus to enforce the terms of the August 2008 Hillsdale County millage that levied an additional 0.5 mill for funding the Hillsdale County Senior Services Center, Inc., and (2) whether a court has the constitutional authority to issue a writ of mandamus to compel a municipality to levy and spend taxes.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 21, 2012:

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (MATTISON V SOCIAL SECURITY COMMISSIONER), No. 144385. On order of the Court, the question certified by the United States District Court for the Western District of Michigan is considered. We direct the Clerk to schedule oral argument on whether to answer the question. MCR 7.305(B). The parties shall file supplemental briefs within 35 days of the date of this order addressing whether Michigan's afterborn heirs statute, MCL 700.2108, is determinative of the question. They should avoid submitting mere restatements of the arguments made in their briefs.

MCPHERSON V MCPHERSON, No. 144666; Court of Appeals No. 299618. 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 may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

MICHIGAN INSURANCE COMPANY V NATIONAL LIABILITY & FIRE INSURANCE COMPANY, Nos. 144771 and 144792; Court of Appeals No. 301980. We direct the Clerk to schedule oral argument on whether to grant the applications or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address (1) whether the resident of the foster care facility injured as a pedestrian in this case can be deemed a "family member" under the definition provided in the policy issued to the facility in this case; (2) if the resident was such a "ward," whether the policy coverage extended thereby established a priority for the payment of PIP benefits higher than the priority established by MCL 500.3115(1); and (3) whether the decision in *United States Fidelity & Guaranty Co v Citizens Ins Co*, 241 Mich App 83 (2000), was correctly decided. The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

SMITH V DEPARTMENT OF HUMAN SERVICES DIRECTOR, Nos. 145612, 145613, 145622, and 145623; reported below: 297 Mich App 148. The motions for immediate consideration and the motion to supplement record are granted. The motion to strike is denied. The applications for leave to appeal the June 26, 2012, judgment of the Court of Appeals are considered. We direct the Clerk to schedule oral argument on whether to grant the applications or take other action. At oral argument, the parties shall address (1) whether the defendant properly implemented the 60-month limitation on Family Independence Program cash assistance benefits without rulemaking under the Administrative Procedures Act (MCL 24.201 *et seq*.), and (2) whether the defendant had the authority to implement the 60-month limitation on Family Independence Program

cash assistance benefits and whether this limitation conflicts with any provisions of the Social Welfare Act (MCL 400.1 *et seq*.). The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

The motion for leave to file a brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 21, 2012:

GANSEN v PHILLIPS, No. 145431; Court of Appeals No. 304102.

In re GODBOLDO-HAKIM, No. 145666; Court of Appeals No. 308040.

INTERNATIONAL TRANSMISSION COMPANY v BEABER, INTERNATIONAL TRANSMISSION COMPANY v DIXON, INTERNATIONAL TRANSMISSION COMPANY v KUHN, INTERNATIONAL TRANSMISSION COMPANY v SLAY ESTATE, INTERNATIONAL TRANSMISSION COMPANY v ROGERS, INTERNATIONAL TRANSMISSION COMPANY v LEMKE, INTERNATIONAL TRANSMISSION COMPANY v SMITH, and INTERNATIONAL TRANSMISSION COMPANY v LIOGGHIO, Nos. 145808, 145809; 145810, 145811, 145812, 145813, 145814, and 145815; Court of Appeals Nos. 311949, 311988, 311989, 311990, 311991, 311992, 311993, and 311994.

Leave to Appeal Denied September 24, 2012:

PEOPLE v KEONDO TAYLOR, No. 143603; Court of Appeals No. 296915.

PEOPLE v VONHABSBURG-LOTHRINGEN, No. 144211; Court of Appeals No. 305566.

PEOPLE v ZAMORA, No. 144218; Court of Appeals No. 299238.

RUBY & ASSOCIATES v GEORGE W SMITH & COMPANY, PC, No. 144349; Court of Appeals No. 297266.

BLASER v DEVRIES, No. 144375; Court of Appeals No. 297555.

PREMIER CENTER OF CANTON v NORTH AMERICAN SPECIALTY INSURANCE COMPANY, No. 144394; Court of Appeals No. 297799.

PEOPLE v LIGON, No. 144402; Court of Appeals No. 303353.

PEOPLE v KEVIN ALLEN, No. 144428; Court of Appeals No. 305264.

COUNTRYWIDE HOME LOANS, INC v PEOPLES CHOICE HOME LOAN, INC, No. 144435; Court of Appeals No. 298399.

In re PAROLE OF GRIER, No. 144489; Court of Appeals No. 304908.

PEOPLE v CHRISTOPHER MOON, No. 144515; Court of Appeals No. 300357.

PEOPLE v WADE, No. 144557; Court of Appeals No. 305910.

PEOPLE v GRANAAS, No. 144609; Court of Appeals No. 299576.

PEOPLE v ECKFORD, No. 144618; Court of Appeals No. 306003.

PEOPLE v TATE, No. 144622; Court of Appeals No. 291123.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v DAVID SMITH, No. 144625; Court of Appeals No. 306869.

PEOPLE v ARCHIE THOMAS, No. 144635; Court of Appeals No. 305367.

PEOPLE v ZAVALETA, No. 144637; Court of Appeals No. 305722.

PEOPLE v BASSO, No. 144641; Court of Appeals No. 307298.

PEOPLE v MARQUIS TAYLOR, No. 144642; Court of Appeals No. 306169.

PEOPLE v ROCCA, No. 144648; Court of Appeals No. 305915.

PEOPLE v KETOLA, No. 144649; Court of Appeals No. 307205.

PEOPLE v SCROGGINS, No. 144697; Court of Appeals No. 307004.

PEOPLE v PAUL JOHNSON, No. 144718; Court of Appeals No. 300879.

PEOPLE v DAVID JOHNSON, No. 144723; Court of Appeals No. 305025.

PEOPLE v RHIMES, No. 144767; Court of Appeals No. 300966.

CAVANAGH, J., would grant leave to appeal to consider the constitutionality of MCL 786.27b.

PEOPLE v DON TURNER, No. 144777; Court of Appeals No. 299906.

PEOPLE v WINFIELD, No. 144789; Court of Appeals No. 306374.

PEOPLE v HARVEY FAIRLEY, No. 144812; Court of Appeals No. 307731.

PEOPLE v CASANAVE, No. 144824; Court of Appeals No. 307681.

PEOPLE v TIGHE, No. 144837; Court of Appeals No. 307839.

PEOPLE v LEE, No. 144879; Court of Appeals No. 305958.

PEOPLE v JIMMY COLE, No. 144882; Court of Appeals No. 307206.

PEOPLE v CLOIS BELL, No. 144884; Court of Appeals No. 305556.

PEOPLE v ROOSEVELT WILLIAMS, No. 144900; Court of Appeals No. 306246.

PEOPLE v LOVETT, No. 144905; Court of Appeals No. 300454.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v GRISHAM, No. 144910; Court of Appeals No. 306966.

PEOPLE v FREDERICK WILLIAMS, No. 144929; Court of Appeals No. 306136.

PEOPLE v JACK SMITH, No. 144992; Court of Appeals No. 307815.

CITY OF ROMULUS v WAYNE COUNTY, No. 144996; Court of Appeals No. 300844.

PEOPLE v DURHAM, No. 145015; Court of Appeals No. 302563.

PEOPLE v MARK JENNINGS, No. 145020; Court of Appeals No. 302403.

PEOPLE v JEROME WILSON, No. 145032; Court of Appeals No. 307862.

ARCHIE v CITIMORTGAGE, No. 145057; Court of Appeals No. 305596.

PEOPLE v TWIETMEYER, No. 145070; Court of Appeals No. 308294.

PEOPLE v ALFORD, No. 145085; Court of Appeals No. 308567.

PEOPLE v WATTS, No. 145086; Court of Appeals No. 301371.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v SHELBY, No. 145087; Court of Appeals No. 308521.

PEOPLE v MASLONKA, No. 145107; Court of Appeals No. 305058.

PEOPLE v SUDDUTH, No. 145115; Court of Appeals No. 307085.

PEOPLE v RICKS, No. 145128; Court of Appeals No. 301479.

PEOPLE v DARTON REESE, No. 145137; Court of Appeals No. 308049.

ARENAC PROPERTY I v ARENAC COUNTY TREASURER, No. 145141; Court of Appeals No. 303766.

PEOPLE v SOLOMON, No. 145143; Court of Appeals No. 308782.

PEOPLE v ERNEST GRAHAM, No. 145151; Court of Appeals No. 301389.

PEOPLE v MCCARN, No. 145162; Court of Appeals No. 308894.

PEOPLE v CHANDLER, No. 145163; Court of Appeals No. 308683.

PEOPLE v BROWNELL, No. 145166; Court of Appeals No. 308526.

PEOPLE v WALLACE, No. 145167; Court of Appeals No. 303036.

PEOPLE v CORRION, No. 145168; Court of Appeals No. 310054.

OLD REPUBLIC INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 145173; Court of Appeals No. 302384.
HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

RODENHISER v DUENAS, No. 145175; reported below: 296 Mich App 268.

PEOPLE v ROWLS, No. 145179; Court of Appeals No. 307555.

PEOPLE v HENDERSON, No. 145180; Court of Appeals No. 308414.

PEOPLE v CECIL MOON, No. 145183; Court of Appeals No. 308508.

PEOPLE v DREW CARTER, No. 145194; Court of Appeals No. 301191.

UTLEY v WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS, No. 145208; Court of Appeals No. 303572.

PEOPLE v RANDOLPH, No. 145211; Court of Appeals No. 309332.

PEOPLE v TALBERT, No. 145228; Court of Appeals No. 302807.

PEOPLE v DORSEY, Nos. 145248, 145249, 145250, and 145251; Court of Appeals Nos. 309116, 309117, 309118, and 309119.

PEOPLE v AMERSEY, No. 145258; Court of Appeals No. 306780.

KUTZ v KUTZ, No. 145262; Court of Appeals No. 300864.

PEOPLE v DUNCAN COLE, No. 145264; Court of Appeals No. 301638.

PEOPLE v RICHMOND COLE, No. 145265; Court of Appeals No. 303806.

PEOPLE v ANTHONY MITCHELL, No. 145267; Court of Appeals No. 308793.

PEOPLE v TODD BAKER, No. 145268; Court of Appeals No. 302784.

FIFTH THIRD BANK v DANOU TECHNICAL PARK, No. 145269; Court of Appeals No. 302884.

PEOPLE v DELEON, No. 145271; Court of Appeals No. 302761.

PEOPLE v KEVIN SPEARS, No. 145272; Court of Appeals No. 309630.

PEOPLE v VORE, No. 145277; Court of Appeals No. 302638.

PEOPLE v PAYNE, No. 145284; Court of Appeals No. 296638.

PEOPLE v CURRY-HOWARD, No. 145289; Court of Appeals No. 302882.

PEOPLE v DEQUARIUS STEWART, No. 145291; Court of Appeals No. 303780.

PEOPLE v BEARDEN, No. 145294; Court of Appeals No. 302140.

PEOPLE v HUNT, No. 145296; Court of Appeals No. 299560.

PEOPLE v RUNION, No. 145300; Court of Appeals No. 309273.

PEOPLE v JOE WILLIAMS, No. 145301; Court of Appeals No. 302410.

PEOPLE v GILLEN, No. 145307; Court of Appeals No. 304350.

PEOPLE v JAMISON, No. 145317; Court of Appeals No. 303882. CAVANAGH, J., would grant leave to appeal.

PEOPLE v CANADA, No. 145320; Court of Appeals No. 303476.

PEOPLE v GILES, No. 145321; Court of Appeals No. 302839.

PEOPLE v GLOVER, No. 145327; Court of Appeals No. 302412.

PEOPLE v HENDERSON, No. 145334; Court of Appeals No. 308415.

PEOPLE v MATTHEW BROWN, Nos. 145335, 145336, 145337, and 145338; Court of Appeals Nos. 308003, 308004, 308005, and 308006.

PEOPLE v SEXTON, No. 145353; Court of Appeals No. 309358.

PEOPLE v GAINES, No. 145359; Court of Appeals No. 299328.

PEOPLE v JAMES THOMAS WRIGHT, No. 145362; Court of Appeals No. 297192.

PUGH v CROWLEY, No. 145366; Court of Appeals No. 305315.

PEOPLE v SPREEMAN, No. 145376; Court of Appeals No. 308535.

TITAN INSURANCE COMPANY v STATE FARM MUTUAL AUTOMOBILE INSURANCE, No. 145377; reported below: 296 Mich App 75.

ZAHRA, J., did not participate because earlier in these proceedings he was on the Court of Appeals panel that addressed substantially the same issue presented here.

PEOPLE v WINSTON, No. 145382; Court of Appeals No. 308322.

PEOPLE v ELIE, No. 145389; Court of Appeals No. 299605.

PEOPLE v MCILVEENE, No. 145390; Court of Appeals No. 308901.

PEOPLE v LOUGHNER, No. 145399; Court of Appeals No. 308944.

PEOPLE v RONNIE OLIVER, No. 145400; Court of Appeals No. 309976.

PEOPLE v BYARS, No. 145429; Court of Appeals No. 308865.

PEOPLE v CHILDRESS, No. 145447; Court of Appeals No. 299592.

BEDFORD v ROGERS, No. 145469; Court of Appeals No. 299783.

PEOPLE v SWEET, No. 145476; Court of Appeals No. 307821.

PEOPLE v LOTZER, No. 145564; Court of Appeals No. 309394.

PEOPLE v NETTEKOVEN, No. 145566; Court of Appeals No. 309395.

MANZO v MANZO, No. 145648; Court of Appeals No. 307082.

Superintending Control Denied September 24, 2012:

GHANNAM v ATTORNEY GRIEVANCE COMMISSION, No. 145221.

HAMMONDS v ATTORNEY GRIEVANCE COMMISSION, No. 145273.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

CHAPMAN v ATTORNEY GRIEVANCE COMMISSION, No. 145309.

Reconsideration Denied September 24, 2012:

PEOPLE v DISNEY, No. 144105; Court of Appeals No. 302386. Leave to appeal denied at 491 Mich 941.

PEOPLE v CHILDS, No. 144169; Court of Appeals No. 297692. Summary disposition at 491 Mich 906.

PEOPLE v DON TOWNSEND, No. 144340; Court of Appeals No. 306278. Leave to appeal denied at 491 Mich 942.

PEOPLE v GILMORE, No. 144346; Court of Appeals No. 306437. Leave to appeal denied at 492 Mich 853.

PEOPLE v CRYSLER, No. 144662; Court of Appeals No. 307264. Leave to appeal denied at 491 Mich 943.

PEOPLE v KEAN, No. 144688; Court of Appeals No. 292312. Leave to appeal denied at 491 Mich 944.

Summary Disposition September 26, 2012:

WELLS FARGO BANK v CHERRYLAND MALL LIMITED PARTNERSHIP, No. 144578; reported below: 295 Mich App 99. 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, the Court of Appeals shall reconsider its decision in light of the Legislature's recent passage of the Nonrecourse Mortgage Loan Act, 2012 PA 67, MCL 445.1591 *et seq*., which retroactively prohibits a post closing solvency covenant from being used as a nonrecourse carveout or as a basis for any claim against a borrower, guarantor, or other surety on a nonrecourse loan. In all other respects, leave to appeal is denied. The motion to vacate is denied.

We do not retain jurisdiction.

FREMONT INSURANCE COMPANY v IZENBAARD, No. 144728; Court of Appeals No. 300825. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. Because the term "premises" is undefined in the insurance contract at issue in this case, reference to dictionary definitions is appropriate. Such definitions do not necessarily require a building to exist on a particular piece of land in order to fall under the common understanding of "premises," which is a term that generally must be interpreted in light of its surrounding context. See, e.g., *Random House Webster's College Dictionary* ("[A] tract of land *including* its buildings.") (emphasis added); Black's Law Dictionary (6th ed) ("Land with its appurtenances and structures thereon. Premises is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent on the circumstances in which used, and may mean a room, shop, building, or any definite area."). The Court of Appeals erred in concluding that the term "premises" as used in the insurance provision at issue in this case must be defined as property that has a building on it; nothing in the language or context of the insurance contract requires as much. We

remand this case to the Court of Appeals to address the additional issue raised, but not decided, below: whether the location of the accident was used "in connection with" the insured residence.

We do not retain jurisdiction.

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES V STATE OF MICHIGAN, No. 144850; Court of Appeals No. 304920. 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 KLAASEN, No. 144978; Court of Appeals No. 308300. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Livingston Circuit Court for reconsideration of the defendant's motion to withdraw his guilty plea in light of this Court's decision in *People v Cole*, 491 Mich 325 (2012).

We do not retain jurisdiction.

In re DUNCAN, No. 145240; Court of Appeals No. 306821. 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 reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the issue raised by the respondent but not addressed by that court during its initial review of this case.

We do not retain jurisdiction.

MARILYN KELLY, J., would deny leave to appeal.

Leave to Appeal Granted September 26, 2012:

PEOPLE V MUSSER, No. 145237; Court of Appeals No. 301765. The application for leave to appeal the February 21, 2012, judgment of the Court of Appeals is considered and it is granted, limited to the issues (1) whether statements in a recording of a police interview of a criminal defendant that vouch for the credibility of a witness, which would be inadmissible if stated by a trial witness, must be redacted from the recording before the jury views it; or (2) if the jury is allowed to see such a recording without redacting the vouching statements, what circumstances must be present and what, if any, protective measures must be in place.

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, and the Criminal Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 26, 2012:

ADDISON TOWNSHIP V BARNHART, No. 145144; Court of Appeals No. 301294. 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 erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls." The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

The motions for leave to file brief amicus curiae are granted. 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.

Leave to Appeal Denied September 26, 2012:

PEOPLE v HUNTER LONG, No. 144076; Court of Appeals No. 302411.

PEOPLE v SCHERRET, No. 144095; Court of Appeals No. 304315.

CITY OF DEARBORN v MATTISON, No. 144330; Court of Appeals No. 305565.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v DEVON SMITH, No. 144368; Court of Appeals No. 303624.

MARILYN KELLY, J., would grant leave to appeal.

PONTIAC SCHOOL DISTRICT v PONTIAC EDUCATION ASSOCIATION, No. 144629; reported below: 295 Mich App 147.

PEOPLE v TODD DOUGLAS, No. 144689; reported below: 295 Mich App 129.

COMMAND OFFICERS ASSOCIATION OF MICHIGAN v SHELBY TOWNSHIP, No. 144710; Court of Appeals No. 300999.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v CHARLES PERRY, No. 144809; Court of Appeals No. 306976.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the trial court for resentencing on the defendant's carjacking and armed robbery convictions.

YERGEAU v BLEICH, No. 144842; Court of Appeals No. 301400.

YERGEAU v BLEICH, No. 144844; Court of Appeals No. 301400.

MARBLE v CIVIL SERVICE COMMISSION, No. 144925; Court of Appeals No. 305853.

PEOPLE v KLAASEN, No. 144980; Court of Appeals No. 308301.

MARILYN KELLY, J., would remand this case for resentencing.

BABIARZ v LESLIE, No. 145119; Court of Appeals No. 301927.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

Leave to Appeal Before Decision by the Court of Appeals Denied September 26, 2012:

JOHN GUIDOBONO, II, REVOCABLE TRUST AGREEMENT v JONES, No. 144799; Court of Appeals No. 308855.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal before a decision by the Court of Appeals and would affirm the Livingston Circuit Court's order dismissing this case.

Leave to Appeal Denied September 28, 2012:

FIFTH THIRD MORTGAGE-MI, LLC v HANCE, No. 144319; Court of Appeals No. 294698. The motion to seal the record is granted. The Court finds that there is good cause to seal the record, consistent with the Oakland Circuit Court's September 27, 2006, protective order and the April 12, 2010, Court of Appeals order sealing the briefs and exhibits. There is no less restrictive means to adequately and effectively protect the specific interests asserted. See MCR 7.313(A), (D) and MCR 8.119(F)(1). The application for leave to appeal the September 29, 2011, judgment of the Court of Appeals is considered, and it is denied.

MARKMAN, J. (*concurring*). I join in this Court's order denying leave to appeal, but write separately to address the Court of Appeals majority's departure from the principles of resolving allegedly ambiguous contract provisions established in *Klapp v United Ins Group Agency, Inc*, 468 Mich 459 (2003). As this Court clarified in *Klapp*, " ' "[t]he law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation." ' " *Id.* at 470, quoting *Penzien v Dielectric Prod Engineering Co, Inc*, 374 Mich 444, 449 (1965). Only if ambiguity persists even *after* all other conventional means of contract interpretation have been applied, and all relevant extrinsic evidence considered, should the rule of *contra proferentem* (ambiguous contracts to be construed against the drafting party) be applied, as it was in this case. *Klapp*, 468 Mich at 474. Contrary to the analysis of the Court of Appeals majority, the rule of *contra proferentem* is a rule of last resort. The primary goal of contract interpretation is to honor the parties' intent, and the rule of *contra proferentem* does not further that goal; rather, it merely ascertains "the winner and the loser in connection with a contract whose meaning has eluded [the decision-maker] despite all efforts to apply conventional rules of interpretation." *Id.* at 474. That is, it is essentially a tiebreaker. However, a tie cannot be declared without first considering relevant extrinsic evidence. I concur with this Court's order because, although I believe that reasonable interpretations of the contract in dispute have been offered by both sides, in the end, I agree with the result reached by the Court of Appeals without finding the contract here to be ambiguous.

PEOPLE v YBARRA, No. 144620; Court of Appeals No. 301243.

ZAHRA, J. (*concurring*). I concur in this Court's order denying leave to appeal in this matter. I write separately to address defendant's argument that he should be allowed to create an evidentiary record to support his claim of ineffective assistance of counsel.

Following his jury conviction for armed robbery, defendant filed an appeal of right in the Court of Appeals and moved to remand for an evidentiary hearing on ineffective assistance of counsel. He appended to his motion a signed but unnotarized statement, asserting that his trial counsel had failed to inform him of the difference between the potential sentencing guidelines recommendation for his jury trial convictions on the three offenses charged and the more favorable sentencing guidelines recommendation if he had accepted the offer to plead guilty to only one offense. He claimed that if his trial counsel had so informed him, then he would have accepted the plea offer. The Court of Appeals denied the motion to remand "for failure to satisfy the requirements of MCR 7.211(C)(1)."[1]

The Court of Appeals subsequently issued an unpublished opinion per curiam, affirming defendant's convictions and sentences.[2] In addressing defendant's ineffective-assistance claim on the plea-agreement issue, the Court of Appeals recognized that a defense attorney's failure to inform a defendant of the sentencing consequences if the defendant is convicted at trial as opposed to those of accepting a guilty plea can be the basis of an ineffective-assistance-of-counsel claim.[3] However, the Court of Appeals rejected defendant's claim, stating that

> defense counsel was not ineffective as there is nothing in the record to show that defense counsel failed to inform [defendant] of the sentencing consequences. Because [defendant] has not established the factual predicate for his claim, he has not shown that trial counsel's performance fell below an objective standard of reasonableness.[4]

Defendant then sought leave to appeal in this Court.

MCR 7.211(C)(1) states that a motion to remand "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." An offer of proof is "[a] presentation of evidence for the record . . . ."[5] An affidavit is defined as "[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or

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[1] *People v Ybarra*, unpublished order of the Court of Appeals, entered July 12, 2011 (Docket No. 301243).

[2] *People v Ybarra*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2011 (Docket No. 301243).

[3] *Ybarra*, unpub op at 3, citing *People v McCauley*, 287 Mich App 158, 162 (2010).

[4] *Ybarra*, unpub op at 3 (citations omitted).

[5] Black's Law Dictionary (7th ed).

affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."[6]

Although titled an "affidavit," defendant's unnotarized statement fails to meet the procedural requirements of MCR 7.211(C)(1). That is, not being notarized or otherwise having been taken before a person having authority to administer an oath or affirmation, the document carries no more weight than a letter outlining defendant's complaints about his trial counsel. And as such, defendant failed to make a sufficient offer of proof of the evidence to be established at a hearing.

Because of defendant's failure to comply with the clear standards for obtaining an evidentiary hearing, the Court of Appeals correctly denied his motion for remand. Neither this issue nor defendant's remaining claims of error warrant relief, so I therefore concur in the denial of defendant's application for leave.

In re RUSSELL, No. 145716; Court of Appeals No. 303586.

PEOPLE V ARMIJO, No. 145897; Court of Appeals No. 308361.

Summary Disposition October 4, 2012:

PEOPLE V GIOGLIO, No. 145091; reported below: 296 Mich App 12. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the maximum sentences imposed by the Kalamazoo Circuit Court, and we remand this case to the trial court for resentencing. The court failed to recognize that it had discretion to set the maximum sentences under MCL 769.10. See *People v Bonilla-Machado*, 489 Mich 412 (2011); *People v Turski*, 436 Mich 878 (1990). In all other respects, leave to appeal is denied.

AQUILINA V FIFTH THIRD BANK, No. 145210; Court of Appeals No. 300712. 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 reasons stated in the Court of Appeals dissenting opinion, and we reinstate the September 29, 2010, order of the Ingham Circuit Court granting summary disposition to the defendant.

Leave to Appeal Granted October 4, 2012:

MALPASS V DEPARTMENT OF TREASURY, Nos. 144430, 144431, and 144432; reported below: 295 Mich App 263. We further order that this case be argued and submitted to the Court together with the cases of *Wheeler Estate v Department of Treasury* (Docket Nos. 145367, 145368, 145369, and 145370), at such future session of the Court as the cases are ready for submission.

The Taxation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determi-

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[6] Black's Law Dictionary (6th ed).

nation of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

WHEELER ESTATE v DEPARTMENT OF TREASURY, HUZELLA v DEPARTMENT OF TREASURY, WRIGHT v DEPARTMENT OF TREASURY, and WHEELER v DEPARTMENT OF TREASURY, Nos. 145367, 145368, 145369, and 145370; reporter below: 297 Mich App 411. We further order that these cases be argued and submitted to the Court together with the cases of *Malpass v Department of Treasury* (Docket Nos. 144430, 144431, and 144432), at such future session of the Court as the cases are ready for submission.

The Taxation Section of the State Bar of Michigan 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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 4, 2012:

LEFEVERS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 144781; Court of Appeals No. 298216. 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 tailgate on the plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for purposes of MCL 500.3106(1)(b), and, if so, whether the plaintiff's injury was "a direct result of physical contact with" the tailgate. The parties may file supplemental briefs within 35 days of the date of this order, but they should not submit mere restatements of their application papers.

MARILYN KELLY, J., would deny leave to appeal.

Leave to Appeal Denied October 4, 2012:

PEOPLE v WHATMAN, No. 142862; Court of Appeals No. 293732.

PEOPLE v J D ROBINSON, No. 144587; Court of Appeals No. 300060.

CAVANAGH, J., would grant leave to appeal.

In re ATTORNEY FEES OF ATCHINSON AND HARTMAN (PEOPLE v MERRIMAN), No. 144733; Court of Appeals No. 292281.

MORRIS v MORRIS, No. 144752; Court of Appeals No. 305208.

PEOPLE v STANLEY JONES, No. 144797; Court of Appeals No. 297690.

THOM v PALUSHAJ, No. 144840; Court of Appeals No. 301568.

PEOPLE v RYAN, No. 144870; reported below: 295 Mich App 388.

PEOPLE v ETCHIE, No. 144872; Court of Appeals No. 301497.

PEOPLE v MANN, No. 144880; Court of Appeals No. 307567.

GROSSE ILE TOWNSHIP v BRITTAIN, No. 144902; Court of Appeals No. 303792.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v CODY NELSON, No. 144909; Court of Appeals No. 301284.

CAVANAGH, J., would grant leave to appeal.

DUFFIELD v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 144916; Court of Appeals No. 305778.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v HARDGES, No. 144963; Court of Appeals No. 293334.

BRONSON METHODIST HOSPITAL v AUTO OWNERS INSURANCE COMPANY, No. 144967; Court of Appeals No. 300229.

US MOTORS v GENERAL MOTORS EUROPE, No. 145002; Court of Appeals No. 299901.

KOSS v AHEPA 371 II, INC, No. 145003; Court of Appeals No. 301203.

CHRYSLER FINANCIAL SERVICES AMERICAS, LLC v DEPARTMENT OF TREASURY, No. 145037; Court of Appeals No. 302299.

PEOPLE v CHEN, No. 145270; Court of Appeals No. 301153.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

Leave to Appeal Granted October 5, 2012:

In re BRADLEY ESTATE, No. 145055; reported below: 296 Mich App 31. The parties shall address whether the Court of Appeals erred by reversing the Kent Circuit Court's ruling that the petitioner's claim for civil contempt indemnification damages under MCL 600.1721 is barred by the government tort liability act, MCL 691.1401 *et seq*.

The motions for leave to file brief amicus curiae of the Michigan Sheriffs' Association, the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, the Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan are granted. 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.

MARILYN KELLY, J., would deny leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 5, 2012:

HOFFMAN v BARRETT, No. 144875; reported below: 295 Mich App 649. 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 plaintiff's complaint should have been dismissed with prejudice because her notice of intent did not comply with MCL 600.2912b(4). The parties may file supplemental briefs within

35 days of the date of this order, but they should not submit mere restatements of their application papers.

MARILYN KELLY, J., would deny leave to appeal.

Leave to Appeal Denied October 5, 2012:

PEOPLE v CRAIGHEAD, No. 144415; Court of Appeals No. 301465.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

TRIERWEILER v GROSS, No. 145758; Court of Appeals No. 308804.

Summary Disposition October 10, 2012:

PEOPLE v STANLEY DUNCAN and PEOPLE v VITA DUNCAN, Nos. 145974 and 145975; Court of Appeals Nos. 312637 and 312638. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand these cases to the Court of Appeals for consideration as on leave granted. We direct the Court of Appeals to expedite its consideration of these cases.

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.

Leave to Appeal Denied October 12, 2012:

In re PALACIOS, No. 145781; Court of Appeals No. 308447.

SIMON v SIMON, No. 145782; Court of Appeals No. 308528.

DAVIS v PARKER, No. 145917; Court of Appeals No. 312064.

Summary Disposition October 22, 2012:

PEOPLE v MULL, No. 145406; Court of Appeals No. 309452. 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 22, 2012:

HARDRICK v AUTO CLUB INSURANCE ASSOCIATION, No. 144421; reported below: 294 Mich App 214.

PEOPLE v ZOICA, No. 144540; Court of Appeals No. 305338.

PEOPLE v HAMIN DIXON, No. 144546; Court of Appeals No. 300575.

PEOPLE v GREER, No. 144551; Court of Appeals No. 305094.

PEOPLE v STALLWORTH, No. 144567; Court of Appeals No. 306898.

PEOPLE v PINDER, No. 144624; Court of Appeals No. 306098.

WALGREEN COMPANY v RDC ENTERPRISES, LLC, No. 144651; Court of Appeals No. 293608.

PEOPLE v DUFRESNE, No. 144653; Court of Appeals No. 305490.

PEOPLE v WINSLOW CHAPMAN, No. 144655; Court of Appeals No. 307263.

PEOPLE v MURRAY, No. 144663; Court of Appeals No. 306439.

PEOPLE v CURRIE, No. 144665; Court of Appeals No. 305882.

PEOPLE v PHILLIP TOWNSEND, No. 144761; Court of Appeals No. 303179.

PEOPLE v DOTSON, No. 144769; Court of Appeals No. 306233.

JACKSON v JACKSON, No. 144773; Court of Appeals No. 303916.

PEOPLE v CARL DIXON, No. 144780; Court of Appeals No. 307048.

PEOPLE v WHALEY, No. 144802; Court of Appeals No. 304732.

PEOPLE v HAROLD ROGERS, No. 144820; Court of Appeals No. 306248.

PEOPLE v LAMONT DIXON, No. 144839; Court of Appeals No. 308055.

PEOPLE v KEITH JACKSON, No. 144851; Court of Appeals No. 307648.

PEOPLE v BOYKIN, No. 144853; Court of Appeals No. 306990.

PEOPLE v SENSELY, No. 144921; Court of Appeals No. 306152.

PEOPLE v RICHARD SANDERS, No. 144937; Court of Appeals No. 308814.

PEOPLE v MONTGOMERY, No. 144948; Court of Appeals No. 308093.

PEOPLE v HARRIGER, No. 144991; Court of Appeals No. 308260.

PEOPLE v MENDOZA, No. 144998; Court of Appeals No. 308396.

PEOPLE v TUCKER, No. 144999; Court of Appeals No. 307491.

PEOPLE v BRIAN CARPENTER, No. 145061; Court of Appeals No. 302231. CAVANAGH, J., would grant leave to appeal.

PEOPLE v COFFIN, No. 145123; Court of Appeals No. 306350.

PEOPLE v ELLIS MILLS, No. 145124; Court of Appeals No. 307697.

PEOPLE v GANTT, No. 145129; Court of Appeals No. 306345.

PEOPLE v BURNETT, No. 145138; Court of Appeals No. 307956.

PEOPLE v TRENT CARR, No. 145149; Court of Appeals No. 307289.

PEOPLE v OVEGIAN, No. 145155; Court of Appeals No. 308355.

ANDERSON v THOMPSON, No. 145160; Court of Appeals No. 295317.

PEOPLE v PALMER, No. 145169; Court of Appeals No. 302265.

RAMSEY v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 145171; Court of Appeals No. 303794.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v TIMES, No. 145184; Court of Appeals No. 307295.

PEOPLE v BOWERS, No. 145185; Court of Appeals No. 301811.

PEOPLE v WISE, No. 145193; Court of Appeals No. 306507.

PEOPLE v CUNNINGHAM, No. 145195; Court of Appeals No. 306711.

PEOPLE v DOSENBERRY, No. 145198; Court of Appeals No. 309050.

PEOPLE v JOHN NORRIS, No. 145200; Court of Appeals No. 306732.

PEOPLE v KALVIN WASHINGTON, No. 145213; Court of Appeals No. 305303.

PEOPLE v KERR, No. 145215; Court of Appeals No. 308556.

PEOPLE v SHULIE JONES, No. 145223; Court of Appeals No. 305551.

PEOPLE v LONGACRE, No. 145232; Court of Appeals No. 308602.

PEOPLE v BERNARD MURPHY, No. 145233; Court of Appeals No. 305255.

PEOPLE v CARLSON, No. 145234; Court of Appeals No. 308583.

PEOPLE v WILLIAM BEDFORD BROWN, No. 145236; Court of Appeals No. 306543.

PEOPLE v HESLEY, No. 145238; Court of Appeals No. 305576.

PEOPLE v TREADWELL, No. 145246; Court of Appeals No. 306377.

PEOPLE v DAVID, No. 145281; Court of Appeals No. 308572.

PEOPLE v HURTADO-GARCIA, No. 145293; Court of Appeals No. 304490.

PEOPLE v FRIEDMAN, No. 145295; Court of Appeals No. 308903.

PEOPLE v JOHN MURPHY, No. 145297; Court of Appeals No. 307390.

CHAMBERLAIN v MESSER, No. 145302; Court of Appeals No. 307817.

PEOPLE v KEITH CARTER, No. 145303; Court of Appeals No. 306919.

PEOPLE v DUNIGAN, No. 145304; Court of Appeals No. 300441.

PEOPLE v ATCHISON, No. 145305; Court of Appeals No. 303721.

PEOPLE v TILLERY, No. 145306; Court of Appeals No. 305674.

BURGLER v SNOW, No. 145318; Court of Appeals No. 304073.

PEOPLE v FLORENCE, No. 145322; Court of Appeals No. 306400.

MISS DIG SYSTEM, INC v CITY OF AUBURN HILLS, No. 145323; Court of Appeals No. 303059.

PEOPLE v CHAUNCEY PHILLIPS, No. 145324; Court of Appeals No. 309241.

PEOPLE v BROWNING, No. 145326; Court of Appeals No. 306426.

PEOPLE v CLAUSELL, Nos. 145329, 145330, 145331, and 145332; Court of Appeals Nos. 309665, 309666, 309667, and 309668.

PEOPLE v ODOMS, No. 145344; Court of Appeals No. 308188.

PEOPLE v ANGELO PARKS, No. 145345; Court of Appeals No. 307550.

HERRY v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 145348; Court of Appeals No. 303120.

PEOPLE v ROBERT WALKER, No. 145355; Court of Appeals No. 304113.

PEOPLE v CHARLES SMITH, No. 145356; Court of Appeals No. 306914.

PEOPLE v WILCHER, No. 145357; Court of Appeals No. 301487.

PEOPLE v NICHOL, No. 145361; Court of Appeals No. 302400.

PEOPLE v MANOKU, No. 145378; Court of Appeals No. 308018.

PEOPLE v RAY, No. 145380; Court of Appeals No. 307495.

PEOPLE v BETTS, No. 145381; Court of Appeals No. 306629.

PEOPLE v RIVET, No. 145383; Court of Appeals No. 303531.

PEOPLE v RICHARDS, No. 145384; Court of Appeals No. 308617.

PEOPLE v DEVON BELL, No. 145402; Court of Appeals No. 295573.

PEOPLE v HALE, No. 145405; Court of Appeals No. 309189.

PEOPLE v KOWAL, No. 145408; Court of Appeals No. 306365.

LOWRY HOLDING COMPANY, INC v GEROCO TECH HOLDING CORP, No. 145411; Court of Appeals No. 303694.

HOME DEPOT USA, INC v STATE OF MICHIGAN, No. 145412; Court of Appeals No. 301341.

PEOPLE v COLSON, No. 145423; Court of Appeals No. 303545.

PEOPLE v AL-SHARA, No. 145427; Court of Appeals No. 303811.

PEOPLE v JUMAR ALEXANDER, No. 145430; Court of Appeals No. 302487.

MOONEY v ARENDS, No. 145440; Court of Appeals No. 302967.

PEOPLE v WILLIE WRIGHT, No. 145441; Court of Appeals No. 302146.

PEOPLE v CALVIN, No. 145443; Court of Appeals No. 303718.

PEOPLE v HESS, No. 145446; Court of Appeals No. 299753.

PEOPLE v KEINONEN, No. 145459; Court of Appeals No. 302102.

PEOPLE v REDMOND, No. 145461; Court of Appeals No. 309642.

In re WATERS DRAIN DRAINAGE DISTRICT, No. 145470; reported below: 296 Mich App 214.

PEOPLE v DUSSEAU, No. 145471; Court of Appeals No. 308979.

DEMEYER v SHEETS, No. 145479; Court of Appeals No. 303804.

PEOPLE v HOOD, No. 145483; Court of Appeals No. 302948.

PEOPLE v ANTHONY DAVIS, No. 145485; Court of Appeals No. 303716.

SIMPSON v JPMORGAN CHASE BANK, NA, No. 145493; Court of Appeals No. 302800.

DANIEL v PUBLIC STORAGE INCORPORATED, No. 145495; Court of Appeals No. 301563.

PEOPLE v MORTON, No. 145498; Court of Appeals No. 294823.

PEOPLE v ROSSELL, No. 145505; Court of Appeals No. 308039.

PEOPLE v INMAN, No. 145523; Court of Appeals No. 308143.

PEOPLE v BRIDGES, No. 145524; Court of Appeals No. 301911.

PEOPLE v COUSINS, No. 145525; Court of Appeals No. 310209.

PEOPLE v RICKY MOORE, No. 145526; Court of Appeals No. 299287.

PEOPLE v DEANDRAE MILLER, No. 145527; Court of Appeals No. 310064.

LASALLE BANK NATIONAL ASSOCIATION v MURRAY, No. 145541; Court of Appeals No. 305218.

PEOPLE v BROUGHTON, No. 145546; Court of Appeals No. 308288.

KINCAID v CITY OF FLINT, No. 145550; Court of Appeals No. 310221.

PEOPLE v WENDELL COOPER, No. 145571; Court of Appeals No. 304043.

SALLIE v FIFTH THIRD BANK, No. 145576; reported below: 297 Mich App 115.

VAN ELSLANDER v THOMAS SEBOLD & ASSOCIATES, INC, Nos. 145606 and 145644; reported below: 297 Mich App 204.

CAVANAGH, J., concurred in the denial of leave but would have reinstated the trial court's award of attorney fees and costs and brought an end to this protracted litigation.

VICTOR v ROSCOMMON COUNTY JUDGE, No. 145655; Court of Appeals No. 308891.

Superintending Control Denied October 22, 2012:

HOUSTON v ATTORNEY GRIEVANCE COMMISSION, No. 142994.

BALLARD v ATTORNEY GRIEVANCE COMMISSION, No. 145487.

Reconsideration Denied October 22, 2012:

PEOPLE v FARNEN, No. 144227; Court of Appeals No. 306121. Leave to appeal denied at 492 Mich 852.

GENTRY v WAYNE COUNTY DEPUTY SHERIFF, No. 144355; Court of Appeals No. 296580. Leave to appeal denied at 491 Mich 933.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v STARKS, No. 144433; Court of Appeals No. 304007. Leave to appeal denied at 492 Mich 853.

E T MACKENZIE CO v RBS CONSTRUCTION, INC, No. 144499; Court of Appeals No. 297406. Leave to appeal denied at 492 Mich 857.

PEOPLE v PENNY, No. 144541; Court of Appeals No. 307301. Leave to appeal denied at 492 Mich 865.

PEPPLER v PEPPLER AGENCY, INC, No. 144815; Court of Appeals No. 300194. Leave to appeal denied at 492 Mich 855.

LIVINGSTON v HUNTINGTON MORTGAGE, No. 144881; Court of Appeals No. 302075. Leave to appeal denied at 492 Mich 855.

PEOPLE v CHARLES BROWN, No. 144940; Court of Appeals No. 299459. Leave to appeal denied at 492 Mich 856.

GE MONEY BANK v HADDAD, No. 145010; Court of Appeals No. 306506. Leave to appeal denied at 492 Mich 857.

PEOPLE v WALTON, No. 145120; Court of Appeals No. 305956. Leave to appeal denied at 492 Mich 868.

Leave to Appeal Denied October 23, 2012:

PEOPLE v BRAME, No. 146004; Court of Appeals No. 311404.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would vacate that part of the Macomb Circuit Court's June 29, 2012, order addressing the prosecution's evidence offered under MRE 404(b)(2) and would remand this case to permit the trial court, at its discretion, to allow the prosecution to submit a proper notice of intent to introduce other acts evidence.

Summary Disposition October 24, 2012:

PEOPLE v DEDRICK MCCAULEY, No. 140422; reported below: 287 Mich App

158. By order of January 12, 2011, the application for leave to appeal the January 19, 2010, judgment of the Court of Appeals was held in abeyance pending the decision in *Lafler v Cooper*, cert gtd 562 US ___; 131 S Ct 856 (2011). On order of the Court, the case having been decided on March 21, 2012, 566 US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012), the application is again 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, we vacate the judgment of sentence of the Wayne Circuit Court, and we remand this case to the trial court for consideration of an appropriate remedy in light of *Lafler*. The trial court did not clearly err in concluding that defense counsel was ineffective, and if the defendant had been properly advised of the prosecutor's aiding and abetting theory, that there was a reasonable probability that the defendant would have accepted the prosecutor's plea offer. On remand, the prosecutor shall reoffer the plea proposal, and once this has occurred, the trial court may "exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Lafler*, 566 US at ___; 132 S Ct at 1389. In exercising that discretion, the trial court may consider the defendant's willingness to accept responsibility for his actions, and it may also consider any information concerning the crime that was discovered after the plea offer was made to fashion a remedy that does not require the prosecution to incur the expense of conducting a new trial. *Id.* at ___; 132 S Ct at 1389.

In re TD, No. 143624; reported below: 292 Mich App 678. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and dismiss this application as moot. Respondent was removed from the sex offender registry by order of the Washtenaw Circuit Court on September 14, 2011, and is no longer required to register under the amended Sex Offenders Registration Act, MCL 28.721 *et seq*. Accordingly, the issue whether it would be constitutional to compel his registration has been rendered moot.

BURRIS v KAM TRANSPORT, INC, No. 144386; Court of Appeals No. 303104. 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.

MARILYN KELLY, J., would deny leave to appeal.

TITAN INSURANCE COMPANY v AUTO-OWNERS INSURANCE COMPANY, No. 145007; Court of Appeals No. 302191. 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 *Titan Ins Co v Hyten*, 491 Mich 547 (2012).

PEOPLE v JEFFREY DAVIS, No. 145254; Court of Appeals No. 308922. 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 re MCCREE, No. 145895. The Judicial Tenure Commission has issued a decision and recommendation, to which the respondent, Honor-

able Wade H. McCree, 3d Circuit Court Judge, consents. It is accompanied by a settlement agreement, in which the respondent waived his rights, stipulated to findings of fact and conclusions of law, and consented to a sanction of public censure.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (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. Respondent is, and at all material times was, a judge of the 3rd Circuit Court in Detroit, Michigan.
>
> 2. As a judge, he is subject to all the duties and responsibilities imposed on judges by the Michigan Supreme Court, and he is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.
>
> 3. On Sunday, June 6, 2010, Respondent used his cell phone to make a digital image of himself after completing a half-marathon and captioned the photograph "2010 Dexter-Ann Arbor race. Fit in my 50's."
>
> 4. A copy of the digital image is attached to the last page of the Settlement Agreement.
>
> 5. Respondent showed the digital image to a number of people, including his family, police officers, and deputies who worked in or passed through his courtroom.

6. Corporal LaDawnn Malone, a 24-year veteran of the Wayne County Sheriff's Department, serves as a "floater," filling in where necessary at the Wayne County Circuit Court.

7. Corporal Malone received the digital image on her cell phone.

8. Respondent believes he sent the digital image to Corporal Malone either at her request or on his own after Corporal Malone and Respondent discussed the image, approximately a year after it was made, although he has no specific recollection of doing so.

9. If called as a witness, Corporal Malone would testify that she retained the digital image as inspiration to motivate her to improve her workouts and eating habits.

10. Corporal Malone's husband provided a copy of the digital image to Charlie LeDuff, a reporter for the Fox 2 television station.

11. On April 23, 2012, Mr. LeDuff interviewed Respondent in Respondent's chambers.

12. During the interview, Respondent conducted himself in a flippant manner and did not give the interview the seriousness he should have. As a result, he brought shame and obloquy to the judiciary. For example, when discussing the digital image of him he said, "'There is no shame in my game."

13. The interview, and the digital image, spread rapidly around the internet and became the subject of jokes and ridicule.

14. The same week, Respondent issued a statement which acknowledged, "Clearly, I made an extremely serious error in judgment. I am embarrassed and totally sorry."

We also adopt the commission's conclusion that these facts demonstrate, by a preponderance of the evidence, that respondent breached the standards of judicial conduct in the following ways:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

(b) 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;

(c) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(d) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

(e) A failure to willingly and freely accept restrictions on conduct, present due to constant public scrutiny, that might be viewed as burdensome on the ordinary citizen, Canon 2A;

(f) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and

(g) A lack of personal responsibility for his own behavior, contrary to MCR 9.205(A).

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings of fact and conclusions of law, we accept the recommendation of the commission and order that Honorable Wade H. McCree be publicly censured. This order stands as our public censure.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

Leave to Appeal Granted October 24, 2012:

PEOPLE v JOHNNY WILLIAMS, No. 144762; Court of Appeals No. 299484. On order of the Court, the application for leave to appeal the January 19, 2012, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether offense variable 19 (interference with the administration of justice) was correctly scored.

We further order the Wayne Circuit Court, in accordance with Administrative Order No. 2003-03, to determine whether the defendant is indigent and, if so, to appoint Neil J. Leithauser, 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 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.

PEOPLE v JEFFERY DOUGLAS, No. 145646; reported below: 296 Mich App 186. The parties shall include among the issues to be briefed (1) whether the Court of Appeals erred in concluding that the defendant was prejudiced by his attorney's failure to inform him of a mandatory minimum sentence if convicted of the charged offense where the trial court determined that the defendant refused plea offers because he claimed to be innocent; (2) whether the remedy for ineffective assistance of counsel may include re-offering a plea bargain to a lesser charge after the defendant has testified at a trial that he did not commit an offense; (3) under MRE 803A(3), what circumstances other than "fear" may excuse the failure of a child to report sexual abuse immediately; (4) whether a second corroborative statement concerning sexual abuse is admissible under MRE 803A where the statement includes a different allegation of sexual abuse than was provided in the declarant's first statement; and (5) whether a witness's testimony that a child's statement was "substantiated" constitutes improper vouching. The motion for bond is denied.

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 24, 2012:

PEOPLE v EBRAHIMI, No. 145101; Court of Appeals No. 305747.

PEOPLE v IVES, No. 145148; Court of Appeals No. 302625.

PEOPLE v EMORY, No. 145152; Court of Appeals No. 303824.

PEOPLE v BYNUM, No. 145191; Court of Appeals No. 304004.

CLIFTON v JOHNSON, No. 145401; Court of Appeals No. 310760.

PEOPLE v KLOOSTERMAN, No. 145439; reported below: 296 Mich App 636.

PEOPLE v BRANTLEY, No. 145456; reported below: 296 Mich App 546.

LEELANAU COUNTY SHERIFF v KIESSEL, No. 145691; reported below: 297 Mich App 285.

Rehearing Denied October 24, 2012:

ATKINS v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 140401. Reported at 492 Mich 707.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant rehearing.

Summary Disposition October 26, 2012:

CONVERSE v AUTO CLUB GROUP INSURANCE COMPANY, No. 142917; Court of Appeals No. 293303. By order of September 6, 2011, the application for leave to appeal the March 3, 2011, judgment of the Court of Appeals was held in abeyance pending the decision in *Joseph v ACIA* (Docket No. 142615). On order of the Court, the case having been decided on May 15, 2012, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200 (2012), the application is again considered and, 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. For the reasons stated in the Court of Appeals dissenting opinion, the Calhoun Circuit Court erred in dismissing plaintiff's Michigan Consumer Protection Act (MCPA) claims. MCL 445.911(7) of the MCPA provides, in pertinent part:

> An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date.

Because plaintiff brought this action within one year of the last payment, plaintiff's action was timely filed and thus plaintiff can seek to recover damages resulting from the methods, acts or practices violative of the MCPA based on conduct by defendant occurring from July 29, 1992, to March 28, 2001 (the effective date of MCL 445.904(3)). In all other respects, leave to appeal is denied.

MARILYN KELLY, J., would reverse the lower court's application of the one-year-back rule in MCL 500.3145(1) for the reasons set forth in her dissenting opinion in *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 223-226 (2012).

PEOPLE v CRABTREE, No. 145105; Court of Appeals No. 302583. In lieu of granting leave to appeal, we reverse that part of the Court of Appeals' judgment addressing the assessment of points for offense variable (OV) 1, MCL 777.31, and OV 2, MCL 777.32, we vacate the sentence of the Hillsdale Circuit Court, and we remand this case to the trial court for resentencing in light of the Court of Appeals' decision in *People v Ball*, 297 Mich App 121 (2012). In all other respects, leave to appeal is denied.

Order Remanding Case to the Judicial Tenure Commission Entered October 26, 2012:

In re MORROW, No. 145257. On order of the Court, the Judicial Tenure Commission having filed a decision and recommendation on the basis of an agreement between the commission and the respondent judge, we reject the recommendation on the ground that the proposed discipline is insufficient in light of the facts presented to the Court. The standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000), provide that misconduct on the bench is usually more serious than the same misconduct off the bench, that deliberate misconduct is more serious than spontaneous misconduct, that misconduct prejudicial to the actual administration of justice is more serious than conduct that is not, and that conduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy is more serious than conduct that merely delays such discovery. Here, respondent's actions occurred on the bench and, as found by the commission, were premeditated, constituted misconduct actually prejudicial to the administration of justice, and undermined the ability of the justice system to discover the truth of what occurred in a legal controversy.

We remand this matter to the Judicial Tenure Commission for further proceedings. The commission shall present either a new recommendation or a status report to this Court within 42 days of the date of this order.

We retain jurisdiction.

CAVANAGH and HATHAWAY, JJ., would enter an order of public censure as recommended by the Judicial Tenure Commission.

Leave to appeal Denied October 26, 2012:

PEOPLE v AMANDA BALL, No. 145668; reported below: 297 Mich App 121.

GRIFFIN v GRIFFIN, No. 145777; Court of Appeals No. 305889.

MILLER v MILLER, No. 145872; Court of Appeals No. 308215.

Summary Disposition October 31, 2012:

36TH DISTRICT COURT v MICHIGAN AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 25, LOCAL 917, No. 145147; reported below: 295 Mich App 502. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals' judgment that reversed the arbitrator's award of reinstatement and back pay for the grievants. The arbitrator and the Wayne Circuit Court correctly found that MCR 3.106(C) does not preclude relief where the collective bargaining agreement imposes a just cause standard for termination. In all other respects, leave to appeal is denied.

Leave to Appeal Granted October 31, 2012:

PEOPLE v SMITH-ANTHONY, No. 145371; reported below: 296 Mich App 413. The parties shall include among the issues to be briefed (1) whether the evidence was sufficient to prove beyond a reasonable doubt that the crime of larceny from the person, MCL 750.357, was committed within the "immediate area of control or immediate presence" of the loss prevention officer who witnessed the theft; (2) whether the 2004 amendment of the robbery statute, 2004 PA 128 (amending MCL 750.530), altered the definition of "presence" with respect to the larceny-from-the-person statute; and, if not (3) whether the common-law definition of the phrase "from the person" remains consistent with the common-law definition of "presence."

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.

PEOPLE v DAVID BURNS, No. 145604; Court of Appeals No. 304403. The parties shall include among the issues to be briefed (1) whether the trial court abused its discretion in admitting the complainant's out-of-court statements under the forfeiture-by-wrongdoing exception to the hearsay rule set out in MRE 804(b)(6) and (2) whether the Court of Appeals substituted its judgment for that of the trial court and, in doing so, invaded the fact-finding authority vested in the trial court.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 31, 2012:

PEOPLE v CRUZ-RIVERA, No. 144545; Court of Appeals No. 298786.

BRONSON METHODIST HOSPITAL v HOME-OWNERS INSURANCE COMPANY and BRONSON METHODIST HOSPITAL v AUTO-OWNERS INSURANCE COMPANY, Nos. 144858 and 144859; reported below: 295 Mich App 431.

PEOPLE v MALONE, No. 144946; Court of Appeals No. 300433.

WESTFIELD INSURANCE COMPANY v KEN'S SERVICE, No. 144966; reported below: 295 Mich App 610.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

PEOPLE v MAYEN, No. 145049; Court of Appeals No. 301505.

MARILYN KELLY, J., would grant leave to appeal.

GRIEVANCE AMINISTRATOR v PLANTS, No. 145103.

NICHOLSON v CITIZENS INSURANCE COMPANY OF AMERICA and WILLOWBROOK REHABILITATION SERVICES v LERNER, Nos. 145225 and 145226; Court of Appeals Nos. 300592 and 303885.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

SALEM SPRINGS, LLC v SALEM TOWNSHIP, No. 146002; Court of Appeals No. 312497.

Summary Disposition November 7, 2012:

PEOPLE v GRISSOM, No. 140147. Reported at 492 Mich 296. On July 31, 2012, the Court issued an opinion reversing the judgment of the Court of Appeals and remanding this case to the St. Clair Circuit Court for application of *People v Cress*, 468 Mich 678 (2003), while directing the circuit court to submit its determination to this Court within 60 days. *People v Grissom*, 492 Mich 296 (2012). On order of the Court, the circuit court's opinion and order granting the defendant's motion for a new trial having been received, we affirm the September 25, 2012 order of the St. Clair Circuit Court and we remand this case to that court for further proceedings. We do not retain jurisdiction.

YOUNG, C.J., concurred in the result because the circuit court did not abuse its discretion in granting the defendant's motion for a new trial, but continued to adhere to the analysis set forth in Justice ZAHRA's opinion in this case, *People v Grissom*, 492 Mich 296, 342 (2012) (ZAHRA, J., concurring in part and dissenting in party).

ZAHRA, J., joined the statement of YOUNG, C.J.

HARKINS v D'AGOSTINI, No. 145288; Court of Appeals No. 301576. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that portion of the Court of Appeals' decision relating to plaintiffs D'Agostini's and Small's (hereinafter plaintiffs) malpractice claims, and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. Plaintiffs lack standing to pursue legal malpractice claims predicated upon duties allegedly breached by defendants in representing plaintiffs' employer, the 48th District Court. See *Beaty v Hertzberg Golden, PC*, 456 Mich 247, 253 (1997). On remand, the circuit court shall grant defendants' motion for summary disposition to the extent plaintiffs' complaint is based on allegations relating to claims the 48th District Court could have brought and deny the motion for summary disposition to the extent

plaintiffs allege independent claims of legal malpractice. The application for leave to appeal as cross-appellants is considered, and it is denied. We do not retain jurisdiction.

CAVANAGH, J., did not participate due to a familial relationship with a member of a law firm involved in this matter.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

PEOPLE v BUCKNER, No. 145328; Court of Appeals No. 308946. 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 November 7, 2012:

WOODBURY v RES-CARE PREMIER, INC, No. 144721; reported below: 295 Mich App 232. The parties shall include among the issues to be briefed (1) whether the common law doctrines of de facto corporation, see, e.g., *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286 (1982), and corporation by estoppel, see, e.g., *Stott v Stott Realty Co*, 288 Mich 35, 48 (1939), survived enactment of the Nonprofit Corporation Act, MCL 450.2101 *et seq.*; (2) if so, whether plaintiff corporation, Center Woods, Inc., which was administratively dissolved in 1993 under § 922 of the Nonprofit Corporation Act, MCL 450.2922, but reinstated in 2009 under § 925, MCL 450.2925, continued to exist as a de facto corporation during the period of dissolution such that defendant Ruth Averill, a member and shareholder of the corporation, was required to provide notice to the corporation pursuant to its articles of agreement of the pending sale of her property; and (3) whether Averill is estopped to deny the existence of the corporation, see *Estey Mfg Co v Runnels*, 55 Mich 130 (1884); *Flueling v Goeringer*, 240 Mich 372 (1927).

Leave to Appeal Denied November 7, 2012:

PEOPLE v ALAN THOMPSON, No. 141956; Court of Appeals No. 292280.

PEOPLE v BEVERLEY, No. 142252; Court of Appeals No. 293279.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v ISADORE DEAN, No. 143152; Court of Appeals No. 296183.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the Court of Appeals for reconsideration in light of *People v Vaughn*, 491 Mich 642 (2012).

PEOPLE v ANDRE EDWARDS, No. 143502; Court of Appeals No. 294826.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the Court of Appeals for reconsideration in light of *People v Vaughn*, 491 Mich 642 (2012).

PEOPLE v CUMMINGS, No. 143805; Court of Appeals No. 297809.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the Court of Appeals for reconsideration in light of *People v Vaughn*, 491 Mich 642 (2012).

PEOPLE v REED, No. 144273; Court of Appeals No. 297053.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the trial court for reconsideration of the mandatory sentence of life without parole in light of *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012).

PEOPLE v PRYOR, No. 144593; Court of Appeals No. 300935.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the Court of Appeals for reconsideration in light of *People v Vaughn*, 491 Mich 642 (2012).

PEOPLE v VICTOR WILSON, No. 144595; Court of Appeals No. 296307.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

PEOPLE v TIMOTHY FIELDS, No. 144596; Court of Appeals No. 305415.

PEOPLE v HETTINGER, No. 144975; Court of Appeals No. 297237.

MIHALOVITS v SDW HOLDINGS CORPORATION, No. 145164; Court of Appeals No. 304186.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v RODNEY ROBINSON, No. 145190; Court of Appeals No. 306707.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

EASTBROOK HOMES, INC v DEPARTMENT OF TREASURY, No. 145192; reported below: 296 Mich App 336.

BAKER v AUTOMOBILE CLUB OF MICHIGAN, Nos. 145217 and 145217; Court of Appeals Nos. 295812 and 296340.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v SWANIGAN, No. 145260; Court of Appeals No. 303385.

PEOPLE v JOSHUA SPENCER, No. 145261; Court of Appeals No. 304422.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v HAMILTON, No. 145263; Court of Appeals No. 309304.

PEOPLE v ANTONIO RAMSEY, No. 145319; Court of Appeals No. 302569.

PEOPLE v THAYER, No. 145388; Court of Appeals No. 306676.

PEOPLE v LEVIGNE and PEOPLE v MCNEIGHT, Nos. 145759 and 145760; reported below: 297 Mich App 278.

MARILYN KELLY and ZAHRA, JJ., would grant leave to appeal.

Superintending Control Denied November 7, 2012:

ADAIR v COURT OF APPEALS, No. 145181.

MARILYN KELLY, J., would grant superintending control.

Summary Disposition November 9, 2012:

PEOPLE v HEYZA, No. 141031; Court of Appeals No. 296313. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court. On remand, the trial court shall verify that the judgment of sentence reflects the plea agreement that was entered into by the defendant and the prosecutor and shall conduct a hearing to determine the proper amount of restitution owed by the defendant. In all other respects, leave to appeal is denied.

MARILYN KELLY, J. (*dissenting*). Defendant suffers from mental illness and physical limitations, which include a chronic back problem that inhibits his ability to work. When he and his wife divorced, he was ordered to pay support for their child. He did not pay it and was charged with failure to pay support under MCL 750.165.

Before the matter came to trial, the judge, relying on *People v Adams*,[1] ruled that defendant was barred from presenting evidence showing his inability to pay support. In *Adams*, the Court of Appeals explicitly prohibited the use of evidence of a defendant's inability to pay court-ordered support in a felony nonsupport case. After the trial judge's ruling, defense counsel stated that defendant would accept the prosecutor's offer of a plea agreement. During the plea hearing, defendant told the judge, "I paid when I was able to pay, Judge. I'm disabled." Because defendant acknowledged that there was an order directing him to pay support with which he failed to comply, the court accepted his guilty plea.

Before sentencing, defendant moved to withdraw his plea. The court denied his motion and imposed a probationary sentence along with costs. The plea agreement indicated that if defendant paid 50 percent of the overdue support balance ($136,863.44) within two years, the charge would be reduced to attempted failure to pay child support. If he paid 80 percent of the amount due within two years, the charge would be reduced to a 93-day misdemeanor. If he paid all of the amount due, the case would be dismissed. The trial court commented that defendant's "hope of complying with any of those conditions is like slim, none and zero." The Court of Appeals denied defendant's application for leave to appeal.

In *People v Likine*, a bare majority of this Court held that a defendant charged with felony nonsupport may, on making the requisite evidentiary showing, establish impossibility to pay as a defense.[2] I dissented and would have held that the proper defense, one available in every other jurisdiction in the country, is inability to pay.[3] The majority disagreed but, in holding that impossibility to pay is a valid defense to felony nonsupport, implicitly overruled *Adams*, which had found that no defense existed.

At the time defendant entered his plea in this case, he was barred by *Adams* from raising any defense whatsoever. His conviction at trial was a certainty and a plea bargain was his only real alternative. This Court should not rule that defendant waived a defense not available to him at the time he pled guilty. In the interest of justice, this case should be remanded in light of *Likine* to allow defendant to withdraw his plea and go to trial so that he may raise an impossibility-to-pay defense.

CAVANAGH and HATHAWAY, JJ., joined the statement of MARILYN KELLY, J.

PEOPLE V VAUGHN MITCHELL, No. 144239; Court of Appeals No. 293284. In lieu of granting leave to appeal, we reverse part II and part (III)B of the Court of Appeals' opinion. The trial court did not err in denying defendant's motion to suppress his confession. "[U]nlike in [*Missouri v Seibert*, 542 US 600 (2004)], there is no concern here that police gave [defendant] *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat." *Bobby v Dixon*, 565 US ___; 132 S Ct 26, 31 (2011). In addition,

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[1] *People v Adams*, 262 Mich App 89 (2004).

[2] *People v Likine*, 492 Mich 367, 398 (2012).

[3] *Id*. at 420 (MARILYN KELLY, J., dissenting).

"*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth v Eagan*, 492 US 195, 198 (1989). Finally, an evidentiary hearing regarding Sergeant Firchau's testimony is unnecessary because (a) as the Court of Appeals recognized, breaks in the chain of custody go to the weight of the evidence, not to its admissibility; (b) the documentary evidence sufficiently establishes that Sergeant Firchau did retrieve the bullets from the medical examiner; and (c) admission of Sergeant Firchau's testimony at defendant's father's second trial that he was not at the autopsy would not make a different result probable on retrial. Given the eyewitness testimony and defendant's confession, there is no doubt that a second jury would find defendant guilty. The Court of Appeals having retained jurisdiction, we remand this case to that court for further proceedings not inconsistent with this order.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 9, 2012:

CHERRYLAND ELECTRIC COOPERATIVE v BLAIR TOWNSHIP, CHERRYLAND ELECTRIC COOPERATIVE v EAST BAY TOWNSHIP, and CHERRYLAND ELECTRIC COOPERATIVE v GARFIELD TOWNSHIP, Nos. 145340, 145341, and 145342; Court of Appeals Nos. 296829, 296830, and 296856. 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 these cases involve a mutual mistake of fact within the meaning of MCL 211.53a. They may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Before Decision by the Court of Appeals Denied November 9, 2012:

AFT MICHIGAN v STATE OF MICHIGAN and MICHIGAN EDUCATION ASSOCIATION v MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, Nos. 145961 and 145962; Court of Appeals Nos. 312260 and 312261.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant the application to bypass the Court of Appeals. MCR 7.302(B)(4) provides that, "in an appeal before decision by the Court of Appeals," an applicant for leave to appeal in this Court must show that

> (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 branch of state government is invalid[.]

Defendants, in my judgment, have made a substantial showing under both (a) and (b). First, the temporary restraining orders (TROs) issued by the trial court are likely to cause substantial harm in the form of multi-million-dollar losses to the school employee pension and healthcare funds. Defendants estimate that if the statute at issue here, 2012 PA 300, does not go into effect, the Michigan Public School Employees' Retirement System (MPSERS) will be underfunded by $200 million in the current fiscal year alone. Plaintiffs contend that allowing lower-court review to run its course will not result in a full year of delays and that defendants thus overstate the financial harm that will be caused by the TROs. But even assuming a more expeditious resolution, MPSERS will still be underfunded at a rate of more than $16 million a month. Second, it is clear that the TROs have effectively invalidated—albeit temporarily—a duly enacted statute of our Legislature. The trial court judge has unilaterally suspended the enforcement of the selection period prescribed by 2012 PA 300. Under both subrules (a) and (b) of MCR 7.302(B)(4), therefore, bypass review is appropriate. Indeed, it seems that MCR 7.302(B)(4) was promulgated precisely for the purpose of expediting review in cases like this one.

I also believe the trial court clearly erred in issuing the TROs. In determining whether to issue a TRO, a trial court should consider four factors: (1) whether the applicant will suffer irreparable harm if the TRO is not granted, (2) the likelihood that the applicant will prevail on the merits, (3) harm to the public interest if the TRO issues, and (4) whether the harm to the applicant in the absence of a TRO outweighs the harm to the opposing party if a TRO is granted. See *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 241 (2001).

There was really little danger of irreparable harm here. If 2012 PA 300 were allowed to go into effect, and then later invalidated, the appropriate remedy for those school employees who had made benefits elections under the statute would be to allow them to opt back out of the healthcare and pension elections they had made. This would be accomplished by restoring their previous benefits and refunding any applicable monies. The only harm to school employees would be financial and thus fully compensable. In fact, the trial court judge acknowledged that appropriate relief could be granted after the fact, noting that the courts could "let [2012 PA 300 go into effect] and fix it later."

Additionally, it is unlikely, in my view, that plaintiffs will prevail on the merits. For starters, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307 (2011) (quotation marks and citation omitted). The Legislature enacted 2012 PA 300 in response to constitutional challenges brought against 2010 PA 75, which had itself amended the Public School Employees Retirement Act, MCL 38.1301 *et seq*., to require all members of that retirement system to contribute up to 3 percent of their salaries to a trust fund for retiree healthcare. It appears that the Legislature took the

constitutional challenges to 2010 PA 75 to heart and was particularly determined to craft 2012 PA 300 in a way that would withstand constitutional scrutiny. I believe the Legislature has probably succeeded.

In *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642 (2005), we held that school employee retiree healthcare benefits are not guaranteed by contract and do not constitute an accrued benefit protected from impairment or diminution by the pension clause of the state constitution or the contract clauses in the state and federal constitutions. Additionally, unlike 2010 PA 75, 2012 PA 300 gives school employees the choice to either contribute 3 percent of their salaries to maintain entitlement to healthcare coverage as a retiree or opt out of the retirement healthcare coverage system.

Similarly, in regard to pensions, 2012 PA 300 gives school employees a choice among three options (1) pay a percentage of their salaries in order to continue receiving service credit at 1.5 percent per year, (2) decline to make the salary-percentage payment and accrue credit at the reduced rate of 1.25 percent a year, or (3) freeze their defined-benefit entitlement as of December 1, 2012, and thereafter participate in a defined-contribution system in which the employer matches contributions up to 4 percent of compensation. Under none of these scenarios do the school employees lose any of the pension benefits already accrued to them. Thus, the pension clause is not violated. "The deferred compensation protected as a contractual obligation by [Const 1963, art 9] § 24 [the pension clause] is the pension payments themselves *earned* by the retiree . . . ." *In re Advisory Opinion*, 490 Mich at 317 (quotation marks omitted; emphasis added).

I also do not see any constitutional infirmities in the implementation schedule set forth in 2012 PA 300. School employees originally had 52 days between the enactment of 2012 PA 300 and the October 26, 2012, deadline to make their decision as to which healthcare and pension options to select. As defendants have pointed out, other recently enacted retirement system reform legislation has utilized shorter windows of time without ill effect. Of course, given the unfortunate procedural developments in this case to date, new election deadlines will now have to be set should 2012 PA 300 ultimately go into effect.

In short, I believe that 2012 PA 300 will ultimately be found constitutional and that, at any rate, even if the statute is invalidated, no irreparable harm will occur to plaintiffs if the statute is allowed to go into effect in the meantime. Regarding the third and fourth TRO factors to be considered by the trial judge, I believe the public has a strong interest in ensuring that the statutes enacted by its elected Legislature are put into effect. The public also has an interest in avoiding massive MPSERS funding shortfalls. Finally, the potential harm to plaintiffs in the absence of the TROs here—if indeed there is any legally cognizable harm to them at all—does not outweigh the harm to defendants caused by the TROs.

Given all this, we should not allow a single trial court judge to unilaterally halt the implementation of a statute duly enacted by the Legislature (the democratic representatives of the *entire* state) and signed by the Governor on such questionable grounds. Judicial intervention in the affairs of the executive in a way that essentially forbids the

latter to exercise its executive power always "raises a question 'of considerable delicacy, as it requires one of the co-ordinate branches of the government to pass its judgment on the acts of another, and the presumption is that the executive department has the same desire to keep within constitutional limits as either of the other two.' " *Smith v Dep't of Human Servs Dir*, 491 Mich 898, 898 (2012) (MARKMAN, J., dissenting), quoting *Dullam v Willson*, 53 Mich 392, 397 (1884). When, as here, a lone judge has acted to frustrate both the executive and legislative branches and fails to present persuasive—let alone compelling—reasons for doing so, this Court should intervene to correct such overreaching.

For these reasons, I respectfully dissent.

Leave to Appeal Denied November 9, 2012:

ADER v DELTA COLLEGE BOARD OF TRUSTEES, No. 143621; Court of Appeals No. 290583. Leave to appeal granted at 490 Mich 1004. 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 February 1, 2012. The application for leave to appeal the July 14, 2011 judgment of the Court of Appeals is denied.

MARKMAN, J. (*dissenting*). I respectfully dissent from the denial of leave because I believe the 'standing' doctrine set forth in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) (*LSEA*), violates the constitutional separation of powers and should be overruled.

As a threshold matter, whether plaintiff's standing is determined under the rule of *LSEA* or the prior rule of *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), is dispositive of the resolution of this case. In this regard, it must be noted that both lower courts initially decided that plaintiff lacked standing under *Lee* and *Cleveland Cliffs*. Only after this Court remanded to the Court of Appeals for reconsideration in light of *LSEA* did the Court of Appeals reverse the trial court and conclude that plaintiff had standing under *LSEA*. Moreover, the parties themselves have both asserted that whether *LSEA* or *Cleveland Cliffs* governs is dispositive. The issue of which of these alternative doctrines governs standing in Michigan is squarely before this Court.

In *Lee*, this Court voted 6-1 to adopt the constitutionally based standing test articulated by the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560 (1992), which provides:

> "Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to

> merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [*Lee*, 464 Mich at 739, quoting *Lujan*, 504 US at 559-560.]

This Court then reaffirmed *Lee* in *Cleveland Cliffs*. However, in *LSEA*, this Court overruled the standing doctrine set forth in *Lee* and *Cleveland Cliffs* and established in its place a "limited, prudential doctrine" that uncoupled standing from its constitutional moorings, providing:

> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*LSEA*, 487 Mich at 372.]

Yet, as former Justice CORRIGAN pointed out in her dissent in *LSEA*, unlike the *Lujan* test, the *LSEA* test is "really no test at all[.]" *Id*. at 388 (CORRIGAN, J., dissenting). It is a "broad and amorphous principle that promises to be nearly impossible to apply in a society that operates under the rule of law." *Id*. at 417. The *LSEA* test provides standing not only where the Legislature has seen fit to confer standing, but also where it may be inferred that the Legislature intended to confer standing. However, the Legislature has no dispositive authority to confer standing because standing is constitutionally based within the separation of powers mandated by the Michigan Constitution.

The separation of powers is explicitly set forth in Const 1963, art 3, § 2, which provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Our Constitution further provides that the Legislature is to exercise the "legislative power" of the state, Const 1963, art 4, § 1, the Governor is to exercise the "executive power," Const 1963, art 5, § 1, and the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1. As we explained in *Cleveland Cliffs*, perhaps the most critical element of the "judicial power" has been its traditional requirement of a genuine "case or controversy" between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a particularized or personal injury. Absent such an injury, little stands in the way of the judicial branch becoming "intertwined in every matter of public debate." *Cleveland Cliffs*,

471 Mich at 615. Through this intertwining, the interests of the other branches of government would necessarily be implicated, particularly the interests of the executive branch in administering the law. That is, if the Legislature is permitted at its discretion to confer jurisdiction upon this Court, unconnected with any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the exclusive purview of the Governor and the executive branch. Unless there is an individual who has personally and particularly been injured by the administration of the laws, it is not the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable fashion. That role is left to the people through their right to petition the Governor, and through their right to vote. The judiciary of this state does not act as a superadministrator of the law.

Given the final authority of the judicial branch to accord meaning to the Constitution, the term "judicial power" cannot ultimately be defined by the Legislature any more than "unreasonable searches and seizures" or the "equal protection of the laws" can ultimately be defined by the Legislature. That a broadening and redefinition of the "judicial power" comes in this case, as in *Cleveland Cliffs*, not from the judiciary itself, usurping a power that does not belong to it, but from the Legislature purporting to confer new powers upon the judiciary, the exercise of such power is no less improper. In either case, the separation of powers prevents the reallocation of executive power to the judiciary.

Because I believe that 'standing' is perhaps the most vital doctrine in limiting the "judicial power" to its proper purview, and because whether the rule of *LSEA* or that of *Lee* and *Cleveland Cliffs* is applied in this case is dispositive of its resolution, I would overrule *LSEA*, reverse the Court of Appeals' decision on remand, and reinstate the Court of Appeals' initial decision.

Summary Disposition November 15, 2012:

MAYOR OF THE CITY OF CADILLAC v BLACKBURN, No. 146104; Court of Appeals No. 312803. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and remand this case to the Court of Appeals, which shall review the application for leave to appeal and decide whether to grant, deny, or order other relief in accordance with MCR 7.205(D)(2). The Court of Appeals has jurisdiction over the petitioner's application for leave to appeal pursuant to Const 1963, art 6, § 10, MCL 600.308(2)(e), and MCR 7.203(B)(1).

The motion to stay is granted, and the proceedings in the Wexford Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Summary Disposition November 20, 2012:

PEOPLE v MANNERS, No. 142997; Court of Appeals No. 294585. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. On remand, the trial court shall amend the May 31, 2011, judgment of sentence to remove all references to the defendant being sentenced as an habitual third offender. In all other respects, leave to appeal is denied.

PEOPLE v RACE, No. 145587; Court of Appeals No. 310210. 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.

NICHOLS v HOWMET CORPORATION, No. 145829; Court of Appeals No. 303783. 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 November 20, 2012:

PEOPLE v WATKINS, No. 142110; Court of Appeals No. 291520.

PEOPLE v NIEMIEC and *In re* NIEMIEC, Nos. 142431 and 142432; Court of Appeals Nos. 298514 and 298689.

PEOPLE v ANTHONY HOWARD, No. 142492; Court of Appeals No. 300585.

PEOPLE v DEMARCUS YOUNG, No. 143993; Court of Appeals No. 296725.

PEOPLE v PEIKERT, No. 144247; Court of Appeals No. 298999.

LI v KOEHLER, No. 144751; Court of Appeals No. 302244.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

PEOPLE v TRACY BARNES, No. 144758; Court of Appeals No. 304011.

HATHAWAY, J., did not participate. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v WILBURN, No. 144994; Court of Appeals No. 307971.

PEOPLE v ROACH, No. 145017; Court of Appeals No. 308287.

PEOPLE v PILLETTE, No. 145021; Court of Appeals No. 308680.

PEOPLE v CULBERSON, No. 145022; Court of Appeals No. 307662.

PEOPLE v BOYETT, No. 145069; Court of Appeals No. 303075.

PEOPLE v HEISLER, No. 145073; Court of Appeals No. 308845.

PEOPLE v REYNOLDS, No. 145150; Court of Appeals No. 303359.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v HARRINGTON, No. 145159; Court of Appeals No. 306364.

PEOPLE v BELCHER, No. 145161; Court of Appeals No. 308796.

PEOPLE v WYLIE, No. 145170; Court of Appeals No. 307642.

PEOPLE v COOK, No. 145247; Court of Appeals No. 306447.

PEOPLE v REGINALD JOHNSON, No. 145255; Court of Appeals No. 307473.

PEOPLE v MCFERRIN, No. 145280; Court of Appeals No. 307170.

PEOPLE v STEVEN TAYLOR, Nos. 145282 and 145283; Court of Appeals Nos. 306541 and 308690.

PEOPLE v CHINN, No. 145298; Court of Appeals No. 306485.

PEOPLE v LAROCK, No. 145308; Court of Appeals No. 306760.

PEOPLE v QUINN, No. 145343; Court of Appeals No. 307275.

PEOPLE v GUERRA, No. 145347; Court of Appeals No. 307999.

PEOPLE v GOODMAN, No. 145350; Court of Appeals No. 306096.

PEOPLE v RIDDLE-BEY, No. 145352; Court of Appeals No. 307834.

PEOPLE v WELLMAN, No. 145354; Court of Appeals No. 306861.

PEOPLE v JEFFREY HOLMES, No. 145358; Court of Appeals No. 307475.

MUSHOVIC v BLOOMFIELD HILLS SCHOOL DISTRICT and FELLIN v BLOOMFIELD HILLS SCHOOL DISTRICT, Nos. 145364 and 145365; Court of Appeals Nos. 303372 and 303374.

PEOPLE v EBY, No. 145372; Court of Appeals No. 303784.

PEOPLE v MIDDS, No. 145373; Court of Appeals No. 307800.

PEOPLE v JUNKER, No. 145379; Court of Appeals No. 309846.

PEOPLE v MICHAEL PORTER, No. 145385; Court of Appeals No. 304168.

PEOPLE v BATES, No. 145391; Court of Appeals No. 307329.

PEOPLE v RASHOD BROWN, No. 145392; Court of Appeals No. 303099.

PEOPLE v PHILIP NORRIS, No. 145393; Court of Appeals No. 307276.

PEOPLE v WESLEY NEAL, No. 145394; Court of Appeals No. 307181.

PEOPLE v FLEMMING, No. 145397; Court of Appeals No. 309586.

PEOPLE v ODOM, No. 145398; Court of Appeals No. 306171.

PEOPLE v BLACKSHERE, No. 145403; Court of Appeals No. 307703.

PEOPLE v BUSS, No. 145407; Court of Appeals No. 307688.

PEOPLE v WARD, No. 145413; Court of Appeals No. 309823.

PEOPLE v DIONTAE NEAL, No. 145419; Court of Appeals No. 307799.

PEOPLE v MOSS, No. 145420; Court of Appeals No. 307954.

PEOPLE v BUGGS, No. 145421; Court of Appeals No. 306102.

PEOPLE v FRISBY, No. 145424; Court of Appeals No. 308821.

PEOPLE v VANZANT, No. 145428; Court of Appeals No. 305631.

PEOPLE v TERRY MCDONALD, No. 145432; Court of Appeals No. 307670.

PEOPLE v SELLERS, No. 145444; Court of Appeals No. 309371.

GRIEVANCE ADMINISTRATOR v LYGIZOS, No. 145448.

PEOPLE v WILKINSON, No. 145449; Court of Appeals No. 309064.

PEOPLE v PLAMONDON, No. 145450; Court of Appeals No. 310105.

PEOPLE v BRYANT, No. 145451; Court of Appeals No. 308054.

PEOPLE v MCCOWAN, No. 145452; Court of Appeals No. 306203.

PEOPLE v CARLOS LEWIS, No. 145454; Court of Appeals No. 307273.

PEOPLE v ALISON MARTIN, No. 145455; Court of Appeals No. 302071.

PEOPLE v GATISS, No. 145457; Court of Appeals No. 307243.

PEOPLE v CAUSLEY, No. 145462; Court of Appeals No. 309871.

PEOPLE v DONALD GRAHAM, No. 145463; Court of Appeals No. 308173.

PEOPLE v BARTULIO, No. 145464; Court of Appeals No. 303284.

PEOPLE v WILLIE FIELDS, No. 145465; Court of Appeals No. 309220.

PEOPLE v HOARD, No. 145466; Court of Appeals No. 303820.

PEOPLE v SHANNON THOMAS, No. 145467; Court of Appeals No. 309175.

PEOPLE v RIOS, No. 145468; Court of Appeals No. 296158.

PEOPLE v OTTO HARRIS, Nos. 145473 and 145474; Court of Appeals Nos. 304335 and 304336.

PEOPLE v ADAM, No. 145475; Court of Appeals No. 307427.

PEOPLE v DAVID JONES, No. 145478; Court of Appeals No. 306988.

PEOPLE v BERNARD ALLEN, No. 145480; Court of Appeals No. 307330.

PEOPLE v THATCHER, No. 145481; Court of Appeals No. 308430.

PEOPLE v CRUMP, No. 145486; Court of Appeals No. 309364.

PEOPLE v ANKNEY, No. 145488; Court of Appeals No. 309109.

MARILYN KELLY, J., would grant leave to appeal for the reasons set forth in her dissenting statement in *People v Luckett*, 485 Mich 1076, 1078 (2010).

PEOPLE v CHILDRESS, No. 145489; Court of Appeals No. 307933.

PEOPLE v NEFF, No. 145492; Court of Appeals No. 301435.

PEOPLE v JETT, No. 145494; Court of Appeals No. 308439.

PEOPLE v HUBEL, No. 145496; Court of Appeals No. 302794.

PEOPLE v MCCANTS, No. 145499; Court of Appeals No. 303454.

PEOPLE v VILLARD BOGARD, No. 145501; Court of Appeals No. 309044.

PEOPLE v WOODS, No. 145502; Court of Appeals No. 309012.

PEOPLE v BURR, No. 145504; Court of Appeals No. 309065.

PEOPLE v HANSEN, Nos. 145506 and 145507; Court of Appeals Nos. 300603 and 300616.

PEOPLE v GONZALES, No. 145508; Court of Appeals No. 308431.

PEOPLE v MUHAMMAD, No. 145509; Court of Appeals No. 301994.

PEOPLE v BULLOCK, No. 145511; Court of Appeals No. 307053.

CITY OF SOUTHFIELD v RHODES, No. 145512; Court of Appeals No. 310494.

PEOPLE v HOWELL, No. 145513; Court of Appeals No. 307259.

PEOPLE v RODERICK SPEARS, No. 145516; Court of Appeals No. 309966.

PEOPLE v FOSTER, No. 145517; Court of Appeals No. 305874.

PEOPLE v DEBERRY, No. 145518; Court of Appeals No. 308087.

MCCLINTON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 145529; Court of Appeals No. 308741.

PEOPLE v WILLIE JONES, No. 145533; Court of Appeals No. 307594.

PEOPLE v SUTTON, No. 145534; Court of Appeals No. 304035.

PEOPLE v MCKENZIE, No. 145535; Court of Appeals No. 308208.

SHARMA v ASCENSION HEALTH, INC, No. 145540; Court of Appeals No. 303913.

ZUNICH v MIDMICHIGAN MEDICAL CENTER-MIDLAND and ZUNICH v FAMILY MEDICINE ASSOCIATES OF MIDLAND, Nos. 145542 and 145543; Court of Appeals Nos. 297456 and 297457.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v JEFFREY CURRY, No. 145545; Court of Appeals No. 302821.

PEOPLE v REGINALD BELL, No. 145548; Court of Appeals No. 308165.

PEOPLE v HUFFMAN, No. 145549; Court of Appeals No. 303942.

PEOPLE v LEWIS FAIRLEY, No. 145552; Court of Appeals No. 309590.

PEOPLE v BRANDON WILLIAMS, No. 145554; Court of Appeals No. 309174.

PEOPLE v WULFF, No. 145555; Court of Appeals No. 303275.

PEOPLE v PUCKETT, No. 145556; Court of Appeals No. 310204.

PEOPLE v BARNHARD, No. 145558; Court of Appeals No. 309621.

PEOPLE v CHAD ADAMS, No. 145559; Court of Appeals No. 309325.

PEOPLE v DANNIE BAKER, No. 145560; Court of Appeals No. 308257.

PEOPLE v MARTINEZ, No. 145561; Court of Appeals No. 307765.

MCCREARY v DEPARTMENT OF CORRECTIONS, No. 145563; Court of Appeals No. 307837.

PEOPLE v LLOYD, No. 145565; Court of Appeals No. 307732.

PEOPLE v IRMON WILLIAMS, No. 145567; Court of Appeals No. 306767.

PEOPLE v RICHARDSON, No. 145568; Court of Appeals No. 306427.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v MORT, No. 145569; Court of Appeals No. 309213.

PEOPLE v MCARTHUR TAYLOR, No. 145570; Court of Appeals No. 301603.

PEOPLE v RICHARD CARTER, No. 145572; Court of Appeals No. 309159.

PEOPLE v RONALD DOUGLAS, No. 145573; Court of Appeals No. 309895.

PEOPLE v LEMONT HOPKINS, No. 145574; Court of Appeals No. 310533.

PEOPLE v EFREM WILSON, No. 145575; Court of Appeals No. 303751.

PEOPLE v WEAVER, No. 145586; Court of Appeals No. 307029.

CANTON CHARTER TOWNSHIP v POLK, No. 145588; Court of Appeals No. 306799.

WESTFIELD INSURANCE COMPANY v ALLSTATE INSURANCE COMPANY, No. 145589; Court of Appeals No. 295486.
HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

PEOPLE v KINDLE, No. 145592; Court of Appeals No. 307486.

PEOPLE v GASKILL, No. 145595; Court of Appeals No. 300896.

PEOPLE v TERRY ADAMS, No. 145596; Court of Appeals No. 304468.

PEOPLE v MCCLENDON, No. 145601; Court of Appeals No. 310466.

PEOPLE v TIMOTHY THOMAS, No. 145602; Court of Appeals No. 304576.

PEOPLE v PRATER, No. 145605; Court of Appeals No. 307336.

PEOPLE v ALMOND, No. 145610; Court of Appeals No. 308309.

PEOPLE v RUSSELL HOPKINS, No. 145611; Court of Appeals No. 308313.

PEOPLE v ELIZONDO, No. 145614; Court of Appeals No. 303333.

PEOPLE v WITT, No. 145615; Court of Appeals No. 310151.

PEOPLE v STILLINGS, No. 145616; Court of Appeals No. 308660.

PEOPLE v CECIL HAWKINS, No. 145617; Court of Appeals No. 308167.

PEOPLE v DEONDRA' WILLIAMS, No. 145618; Court of Appeals No. 302371.

PEOPLE v DANCY, No. 145619; Court of Appeals No. 301663.

PEOPLE v PORTIS, No. 145620; Court of Appeals No. 309965.

PEOPLE v MCDANIEL, No. 145621; Court of Appeals No. 309792.

PEOPLE v LALONE, No. 145626; Court of Appeals No. 303378.

PEOPLE v HAYES, No. 145629; Court of Appeals No. 310429.

PEOPLE v EDMUND BELL, No. 145630; Court of Appeals No. 304893.

PEOPLE v TERRANCE DAWSON, No. 145635; Court of Appeals No. 302650.

PEOPLE v PENO WASHINGTON, No. 145638; Court of Appeals No. 300630.

PEOPLE v HAIRE, No. 145640; Court of Appeals No. 309851.

PEOPLE v BRASHER, No. 145641; Court of Appeals No. 308423.

PEOPLE v SETH ROBINSON, No. 145642; Court of Appeals No. 302966.

PEOPLE v ROD HOLMES, No. 145643; Court of Appeals No. 308034.

VMG, INC v BYRON TOWNSHIP, No. 145645; Court of Appeals No. 303520.

PEOPLE v ZIMMER, No. 145647; Court of Appeals No. 309982.

PEOPLE v WALLAGER, No. 145652; Court of Appeals No. 308675.

PEOPLE v PERCEL WILLIAMS, No. 145653; Court of Appeals No. 310319.

PEOPLE v B J THOMAS, No. 145656; Court of Appeals No. 309193.

PEOPLE v WILLIE HUNTER, No. 145660; Court of Appeals No. 310802.

PEOPLE v JAMES JOHNSON, No. 145661; Court of Appeals No. 308235.

PEOPLE v CAMERON, No. 145662; Court of Appeals No. 304094.

PEOPLE v BISKNER, No. 145663; Court of Appeals No. 310337.

PEOPLE v ROCCA, No. 145664; Court of Appeals No. 308251.

PEOPLE v RAGLAND, No. 145665; Court of Appeals No. 306906.

PEOPLE v ALEX PERRY, No. 145667; Court of Appeals No. 303837.

PEOPLE v GRANDERSON, No. 145669; Court of Appeals No. 303616.

PEOPLE v DONALDSON, No. 145670; Court of Appeals No. 309696.

PEOPLE v LITTLE, No. 145671; Court of Appeals No. 309801.

PEOPLE v CUTLER-FERRO, No. 145672; Court of Appeals No. 310317.

PEOPLE v NAJEE WILLIAMS, No. 145673; Court of Appeals No. 303191.

PEOPLE v JAMES MOORE, No. 145674; Court of Appeals No. 309615.

PEOPLE v RICHEY, No. 145680; Court of Appeals No. 307932.

PEOPLE v MEADS, No. 145681; Court of Appeals No. 304556.

PEOPLE v PETERS, No. 145683; Court of Appeals No. 304359.

PEOPLE v HARVEY, No. 145686; Court of Appeals No. 301531.

PEOPLE v PHILLIP POWELL, No. 145689; Court of Appeals No. 310285.

PEOPLE v BOSTICK, No. 145690; Court of Appeals No. 308627.

PEOPLE v MCGAHA, No. 145697; Court of Appeals No. 301220.

PEOPLE v GRIX, No. 145699; Court of Appeals No. 310051.

PEOPLE v JOHN WILLIAMS, No. 145700; Court of Appeals No. 309674.

PEOPLE v SOLERNORONA, No. 145701; Court of Appeals No. 299269.

ORTIZ v RICHARD A HANDLON CORRECTIONAL FACILITY WARDEN, No. 145703; Court of Appeals No. 307829.

PEOPLE v PARKER, No. 145704; Court of Appeals No. 310615.

PEOPLE v PHIPPS, No. 145705; Court of Appeals No. 309963.

PEOPLE v GEOFFREY LAWSON, No. 145709; Court of Appeals No. 302128.

PEOPLE v FIZER, No. 145711; Court of Appeals No. 310532.

PEOPLE v GOODEN, No. 145712; Court of Appeals No. 308312.

PEOPLE v POINDEXTER, No. 145713; Court of Appeals No. 310316.

PEOPLE v DUTTERER, No. 145714; Court of Appeals No. 310603.

PEOPLE v ESBAUGH, No. 145723; Court of Appeals No. 309518.

PEOPLE v CHARLES MILLER, No. 145728; Court of Appeals No. 310817.

PEOPLE v DWYER, No. 145729; Court of Appeals No. 301300.

PEOPLE v IMLER, No. 145734 ; Court of Appeals No. 309576.

PEOPLE v ZACHARY ELLIS, No. 145740; Court of Appeals No. 308375.

PEOPLE v HUGUELY, No. 145747; Court of Appeals No. 303436.

PEOPLE v ERIC BALL, No. 145751; Court of Appeals No. 310739.

PORTER v NISWONGER, No. 145752; Court of Appeals No. 308010.

PEOPLE v KELLMAN, No. 145756; Court of Appeals No. 307345.

ADVANCE STEEL COMPANY v OILFIELD PIPE & SUPPLY, INC, No. 145761; Court of Appeals No. 302724.

JACKSON-EL v SPADA, No. 145762; Court of Appeals No. 308847.

PEOPLE v RANDLE, No. 145766; Court of Appeals No. 303947.

PEOPLE v CHRISTIAN, No. 145769; Court of Appeals No. 304265.

PEOPLE v EARLS, No. 145770; Court of Appeals No. 281248.

ELHADY v CITIMORTGAGE, INC, No. 145771; Court of Appeals No. 304745.

TECHNER v GREENBERG, No. 145772; Court of Appeals No. 303859.

PEOPLE v GIDDIS, No. 145775; Court of Appeals No. 310730.

PEOPLE v PROFIT, No. 145776; Court of Appeals No. 309473.

PEOPLE v HEATH, No. 145778; Court of Appeals No. 305364.

PEOPLE v BOONE, No. 145784; Court of Appeals No. 308974.

PEOPLE v MICHAEL MARVIN, No. 145785; Court of Appeals No. 302002.

PEOPLE v SHIRLEY OLIVER, No. 145786; Court of Appeals No. 310457.

PEOPLE v BOOKER, No. 145788; Court of Appeals No. 310785.

PEOPLE v MAURICE HAYNES, No. 145789; Court of Appeals No. 308858.

PEOPLE v FRANKLIN, No. 145791; Court of Appeals No. 309424.

PEOPLE v TACKETT, No. 145793; Court of Appeals No. 305881.

SULOWSKA v ALBERT TROSTEL & SONS COMPANY, No. 145794; Court of Appeals No. 304195.

PEOPLE v MCGHEE, No. 145803; Court of Appeals No. 309840.

PEOPLE v JENKINS, Nos. 145806 and 145807; Court of Appeals Nos. 303917 and 304204.

PEOPLE v HORN, No. 145817; Court of Appeals No. 304877.

PEOPLE v SUTTON, No. 145821; Court of Appeals No. 299262.

PEOPLE v PLATZ, No. 145823; Court of Appeals No. 302885.

PEOPLE v BRAGG, No. 145839; Court of Appeals No. 308628.

PEOPLE v VERDELL REESE, No. 145840; Court of Appeals No. 292153.

PEOPLE v WILLIAM HALL, No. 145858; Court of Appeals No. 309507.

PEOPLE v SETTLES, No. 145860; Court of Appeals No. 310009.

PEOPLE v DUNN, No. 145881; Court of Appeals No. 311927.

PEOPLE v HARDY, No. 145890; Court of Appeals No. 309938.

PEOPLE v NULL, No. 145891; Court of Appeals No. 308949.

PEOPLE v RICKY VAUGHN, No. 145892; Court of Appeals No. 311400.

PEOPLE v ROBERT THOMPSON, No. 145930; Court of Appeals No. 309354.

PEOPLE v TERPSTRA, No. 146001; Court of Appeals No. 304437.

Superintending Control Denied November 20, 2012:

HOPE-JACKSON v ATTORNEY GRIEVANCE COMMISSION, No. 145864.

Reconsideration Denied November 20, 2012:

PEOPLE v ARTHUR, No. 144035; Court of Appeals No. 302919. Leave to appeal denied at 492 Mich 852.

BURNSIDE v GENESEE CIRCUIT JUDGE, No. 144685; Court of Appeals No. 306913. Leave to appeal denied at 491 Mich 944.

PEOPLE v HAWLEY, No. 144847; Court of Appeals No. 307750. Leave to appeal denied at 491 Mich 946.

PEOPLE v MARCELL WILLIAMS, No. 145074; Court of Appeals No. 306161. Leave to appeal denied at 491 Mich 947.

BONNER v ALLEN, No. 145117; Court of Appeals No. 307802. Leave to appeal denied at 492 Mich 868.

Summary Disposition November 21, 2012:

BOERTMANN v CINCINNATI INSURANCE COMPANY, No. 142936; Court of Appeals No. 293835. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the March 8, 2011, 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 defendant. MCL 500.3105(1) provides, "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." An injury arises out of the use of a motor vehicle as a motor vehicle when "the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Thornton v Allstate Ins*

Co, 425 Mich 643, 659 (1986). Here, as tragic as the motor vehicle accident that caused the death of plaintiff's son was, the causal connection between plaintiff's injury, i.e., posttraumatic stress disorder, and the "use of a motor vehicle as a motor vehicle" is not "more than incidental, fortuitous, or 'but for.' " Any injury suffered by plaintiff was too attenuated to be compensable. Plaintiff herself was in no way involved in the motor vehicle accident; she was not on the motorcycle with her son, nor was she in the vehicle that struck her son; and she was not struck by the motorcycle or by the vehicle that struck her son. Instead, just as with the plaintiff in *Keller v Citizens Ins Co of America*, 199 Mich App 714 (1993), plaintiff was simply a bystander who very unfortunately witnessed an accident that resulted in her son's death. Accordingly, just as with the plaintiff in *Keller*, plaintiff is not entitled to no-fault benefits.

HATHAWAY, J. (*dissenting*). I believe that the Court of Appeals correctly analyzed this matter and reached the correct result. Accordingly, I would affirm the Court of Appeals.

CAVANAGH and MARILYN KELLY, JJ., joined the statement of HATHAWAY, J.

Application for Leave to Appeal Dismissed on Stipulation November 30, 2012:

AFSCME LOCAL 25 v WAYNE COUNTY, Nos. 146119 and 146120; reported below: 297 Mich App 489.

Summary Disposition December 5, 2012:

In re CARROLL, No. 143202; reported below: 292 Mich App 395. By order of April 18, 2012, the application for leave to appeal the April 26, 2011, judgment of the Court of Appeals was held in abeyance pending the decisions in *Johnson v Recca* (Docket No. 143088) and *Douglas v Allstate Ins Co* (Docket No. 143503). The cases having been decided on July 30, 2012, *Johnson*, 492 Mich 169 (2012), and *Douglas*, 492 Mich 241 (2012), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of our decisions in *Johnson* and *Douglas*.

In re CONSERVATORSHIP OF CISNEROS, No. 144316; Court of Appeals No. 298922. By order of April 18, 2012, the application for leave to appeal the September 27, 2011, judgment of the Court of Appeals was held in abeyance pending the decisions in *Johnson v Recca* (Docket No. 143088) and *Douglas v Allstate Ins Co* (Docket No. 143503). The cases having been decided on July 30, 2012, *Johnson*, 492 Mich 169 (2012), and *Douglas*, 492 Mich 241 (2012), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of our decisions in *Johnson* and *Douglas*.

PEOPLE v GOSSELIN, No. 145212; Court of Appeals No. 308923. 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 delete the requirement that the defendant pay one-third of her restitution obligation before she may be released on parole. The trial court had no authority to impose the restitution obligation as a condition of parole. See *People v Greenberg*, 176 Mich App 296, 310-311 (1989). In all other respects, leave to appeal is denied.

LEMIN v JOHN MICHAEL GARRETT, MD, PC, No. 145500; Court of Appeals No. 307539. 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 *Hoffner v Lanctoe*, 492 Mich 450 (2012).

HATHAWAY, J., would grant leave to appeal.

Leave to Appeal Granted December 5, 2012:

ANDRIE, INC v DEPARTMENT OF TREASURY, No. 145557; reported below: 296 Mich App 355. On order of the Court, the motions for immediate consideration and the motion to stay the precedential effect of the published Court of Appeals opinion are granted. The application for leave to appeal the April 26, 2012, judgment of the Court of Appeals is considered, and it is granted. The parties shall address (1) whether the Court of Appeals correctly determined that a retail transaction in Michigan subject to the sales tax, MCL 205.51 *et seq*., is not subject to the use tax, MCL 205.91 *et seq*.; (2) whether a retail purchaser is entitled to a presumption that sales tax is paid on retail transactions in Michigan; and (3) whether the exemption in MCL 205.94(1)(a) applies in this case.

Leave to Appeal Denied December 5, 2012:

PEOPLE v GRANT, No. 142378; Court of Appeals No. 300556.

MARILYN KELLY, J., would remand this case to the trial court to allow defendant to withdraw his plea.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v PROCHOWSKI, No. 143040; Court of Appeals No. 302568.

MARILYN KELLY, J., would remand this case to the trial court to allow defendant to withdraw his plea.

PEOPLE v JERRY MATTHEWS, No. 143440; Court of Appeals No. 296889.

LEMERAND v UNIVERSITY OF MICHIGAN REGENTS, No. 144186; Court of Appeals No. 298637.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v DAVID HUDSON, No. 144930; Court of Appeals No. 307968.

SEXTON-WALKER v GREAT EXPRESSIONS DENTAL CENTERS, PC, No. 145274; Court of Appeals No. 302513.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v JAMERSON, No. 145299; Court of Appeals No. 303507.

PEOPLE v JAMES TAYLOR, No. 145333; Court of Appeals No. 307168.

MARILYN KELLY, J., would vacate the defendant's sentence and remand this case for resentencing.

MARSHALL v BOYNE USA, INC, No. 145339; Court of Appeals No. 301725.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would reverse the judgment of the Court of Appeals and reinstate the trial court's order denying defendant's motion for summary disposition.

PEOPLE v JAMES MICHAEL WRIGHT, No. 145410; Court of Appeals No. 309911.

CAVANAGH, J., would grant leave to appeal.

GRIEVANCE ADMINISTRATOR v WIDENBAUM, No. 145418.

ZAHRA, J., would grant leave to appeal.

HATHAWAY, J., did not participate because she has a professional relationship with a member of a law firm involved in this matter.

PEOPLE v WILLS, No. 145434; Court of Appeals No. 309029.

BUHALIS v TRINITY CONTINUING CARE SERVICES, Nos. 145436 and 145437; reported below: 296 Mich App 685.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v GONSER, No. 145442; Court of Appeals No. 298252.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v SEAMAN, No. 145515; Court of Appeals No. 310010.

ANDRIE, INC v DEPARTMENT OF TREASURY, No. 145553; reported below: 296 Mich App 355.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

MATTEI v OTT, Nos. 145732 and 145733; Court of Appeals Nos. 303966 and 304090.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

Summary Disposition December 7, 2012:

PEOPLE v KITCHEN, No. 145737; Court of Appeals No. 310796. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence in Case No. 11-000462-FH, and remand this case to the Ingham Circuit Court for further proceedings. There is no dispute that the trial judge deviated from the plea agreement, which included a

prosecutorial sentencing recommendation pursuant to *People v Killebrew*, 416 Mich 189 (1977), but then failed to give the defendant the opportunity to withdraw his plea. On remand, the trial judge shall impose sentence in accordance with the agreement, or conduct a resentencing, or give the defendant the opportunity to withdraw his plea.

We further order the trial court to determine, in accordance with Administrative Order No. 2003-03, whether the defendant is indigent and, if so, to appoint counsel to represent him in connection with the remand proceedings.

We do not retain jurisdiction.

Finally, we remind the trial judge of her obligations under Canon 3 of the Code of Judicial Conduct and caution her against engaging in any further ex parte communication with a party in violation of that canon.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 7, 2012:

CUMMINGS v LEWIS, No. 145445; Court of Appeals No. 303386. 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 (1) the plaintiff's no contest plea to resisting arrest bars her remaining claims pursuant to *Heck v Humphrey*, 512 US 477, 487 (1994); (2) accepting the plaintiff's version of events, defendant Seth Lewis nevertheless acted reasonably, as a matter of law, under all of the circumstances; and (3) the defendant is entitled to governmental immunity for the plaintiff's remaining claims. The parties may file supplemental briefs within 42 days of the date of this order.

Leave to Appeal Before Decision by the Court of Appeals Denied December 7, 2012:

VANSLEMBROUCK v HALPERIN, No. 145153; Court of Appeals No. 309680.

Leave to Appeal Denied December 7, 2012:

In re GOLDIE, No. 146085; Court of Appeals Nos. 307219.

In re GOLDIE, No. 146096; Court of Appeals Nos. 307218.

RODRIGUEZ v BANK OF AMERICA, No. 146215; Court of Appeals No. 312626.

CITY OF BRIGHTON v BONNER, No. 146216; Court of Appeals No. 312770.

Order Imposing Costs in Judicial Tenure Commission Proceeding Entered December 7, 2012:

In re JAMES, No. 143942.

On order of the Court, the Judicial Tenure Commission's bill of costs is considered, and the respondent, Sylvia A. James, is ordered to pay costs of $16,500 to the commission.

Summary Disposition December 12, 2012:

HALL v STARK REAGAN, PC, Nos. 143909 and 143911; reported below: 294 Mich App 88. Leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we reverse that part of the September 13, 2011, judgment of the Court of Appeals holding that this matter was not subject to arbitration, and we reinstate the October 1, 2009, order of the Oakland Circuit Court granting summary disposition in favor of the defendants. The dispute in this case concerns the motives of the defendant shareholders in invoking the separation provisions of the Shareholders' Agreement, Article 8.1 and/or Article 9.1, with respect to the plaintiffs. This is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under the Shareholders' Agreement, and is therefore subject to binding arbitration pursuant to Article 14.1 of the Agreement. Because the dispute between these parties is subject to binding arbitration, it was unnecessary for the Court of Appeals to reach the issue of standing under the Civil Rights Act, MCL 37.2101 *et seq*., and we vacate that part of the judgment of the Court of Appeals. For the same reason, we decline to address the remaining issues raised on appeal.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals, reinstating the trial court's grant of summary disposition for defendants and compelling the arbitration of plaintiffs' claim under Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*. I agree with Justice MARILYN KELLY's dissenting statement that a dispute regarding defendants' motivations for terminating plaintiffs' employment does not fall within the scope of the parties' arbitration clause. Thus, I would affirm the result reached by the Court of Appeals, including its holding that plaintiffs have standing under the CRA.

However, even if the parties' dispute fell within the scope of the arbitration clause, for the reasons I stated in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 414-438 (1996) (opinion by CAVANAGH, J.), the arbitration clause in this case is not enforceable because an employee's prospective waiver of the constitutional right to litigate a civil rights claim in a judicial forum is contrary to the Legislature's intent when it enacted the CRA and the people's intent when they adopted the Michigan Constitution in 1963, see *id*. at 426-436. The right to pursue employment is secured by an individual's direct access to judicial remedies; therefore, the majority abases this right by enforcing a prospective waiver of the right to a judicial forum. The foregoing provides additional justification for why this Court should affirm the result reached by the Court of Appeals, although on different grounds.

HATHAWAY, J., joined the statement of CAVANAGH, J.

MARILYN KELLY, J. (*dissenting*). I dissent from the majority's decision to reverse in part the Court of Appeals' judgment and reinstate summary disposition in favor of defendants. The majority concludes that plaintiffs' civil rights claims constitute a "dispute regarding interpretation or enforcement of any of the parties' rights or obligations" under the shareholders' agreement. I disagree.

As the Court of Appeals majority observed, the only "rights or obligations" addressed in the shareholders' agreement involved entitlement to stock ownership and restrictions on stock transfer.[1] Plaintiffs have advanced no argument that defendants violated any of those provisions. Rather, plaintiffs claim that although defendants complied with all provisions in the agreement, their *reasons* for divesting plaintiffs of their stock violated the Civil Rights Act.[2]

There is a significant difference between challenging the motives for divesting plaintiffs of their stock and the mechanics by which the divestiture occurred. The latter is clearly within the scope of the shareholders' agreement because that agreement sets forth the specific mechanics by which such divestiture may occur. But the shareholders' agreement is silent with respect to the former. Accordingly, I cannot conclude that plaintiffs' claims involve any "rights or obligations" arising under that agreement.

For this reason, I dissent from the order and would affirm the Court of Appeals' judgment in its entirety.

HATHAWAY, J., joined the statement of MARILYN KELLY, J.

PEOPLE V RHODES, No. 145068; Court of Appeals No. 308107. 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 defendant's delayed application for leave to appeal was timely filed by virtue of the prison mailbox rule, MCR 7.205(A)(3).

We do not retain jurisdiction.

PEOPLE V LASKI, No. 145874; Court of Appeals No. 310485. 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.

MARILYN KELLY, J., would deny leave to appeal.

PEOPLE V WEBB, No. 145969; Court of Appeals No. 305017. 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 to the extent that the Court of Appeals vacated the defendant's convictions. We do not disturb the Court of Appeals' determination that the lack of an expert witness deprived the defendant of an opportunity to present a defense to the charged crimes, or its ruling that the defendant is entitled to funds to retain a DNA expert. However, the error in denying funds may have been harmless and, at this point in the proceedings, it would be premature to vacate the defendant's convictions before the results of independent DNA testing are known. We remand this case to the Saginaw Circuit Court for further proceedings not inconsistent with this order. The trial court shall provide funds sufficient to permit the defendant to obtain independent DNA testing. Testing shall proceed forthwith, and the results shall be provided to both parties as soon as reasonably possible. Within 56 days of receiving the test results, the defendant may seek further relief, if appropriate, in the trial court.

We do not retain jurisdiction.

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[1] *Hall v Stark Reagan, PC*, 294 Mich App 88, 96 (2011).

[2] MCL 37.2101 *et seq*.

Order Declining to Authorize Certification of Question Entered December 12, 2012:

In re EXECUTIVE MESSAGE OF THE GOVERNOR (BROWN v GOVERNOR), No. 143563. The Executive Message of the Governor pursuant to MCR 7.305(A) was received on August 12, 2011, requesting that this Court direct the Ingham Circuit Court to certify certain questions for immediate determination by this Court. On order of the Court, the motion for leave to file a brief amicus curiae by the American Federation of State, County & Municipal Employees, AFL-CIO, is granted. The Executive Message of the Governor is considered, and the Court respectfully declines the request for certification as moot.

Leave to Appeal Denied December 12, 2012:

AWAD v GENERAL MOTORS ACCEPTANCE CORPORATION, No. 145202; Court of Appeals No. 302692.

MARILYN KELLY, J., would grant leave to appeal.

MSX INTERNATIONAL PLATFORM SERVICES, LLC v HURLEY, No. 145395; Court of Appeals No. 300569.

HATHAWAY, J., would grant leave to appeal.

HUNTINGTON NATIONAL BANK v FIRST AMERICAN TITLE INSURANCE COMPANY, No. 145414; Court of Appeals No. 303496.

ZAHRA, J., would grant leave to appeal.

PEOPLE v WHITNEY, No. 145460; Court of Appeals No. 303399.

PEOPLE v COMELLA, No. 145510; reported below: 296 Mich App 643.

PEOPLE v RIVARD, No. 145514; Court of Appeals No. 303854.

CITY OF HUNTINGTON WOODS v ORCHARD, HILTZ & MCCLIMENT, INC, No. 145603; Court of Appeals No. 301987.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v CROFF, No. 145607; Court of Appeals No. 302088.

SELDON v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 145627; reported below: 297 Mich App 427.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v ROEDER, No. 145637; Court of Appeals No. 310212.

MARILYN KELLY, J., would remand this case to the Court of Appeals for consideration of whether there was an adequate factual basis to support the defendant's guilty plea.

PEOPLE v HAMAMA, No. 145708; Court of Appeals No. 304527.

HOFFMAN v CONSUMERS ENERGY COMPANY, Nos. 145730 and 145731; Court of Appeals Nos. 300577 and 301977.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v CORDARRELL SIMS, No. 145744; Court of Appeals No. 292529.

LIPNEVICIUS v LIPNEVICIUS, No. 145909; Court of Appeals No. 304520.

Summary Disposition December 14, 2012:

SMITH v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 142515; Court of Appeals No. 294311. 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 reasons stated in the Court of Appeals dissenting opinion, and we reinstate the September 9, 2009, order of the Wayne Circuit Court. See *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707 (2012).

MARILYN KELLY, J., would deny leave to appeal for the reasons set forth in her dissenting opinion in *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 723 (2012).

HATHAWAY, J., did not participate due to a familial relationship with counsel of record.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 14, 2012:

PEOPLE v JOHNNY HARRIS, No. 145833; Court of Appeals No. 296631. 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 defendant was prejudiced by the admission of Dr. Carrie Ricci's diagnosis that the complainant was the victim of child sexual abuse and whether the defendant is entitled to a new trial. The parties shall file supplemental briefs within 42 days of the date of this order.

Leave to Appeal Denied December 14, 2012:

In re HUGHES, No. 146111; Court of Appeals No. 309415.

Summary Disposition December 18, 2012:

LYON CHARTER TOWNSHIP v MCDONALD'S USA, LLC, No. 143342; reported below: 292 Mich App 660. 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 hereby vacate part II(B) and the first sentence of part IV of the Court of Appeals May 24, 2011, majority opinion, which are unnecessary to the decision in this case. The appellant's request for relief is denied in all other respects.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., concurred in the result.

ZAHRA, J. (*dissenting*). I would reverse the Court of Appeals majority decision and reinstate the trial court's award to defendant-appellant Milford Road East Development Associates, L.L.C. (defendant) of just compensation under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., in the amount of $1.5 million.

This case involves review of a verdict rendered after a bench trial in a condemnation action. Defendant is the developer of Lyon Towne Center, located in plaintiff Lyon Charter Township, south of I-96 and east of Milford Road. A related company, Milford Road West Development Associates, L.L.C. (MRWDA) has the same owners as defendant and is the developer of Lyon Crossing, a development also south of I-96, but west of Milford Road. Defendant and MRWDA entered into two nearly identical planned development agreements with plaintiff to develop the approximately 115 acres of vacant land. The developments were phased developments collectively known as Lyon Centers. Defendant expended approximately $10 million to construct a ring road called Lyon Center Drive to connect Lyon Towne Center and Lyon Crossing and bring public sewer and water service to Lyon Centers. Before the development was completed, plaintiff exercised its right of eminent domain to access these water and sewer lines to benefit a neighboring private property owner.

Claiming that it merely desired "to expand its municipal public services, water and sewer, to that portion of the township north of 1-96," plaintiff asked McDonald's USA, L.L.C., which had purchased a unit in the condominium development, to grant it an easement over its property. When defendant originally sold the unit to McDonald's, defendant, pursuant to the Lyon Towne Center Master Deed and Bylaws, "reserve[d] for the benefit of itself . . . permanent easements to use, tap into, enlarge or extend all utility facilities in the Condominium and servient estates . . . ." Defendant also reserved for itself the right to approve or disapprove all future developments and improvements, including utilities. McDonald's thus refused to grant plaintiff the requested easement.

Plaintiff then filed this action against McDonald's to condemn an easement for permanent subsurface water and sewer utilities under the condominium unit within Lyon Towne Center owed by McDonald's. Defendant moved to intervene, noting that it retained the above-mentioned property rights to the common elements of the Lyon Center under the master deed and bylaws. In response, plaintiff maintained that defendant had no property interest in the affected property and that no common elements are involved. Plaintiff maintained this position throughout the proceedings.

The trial court awarded defendant $1.5 million as just compensation under the UCPA. The Court of Appeals reversed the judgment in a 2-1 decision, concluding in part that the trial court had wrongly awarded

damages to defendant for being "outpositioned" in the market place.[1] The Court of Appeals majority further concluded that the trial court's award constituted a "new theory of compensation" that would "seriously hinder future economic growth, particularly in commercial and industrial markets."[2]

Like most condemnation actions, this case is factually intense. Omitted from the Court of Appeals majority opinion are some undisputed facts that plainly influenced the trial court's decision and are, in my view, pertinent to appellate review. For example, the automobile dealership that benefitted from plaintiff's exercise of eminent domain had previously been under contract to purchase property within defendant's development. The object of this contract never came to fruition because plaintiff withheld its approval to place the dealership within defendant's development. At the same time, plaintiff rezoned nearby property to accommodate placement of an automobile dealership on that property. After the dealership purchased the rezoned property, it was discovered that the land would not percolate water,[3] thereby making it impossible to use septic tanks. The dealership could be constructed in its new location only if the water and sewer lines that defendant had paid approximately $10 million to extend to its property were further extended to the rezoned parcel. Plaintiff was reluctant to exercise its power of eminent domain and agreed to do so only after the dealership and its developer agreed to indemnify and hold plaintiff harmless for its condemnation action. The trial court observed that plaintiff not only prevented defendant from developing its property in accordance with the phased development plan, but also diverted at least two would-be purchasers of property within defendant's development to land that could be developed only because of plaintiff's exercise of eminent domain.

In my view, this Court's order vacating "part II(B) and the first sentence of part IV of the Court of Appeals May 24, 2011, majority opinion, which are unnecessary to the decision in this case," but otherwise denying relief is troubling for several reasons. The order vacates the portion of the Court of Appeals majority opinion relating to its interpretation of "parcel" under the UCPA but otherwise denies relief and thus, by implication, accepts the Court of Appeals majority's conclusion that, even if it had property rights that were affected by the taking, defendant is simply not entitled to just compensation. In my view, while the order properly leaves in place the Court of Appeals majority's determination that defendant has a property interest in the property that was taken, it improperly lets stand the clearly erroneous determination that this property interest was limited because the master deed or bylaws specify that any development was "subject to plaintiff's approval." That plaintiff's approval was

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[1] *Lyon Charter Twp v McDonald's USA*, LLC, 292 Mich App 660, 675 (2011).

[2] *Id*. at 673-674.

[3] "Percolating water" is "[w]ater that oozes or seeps through soil without a defined channel . . . ." Black's Law Dictionary (7th ed), p 1585.

required merely acknowledges that plaintiff has the right to regulate all development. Though plaintiff could veto a project approved by the developer, it did not have the right under the master deed or bylaws to compel an extension of the public utilities as done here without paying defendant just compensation. In other words, there is little dispute that defendant possessed property rights under the master deed and bylaws that were affected by plaintiff's taking.

The order also leaves unaddressed the significant issue of defining the "parcel" of property affected by the taking under the UCPA. The UCPA defines a "parcel" as "an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and treated as separate for valuation purposes."[4] The Court of Appeals majority held that because the "common beneficial ownership between defendant and Milford Road West Development Associates is extraneous to the deeds," it "is insufficient to grant an interest in the McDonald's easement to the common owners."[5] However, as explained by amicus curiae Michigan Chamber Litigation Center,

> [t]he legislature did not limit the relevant 'parcel' for valuation purposes in a condemnation case to the individually deeded lots within a development; instead, it defined the relevant "parcel" to include the development as a whole, so long as it is an "identifiable unit of land" subject to "substantially common beneficial ownership."

The Court of Appeals majority clearly erred by relying on the fact that the "common beneficial ownership between defendant and Milford Road West Development Associates is extraneous to the deeds" to conclude that Lyon Centers is not the pertinent "parcel."[6] In essence, the Court of Appeals majority engrafted on the definition of "parcel" additional requirements not contained within it. Property under common, but separate, ownership is often developed in phases, and it is foreseeable that, in future condemnations, a taking from one phase of a commonly owned series of developments may have significant effects on the value of property used in later (or simply other) phases of the development. The Legislature expressly provided that parcels having substantially common ownership might be deemed to be a single parcel, even when they, as in this case, are not contiguous.

In my view, the erroneous interpretation of the term "parcel" also infected the Court of Appeals majority decision in regard to the amount of just compensation. On one hand, the Court of Appeals majority "assume[d], without deciding," that Lyon Centers was an identifiable unit of land with common ownership, yet on the other hand held that,

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[4] MCL 213.51(g).

[5] *Lyon Charter Twp*, 292 Mich App at 670.

[6] *Id*.

because the right of control defendant relied on derived from the master deed for the Lyon Towne Center, which created no rights within Lyon Crossing, defendant could not recover for any impairment of the value of Lyon Crossing.[7] Had the Court of Appeals majority truly assumed without deciding that Lyon Centers was an identifiable unit of land with common ownership, the Court of Appeals majority would have recognized that the easement within Lyon Centers must necessarily also be subject to common ownership.

Last, and most troubling, is that this Court's order leaves in place a rule of law barring just compensation awards when a condemning governmental entity characterizes a loss of a property's market value as attributable to being "outpositioned" in the market place. While plaintiff correctly notes that no case directly supports this proposition, plaintiff concedes that no case directly contravenes this proposition either. Indeed, no Michigan court has previously addressed the question of just compensation under these particular circumstances. However, this does not mean that the trial court abused its discretion by awarding defendant just compensation under these particular circumstances. Instead, one may reasonably conclude that the trial court's award merely compensated defendant for plaintiff's taking of defendant's property rights in a manner that is wholly consistent with the well-established principle that "[w]hen only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property."[8] In other words, although these precise circumstances may never have been addressed by this Court before, or perhaps more likely may never have been specifically identified in the language of "outpositioning," or "lost competitive disadvantage," the broader principles relied on by the trial court have certainly been addressed by this Court on many occasions. Just as traditional principles of free speech apply in a countless array of new circumstances regularly arising in courts throughout the land, e.g., hate crimes, campaign finance restrictions, regulatory prohibitions on commercial speech, antiharassment laws, etc., traditional principles of just compensation apply in a countless array of new circumstances regularly arising in those same courts.

It is well established that the "proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property if applicable."[9] "The purpose of just compensation is to put property owners in as good a position as they would have been had their

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[7] *Id*. at 669-670.

[8] M Civ JI 90.12.

[9] *Dep't of Transp v VanElslander*, 460 Mich 127, 130 (1999) (citations and quotation marks omitted); see also 13 Powell, Real Property, § 79F.04[3][a], p 79F-66.1 ("The law is well settled that takings of a part of an owner's land require not only that the owner be paid for the portion of the property that is taken, but also for any diminution in value to the property that remains.").

property not been taken from them."[10] Accordingly, "the proper amount of compensation for property takes into account *all factors* relevant to market value."[11]

> [A] guiding principle when awarding just compensation in a condemnation suit is to "neither enrich the individual at the expense of the public nor the public at the expense of the individual" but to leave him "in as good a position as if his lands had not been taken." Thus, in a partial taking, the formula to calculate the fair market value of the remainder parcel must account for the fact that damages will vary from case to case, depending on the unique circumstances of each taking. Restoring the individual to his position before the taking will require a flexible, case-by-case approach to damages.[12]

Just compensation

> "may perhaps depend on the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition of the condition [sic] in which it may leave the remainder in respect to convenience of use . . . ."[13]

"In considering the effect of the taking upon the remainder, the after value must take into account the proposed use of the project and the effect of that use upon the remainder."[14] "Damages to the remainder that are to be reasonably anticipated from use of the property for the purpose for which the condemnation is made, are relevant in determining the compensation to be awarded for the taking."[15] "Further, in valuing what is left after the taking, you must assume that the [condemning authority] will use its newly acquired property rights to the full extent allowed by the law."[16] Defendant's appraiser testified that the value of the remain-

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[10] *VanElslander*, 460 Mich at 129 (citations and quotation marks omitted).

[11] *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 379 (2003) (emphasis added); see also *VanElslander*, 460 Mich at 129 ("Just compensation means the *full* monetary equivalent of the property taken.") (emphasis added) (citations and quotation marks omitted).

[12] *Dep't of Transp v Tomkins*, 481 Mich 184, 198 (2008) (citation omitted).

[13] *Tomkins*, 481 Mich at 207, quoting 1 Cooley, Constitutional Limitations (1st ed), p 565.

[14] 4A Nichols, Eminent Domain (3d ed), § 14A.06[3], p 14A-127.

[15] *Id.*, p 14A-129.

[16] M Civ JI 90.12.

der was reduced by $3 million as a result of the taking.[17] Plaintiff failed to offer an alternative estimate. As mentioned, plaintiff took the position throughout the proceedings that defendant's property rights were not affected by the taking.[18]

Further, the Court of Appeals majority wholly failed to apply the correct standard of review in this case. A trial court's award of just compensation is reviewed for an abuse of discretion: "The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented."[19] "The determination of value and just compensation in a condemnation case is not a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all of the evidence . . . ."[20] An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.[21] The standard is only once mentioned by the Court in a passing reference to *Oakland County Board of County Road Commissioners v Bald Mountain West*,[22] in which the Court of Appeals held that the trial court did not abuse its discretion by admitting the defendant's appraiser's testimony. The Court of Appeals majority in this case simply did not review the trial court's decision to determine whether the trial court had abused its discretion. Rather, the Court of Appeals majority struck down the trial court's decision as a matter of law even though, as mentioned, no Michigan court has previously addressed the question of just compensation under these circumstances.

The trial court relied on the principles discussed earlier and the Michigan Civil Jury Instructions to calculate the award. M Civ JI 90.12 provides that, in valuing property left after a partial taking, the factfinder should take into account the following factors:

> (1) its reduced size, (2) its altered shape, (3) reduced access, (4) *any change in utility or desirability of what is left after the taking*,

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[17] See 13 Powell, § 79F.04[3][b][ii], p 79F-66.2 ("[S]everance damages equal the difference between the value of the entire tract before the taking and the value of the remainder after the taking.").

[18] It should be noted that plaintiff did argue that any property interest was not affected because, as a practical matter, the water and sewer lines would be installed underground with directional boring and would not disrupt the surface of the property. Plaintiff obviously cannot support the proposition that property rights are only affected by a physical disruption to the property.

[19] *VanElslander*, 460 Mich at 129.

[20] M Civ JI 90.05.

[21] *People v Babcock*, 469 Mich 247, 269 (2003).

[22] *Oakland Co Bd of Co Rd Comm'rs v Bald Mountain West*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2008 (Docket No. 275230).

> (5) the effect of the applicable zoning ordinances on the remaining property, and (6) *the use which the* [*condemning authority*] *intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.*[23]

The trial court applied these factors in arriving at its award.

Only defendant submitted evidence to the trial court regarding just compensation. Defendant's appraisal expert did not base his opinion on the increased value of the otherwise useless land owned by the dealership. Rather, the expert focused on the value of defendant's parcel. The expert concluded that defendant's parcel was reduced in value by $3 million as a result of the taking. Significantly, the trial court noted that plaintiff submitted no alternative appraisal report. In determining the value after the taking, defendant's expert accounted for the loss of desirability, loss of marketability, the purpose for which plaintiff was going to use the property taken (to create a commercial enterprise on property that otherwise could not be developed), and the effect of that use on the owner's remaining property. The expert opined that the remaining unsold and unoccupied property in defendant's development directly suffered as a result of the act of governmental taking.

As a consequence of the Court of Appeals majority decision, and our limited action here, defendant, whose property rights were undisputedly taken by the government, receives nothing. For this reason, I question the Court of Appeals majority's conclusion that affirming the award in favor of defendant "would seriously hinder future economic growth, particularly in commercial and industrial markets."[24] What developer will invest multiple millions of dollars to develop unused land knowing that the government can take the developer's property rights to the benefit of a private sector competitor without compensating the developer for the resulting diminution in the value of the property?

Further, I question the validity of the Court of Appeals majority's policy argument that "[t]o allow an award for lost competitive advantage would be to allow the first developer in a geographic area to monopolize real estate by placing unreasonably high cost barriers for competitors to tap into public utility lines."[25] First, the competitor ran the risk that public utility lines would not be available when it purchased property for which the competitor believed it would not need to tap into public utility lines. Second, the competitor here did not negotiate the extension of public utilities with defendant. Rather, the competitor unilaterally lobbied plaintiff to condemn an easement. Third, any monopolization of public utility lines could have been avoided had plaintiff at all indicated a desire to extend those public utility lines north of I-96 through Lyon Centers. Plaintiff expressly agreed to a submitted "utility and grading plan," a "storm water management" plan, and various other design documents incorporated within the planned development agreements.

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[23] Emphasis added.

[24] *Lyon Charter Twp*, 292 Mich App at 673-674.

[25] *Id*. at 675.

There is no evidence that any of these documents considered the possibility of extending utility lines outside of Lyon Crossing. Only after defendant installed utility lines at significant cost to benefit its condominium units and the condominium project in general did plaintiff consider extending the utility lines in this manner. In my view, plaintiff was in the best position to prevent any so-called monopolistic effect by negotiating the extension of utility lines over private property in the planned development agreements.

After taking these property rights, plaintiff in essence gave these rights to a private entity, no doubt with the expectation of generating additional tax revenue for the very taking it had facilitated. All this was done while being indemnified and held harmless by the private entity that benefitted from plaintiff's actions. The trial court did not err by concluding that Lyon Centers was the relevant parcel and that defendant had property rights that were affected by plaintiff's taking. Further, the trial court did not abuse its discretion in awarding defendant just compensation. I would reverse the judgment of the Court of Appeals and reinstate the trial court's judgment.

MARKMAN and MARY BETH KELLY, JJ., joined the statement of ZAHRA, J.

PEOPLE v VEILLEUX, No. 145142; Court of Appeals No. 302335. On November 14, 2012, the Court heard oral argument on the application for leave to appeal the March 29, 2012, 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 the judgment of the Court of Appeals and we remand this case to the Oakland Circuit Court for it to correct the judgment of sentence by striking those provisions making the sentences for contempt consecutive to each other and consecutive to defendant's sentence for the underlying felony. "A consecutive sentence may be imposed only if specifically authorized by statute." *People v Lee*, 233 Mich App 403, 405 (1999). Contrary to the lower courts' holdings, MCL 768.7a(1) does not specifically authorize the consecutive sentences imposed here. MCL 768.7a(1) only applies to "[a] person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution." When defendant committed the contempts of court at issue here, he was not at the time incarcerated in a penal or reformatory institution and he was not an escapee. Finally, we are not persuaded that defendant waived the issue of whether his contempt sentences were properly imposed consecutively to each other by not raising it when he was originally sentenced. After defendant was originally sentenced, the order appointing appellate counsel only referenced defendant's drug sentence; it did not mention the contempt sentences and appellate counsel withdrew from the case without addressing the contempt sentences. The ex parte motion to rescind the order appointing him does not suggest that he discussed anything involving the contempt sentences with defendant. However, after defendant was sentenced for his probation violation and the contempt sentences were reimposed, the order appointing new appellate counsel *did* mention the contempt sentences, and defendant's attorney *did* challenge such sentences. Given these circumstances, we hold that the challenges to the contempt sentences have been properly preserved. Because we hold that the trial

court erred in imposing consecutive sentences under MCL 768.7a(1),[1] and because defendant has already served his concurrent sentences, it is unnecessary for us to address whether under the circumstances of this case the trial court acted properly in holding defendant in contempt multiple times.

Summary Disposition December 20, 2012:

ILE v FOREMOST INSURANCE COMPANY, No. 143627; reported below: 293 Mich App 309. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the July 14, 2011, judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for entry of summary disposition in favor of the defendant. The Court of Appeals erroneously concluded that the underinsured motorist coverage in the insurance policy issued by the defendant to Darryl Ile was illusory because Ile could reasonably believe that his insurance premium payment included some charge for underinsurance when there are no circumstances in which Ile could recover underinsured motorist benefits given the policy limits Ile selected. We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract.[1]

Moreover, when read as a whole, the clear language of the policy provides for combined uninsured and underinsured motorist coverage that, as promised, would have operated to supplement any recovery by Ile to ensure that he received a total recovery of up to $20,000/$40,000 (the policy limit) had the other vehicle involved in the crash been either uninsured or insured in an amount less than $20,000/$40,000. That such coverage would, under the terms of the policy, always be labeled "uninsured," as opposed to "underinsured," does not make the policy illusory.

MARILYN KELLY, J. (*dissenting*). I dissent from the majority's order reversing the judgment of the Court of Appeals and remanding the case to the trial court for entry of summary disposition in favor of defendant. This case, like others, is rife with issues that warrant a more detailed analysis than the majority's order provides.[1]

For instance, the order states that "when read as a whole, the clear language of the policy provides for combined uninsured and underinsured motorist coverage . . . ." Accordingly, it holds that the policy is not illusory. It is unclear what policy language the majority relies on to

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[1] Because the lower courts relied on MCL 768.7a(1) in imposing the consecutive sentences, we need not address whether another authority, statutory or otherwise, exists for the imposition of consecutive sentences in this case.

[1] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003).

[1] See, e.g., *Kroon-Harris v Michigan*, 477 Mich 988, 989 (2007) (MARILYN KELLY, J., dissenting) ("Because the majority's order leaves fundamental questions unanswered, it is inadequate.").

reach this conclusion. Similarly, the order does not discuss the policy's reduction clause, which prohibits a policy holder from recovering more than the $20,000/$40,000 uninsured/underinsured limits. As a consequence, the reader is left without an understanding of how those limits apply to this case and whether plaintiff has in fact been made whole under the policy. Furthermore, it is uncertain from the order why summary disposition in favor of defendant is appropriate. Simply because the majority disavows the doctrine of reasonable expectations[2] and holds that the policy is not illusory does not automatically entitle defendant to relief.

In sum, I would not dispose of this case by order. The parties deserve a more thorough explanation of the majority's decision.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

HATHAWAY, J. (*dissenting*). I believe that the Court of Appeals majority reached the correct result. Accordingly, I would affirm the judgment of the Court of Appeals.

Summary Disposition December 21, 2012:

PEOPLE v ORLEWICZ, No. 143453; reported below: 293 Mich App 96. By order of May 21, 2012, the application for leave to appeal the judgment of the Court of Appeals was held in abeyance pending the decision in *People v Vaughn* (Docket No. 142627). The case having been decided on July 9, 2012, 491 Mich 642 (2012), 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 consideration of defendant's argument under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In all other respects, leave to appeal is denied.

Leave to Appeal Denied December 21, 2012:

In re KIECA, No. 146162; Court of Appeals No. 307194.
MARILYN KELLY, J., would grant leave to appeal.

ALMUTAWA v MEYERS, No. 146217; Court of Appeals No. 306853.
MARILYN KELLY, J., would grant leave to appeal.

Leave to Appeal Denied December 26, 2012:

PEOPLE v LOREN GREENE, No. 144339; Court of Appeals No. 304286.

PEOPLE v LOREN GREENE, No. 144341; Court of Appeals No. 306962.

PEOPLE v WAYMOND THOMAS, No. 144487; Court of Appeals No. 306694.

PEOPLE v GREEN, No. 144658; Court of Appeals No. 299872.

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[2] For a thorough discussion of the doctrine of reasonable expectations, see *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 65-70 (2003) (CAVANAGH, J., dissenting).

PEOPLE v ELRICK COOPER, No. 144660; Court of Appeals No. 296677.

PEOPLE v PATRICK JONES, No. 144741; Court of Appeals No. 301685.

PEOPLE v FORGEON, No. 144923; Court of Appeals No. 301707.

PEOPLE v LOREN GREENE, No. 144941; Court of Appeals No. 307894.

PATTON v VILLAGE OF CASSOPOLIS, No. 145009; Court of Appeals No. 301754.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v EUGENE HOPKINS, No. 145075; Court of Appeals No. 300693.

PEOPLE v SIMMONS, No. 145197; Court of Appeals No. 301661.

PEOPLE v COREY HARRIS, No. 145256; Court of Appeals No. 304046.

PEOPLE v JERRY SMITH, No. 145314; Court of Appeals No. 305113.

PEOPLE v PITTS, No. 145315; Court of Appeals No. 301545.

PEOPLE v TARRANISHA DAVIS, No. 145351; Court of Appeals No. 297743.

PEOPLE v BURNS-PERRY, No. 145374; Court of Appeals No. 306814. The motion to remand for resentencing is denied without prejudice to any relief that the defendant may seek under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

PEOPLE v KELLER, No. 145396; Court of Appeals No. 304022.

PEOPLE v KNIGHT, No. 145435; Court of Appeals No. 306792.

KRUEGER v DEPARTMENT OF TREASURY, No. 145438; reported below: 296 Mich App 656.

PEOPLE v ERIC MILLER, No. 145453; Court of Appeals No. 300209.

PEOPLE v GORDON, No. 145472; Court of Appeals No. 302799.

CALHOUN COUNTY v BLUE CROSS & BLUE SHIELD OF MICHIGAN, No. 145490; reported below: 297 Mich App 1.

PEOPLE v STEVEN COOPER, No. 145503; Court of Appeals No. 307283.

PEOPLE v MATTI, No. 145520; Court of Appeals No. 307622.

PEOPLE v RIGGINS, No. 145537; Court of Appeals No. 307591.

PEOPLE v BRIGGS, No. 145547; Court of Appeals No. 308766.

PEOPLE v QUILLAN, No. 145585; Court of Appeals No. 300340.

PEOPLE v CLARK, No. 145598; Court of Appeals No. 307620.

PEOPLE v MACARTHUR, No. 145599; Court of Appeals No. 308190.

PEOPLE v RYAN PARRISH, No. 145600; Court of Appeals No. 308574.

PEOPLE v RITTER, No. 145608; Court of Appeals No. 310030.

PEOPLE v CHRISTA FREDERICK, No. 145609; Court of Appeals No. 306787.

PEOPLE v HODGES, No. 145634; Court of Appeals No. 300969.

PEOPLE v BLANKENSHIP, No. 145639; Court of Appeals No. 309196.

DAVIS v CITY OF FLINT, No. 145649; Court of Appeals No. 303893.

PEOPLE v JOSEPH ERBY FREEMAN, No. 145654; Court of Appeals No. 308112.

PEOPLE v GLADISH, No. 145657; Court of Appeals No. 309252.

PEOPLE v EVERETT, No. 145659; Court of Appeals No. 302802.

PEOPLE v VARTINELLI, No. 145685; Court of Appeals No. 308509.

PEOPLE v PROCTOR, No. 145687; Court of Appeals No. 303493.

PEOPLE v JEFFREY JONES, No. 145692; reported below: 297 Mich App 80.

HOPP v PALACE SPORTS & ENTERTAINMENT, No. 145693; Court of Appeals No. 307119.

PEOPLE v BURKE, No. 145696; Court of Appeals No. 307702.

MOORE v PUGSLEY CORRECTIONAL FACILITY WARDEN, No. 145710; Court of Appeals No. 308850.

PEOPLE v FLORES, No. 145719; Court of Appeals No. 310021.

PEOPLE v FERRELL, No. 145720; Court of Appeals No. 310447.

PEOPLE v USHER, No. 145721; Court of Appeals No. 310240.

PEOPLE v EDDIE SMITH, No. 145722; Court of Appeals No. 310753.

PEOPLE v EDDIE SMITH, No. 145724; Court of Appeals No. 310754.

PEOPLE v ANTHONY YOUNG, No. 145726; Court of Appeals No. 306681.

PEOPLE v ECHOLS, No. 145735; Court of Appeals No. 303354.

PEOPLE v JAVON THOMAS, No. 145736; Court of Appeals No. 302344.

PEOPLE v DANTZLER, No. 145738; Court of Appeals No. 303252.

PEOPLE v DOTHARD, No. 145739; Court of Appeals No. 299237.

PEOPLE v EISEN, No. 145741; reported below: 296 Mich App 326.

CALLISON v HATZEL & BUEHLER, INC, No. 145742; Court of Appeals No. 301729.

PEOPLE v KEYS, No. 145746; Court of Appeals No. 303588.

PEOPLE v WOOLWORTH, No. 145749; Court of Appeals No. 297824.

PEOPLE v BLACKWELL, No. 145757; Court of Appeals No. 302473.

PEOPLE v DRAKE, No. 145780; Court of Appeals No. 303941.

PEOPLE v RAYMONE ROGERS, No. 145787; Court of Appeals No. 310558.

PEOPLE v LACASSE, No. 145792; Court of Appeals No. 309017.

PEOPLE v MEDLIN, No. 145796; Court of Appeals No. 304402.

PEOPLE v WOODARD, No. 145797; Court of Appeals No. 305131.

PEOPLE v MOSLEY, No. 145798; Court of Appeals No. 305478.

PEOPLE v CULLENS, No. 145819; Court of Appeals No. 296492.

PEOPLE v CODDINGTON, No. 145820; Court of Appeals No. 307286.

PEOPLE v CLARDY, No. 145822; Court of Appeals No. 308786.

COMMUNITY SHORES BANK v BABBITT'S SPORT CENTER, LLC, No. 145824; Court of Appeals No. 305235.

PEOPLE v OSTRANDER, No. 145827; Court of Appeals No. 302687.

PEOPLE v DARRIUS GREENE, No. 145830; Court of Appeals No. 293513.

PEOPLE v ELLEDGE, No. 145846; Court of Appeals No. 311099.

PEOPLE v KENNETH EDWARDS, No. 145847; Court of Appeals No. 309770.

PEOPLE v ELLEDGE, No. 145848; Court of Appeals No. 311111.

PEOPLE v KRACZKOWSKI, No. 145849; Court of Appeals No. 304760.

PEOPLE v DON JACKSON, No. 145850; Court of Appeals No. 304474.

PEOPLE v FREDERICK MARTIN, No. 145851; Court of Appeals No. 302405.

PEOPLE v TARVER, No. 145852; Court of Appeals No. 300775.

PEOPLE v COTY MCCAULEY, No. 145853; Court of Appeals No. 302027.

PEOPLE v LARRY HUNTER, No. 145854; Court of Appeals No. 300689.

PEOPLE v LEAK, No. 145857; Court of Appeals No. 304713.

PEOPLE v SEAN RAMSEY, No. 145859; Court of Appeals No. 308813.

PEOPLE v BLANKS, No. 145867; Court of Appeals No. 307502.

PEOPLE v HOCH, No. 145869; Court of Appeals No. 309928.

PEOPLE v KASPER, No. 145870; Court of Appeals No. 304481.

PEOPLE v ROBERT BROWN, No. 145871; Court of Appeals No. 311280.

PEOPLE v PFAFFINGER, No. 145875; Court of Appeals No. 310908.

CHRYSLER FINANCIAL SERVICES AMERICAS, LLC v DEPARTMENT OF TREASURY, No. 145877; Court of Appeals No. 304105.

PEOPLE v POLSTON, No. 145880; Court of Appeals No. 303302.

PEOPLE v AKHMEDOV, No. 145885; reported below: 297 Mich App 745.

PEOPLE v HOBBS, No. 145888; Court of Appeals No. 306002.

PEOPLE v VANBROKLIN, No. 145889; Court of Appeals No. 303638.

PEOPLE v COATSWORTH, No. 145903; Court of Appeals No. 304694.

PEOPLE v OBAR ELLIS, No. 145904; Court of Appeals No. 303095.

PEOPLE v GREGORY, No. 145905; Court of Appeals No. 304973.

PEOPLE v KIRKLAND, No. 145906; Court of Appeals No. 310626.

PEOPLE v CAMEL, No. 145907; Court of Appeals No. 309059.

PEOPLE v MANNING, No. 145908; Court of Appeals No. 299518. CAVANAGH, J., would grant leave to appeal.

EVANS v REDWOOD DENTAL GROUP, No. 145911; Court of Appeals No. 308799.

THOMAS v DEPARTMENT OF TREASURY, No. 145918; Court of Appeals No. 303184.

PEOPLE v CRAWFORD, No. 145919; Court of Appeals No. 302648. CAVANAGH, J., would grant leave to appeal.

PEOPLE v SAM SANDERS, No. 145920; Court of Appeals No. 303989.

CLARK v MEITZNER, No. 145922; Court of Appeals No. 304639.

PEOPLE v SACHS, No. 145928; Court of Appeals No. 308837.

PEOPLE v BYRD, No. 145929; Court of Appeals No. 309140.

PEOPLE v LYLE INGRAM, No. 145931; Court of Appeals No. 310665.

PEOPLE v COMSTOCK, No. 145934; Court of Appeals No. 311523.

PEOPLE v MONCADO, No. 145936; Court of Appeals No. 305368.

PEOPLE v CHARLES HAWKINS, No. 145941; Court of Appeals No. 308456.

PEOPLE v O'CONNOR, No. 145944; Court of Appeals No. 311904.

GARY v COMCAST ENTERTAINMENT GROUP, No. 145949; Court of Appeals No. 304720.

PEOPLE v MARCUS JACKSON, No. 145953; Court of Appeals No. 311436.

PEOPLE v ISAAC HARRIS, No. 145954; Court of Appeals No. 308389.

PEOPLE v AIKENS, No. 145957; Court of Appeals No. 307538.

PEOPLE v CRENSHAW, No. 145959; Court of Appeals No. 304392.

PEOPLE v KINCAID, No. 145960; Court of Appeals No. 311860.

PEOPLE v PROSKIE, No. 145980; Court of Appeals No. 309134.

PEOPLE v RICHARD ROBINSON, No. 145983; Court of Appeals No. 310963.

PEOPLE v BOWDRY, No. 145985; Court of Appeals No. 310060.

PEOPLE v DIAZ, No. 145989; Court of Appeals No. 305016.

PEOPLE v JAMES MCDONALD, No. 145991; Court of Appeals No. 310168.

PEOPLE v EUSEAN JENNINGS, No. 145992; Court of Appeals No. 307331.

PEOPLE v HUGHES, No. 145993; Court of Appeals No. 301332.

PEOPLE v SIMON PHILLIPS, Nos. 145997 and 145998; Court of Appeals Nos. 298034 and 307770.

PEOPLE v SEEMAN, No. 146003; Court of Appeals No. 311718.

PEOPLE v ANTONIO ALEXANDER, No. 146007; Court of Appeals No. 304855.

PEOPLE v FRANK SMITH, No. 146009; Court of Appeals No. 311525.

PEOPLE v FLETCHER DEAN, No. 146013; Court of Appeals No. 305168.

JOHNS v WIXOM BUILDERS SUPPLY, INC, No. 146014; Court of Appeals No. 299542.

PEOPLE v MICHAEL DUNCAN, No. 146026; Court of Appeals No. 311786.

WEISS v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 146036; Court of Appeals No. 304269.
HATHAWAY, J., would grant leave to appeal.

PEOPLE v JOSEPH HOWARD, No. 146037; Court of Appeals No. 305859.

PEOPLE v METCALFE, No. 146038; Court of Appeals No. 311068.

PEOPLE v GERMAINE NELSON, No. 146039; Court of Appeals No. 311281.

PEOPLE v STEVENS, No. 146081; Court of Appeals No. 304033.

PEOPLE v WYNN, Nos. 146087 and 146088; Court of Appeals Nos. 305382 and 305384.

PEOPLE v PROCTOR, No. 146135; Court of Appeals No. 305964.

PEOPLE v NEIL BENNETT, No. 146141; Court of Appeals No. 311706.

PEOPLE v BASTIEN, No. 145882; Court of Appeals No. 304817.

Reconsideration Granted December 26, 2012:

LECH v HUNTMORE ESTATES CONDOMINIUM ASSOCIATION, Nos. 144356 and 1443567; Court of Appeals Nos. 296489 and 297196. Summary disposition at 491 Mich 937. On order of the Court, the motion for reconsideration

of this Court's June 20, 2012, order is considered, and it is granted in part. On reconsideration, we modify our previous order so as to remand this case to the Court of Appeals for reconsideration of the issues raised by the plaintiff in Court of Appeals Docket No. 297196.

Reconsideration Denied December 26, 2012:

PEOPLE v BACON, No. 144089; Court of Appeals No. 303355. Leave to appeal denied at 491 Mich 941.

PEOPLE v DERRICK COLEMAN, No. 144177; Court of Appeals No. 304578. Leave to appeal denied at 491 Mich 941.

PEOPLE v MEISSNER, No. 144274; reported below: 294 Mich App 438. Leave to appeal denied at 491 Mich 938.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v IVORY, No. 144779; Court of Appeals No. 300861. Leave to appeal denied at 491 Mich 945.

VUCAJ v CM TRANSPORTATION, INC, No. 144798; Court of Appeals No. 304546. Leave to appeal denied at 491 Mich 945.

HALFORD v CITY OF FLINT, No. 144843; Court of Appeals No. 304068. Leave to appeal denied at 491 Mich 946.

CAVANAGH and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v BANKS, No. 144961; Court of Appeals No. 306929. Leave to appeal denied at 492 Mich 856.

PEOPLE v RYON PHILLIPS, No. 145134; Court of Appeals No. 309212. Leave to appeal denied at 492 Mich 869.

PEOPLE v URBINA, No. 145156; Court of Appeals No. 303650. Leave to appeal denied at 492 Mich 869.

PEOPLE v JOSE PEREZ, No. 145187; Court of Appeals No. 303305. Leave to appeal denied at 492 Mich 869.

PEOPLE v CHRISTOPHER SMITH, No. 145231; Court of Appeals No. 308835. Leave to appeal denied at 492 Mich 869.

PEOPLE v CHEN, No. 145270; Court of Appeals No. 301153. Leave to appeal denied at 493 Mich 866.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

Leave to Appeal Denied January 11, 2013:

PEOPLE v BRANDON JOHNSON, No. 145743; Court of Appeals No. 304459.

MARKMAN, J. (*concurring*). Although I concur in the order, I write separately to state my agreement with the Court of Appeals partial dissent that the victim's statement here did not constitute hearsay and, in any event, was admissible under the hearsay exception for statements "made for purposes of medical treatment or medical diagnosis." MRE 803(4). A statement is only hearsay if it is offered to prove the truth of the matter asserted. MRE 801(c). Here, the testimony was not offered to prove that defendant "carries a gun," but was instead offered to describe the process of the examination of the victim and the gathering of the information contained in necessary medical forms. Further, even if the testimony did constitute hearsay, it was reasonably necessary for medical diagnosis or treatment of the victim. The Court of Appeals held in *People v Mahone*, 294 Mich App 208, 214-215 (2011), that particularly in sexual assault cases, in which injuries might be "latent" or "psychological" in nature, a victim's complete history and recitation of the totality of the circumstances of the assault are properly considered statements made for purposes of medical treatment or diagnosis.

HATHAWAY, J., did not participate.

PEOPLE V ARMSTRONG, No. 145856; Court of Appeals No. 308991.

HATHAWAY, J., did not participate.

Summary Disposition January 18, 2013:

PEOPLE V KIYOSHK, No. 143469; Court of Appeals No. 295552. On October 10, 2012, the Court heard oral argument on the application for leave to appeal the June 2, 2011, 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 the judgment of the Court of Appeals and remand this case to that court for consideration of defendant's ineffective assistance of counsel claim. A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction. "Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case." *People v Lown*, 488 Mich 242, 268 (2011) (emphasis, citations, and quotation marks omitted). The circuit court possessed subject matter jurisdiction here, as "Michigan circuit courts are courts of general jurisdiction and unquestionably have [subject matter] jurisdiction over felony cases." *Id.* Defendant's age when the offense was committed does not pertain to the "kind or character" of the case, but rather constitutes a defendant-specific, "particular fact[]." Whether defendant was of an age that made circuit court jurisdiction appropriate is thus a question of personal jurisdiction. See *People v Veling*, 443 Mich 23, 31-32 (1993) (noting that statutory procedures that divested the juvenile court of exclusive jurisdiction over qualifying juveniles who committed certain offenses operated to give "the circuit courts *personal* jurisdiction over those juveniles") (emphasis added); accord *Twyman v State*, 459 NE2d 705, 708 (Ind, 1984) ("The age of the [juvenile] offender . . . is merely a restriction on the personal jurisdiction possessed by a criminal court."); *State v Emery*, 636 NW2d 116, 122 (Iowa,

2001), quoting *State v Marks*, 920 P2d 19, 22 (Ariz App, 1996) (consequence of flawed transfer proceeding from juvenile to adult court is to "deprive the adult division of personal jurisdiction"); *Sawyers v State*, 814 SW2d 725, 729 (Tenn, 1991) (absence of proper transfer order from juvenile to criminal court "cannot be said to affect the court's subject matter jurisdiction"); *State v Kelley*, 206 Conn 323, 332 (1988) ("[Q]uestions relating to the propriety of the transfer of a juvenile from the docket for Juvenile Matters to the regular criminal docket do not implicate the Superior Court's subject matter jurisdiction."). "[A] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction." *Lown*, 488 Mich at 268 (citations omitted). Therefore, by entering a guilty plea in the circuit court, and failing to contest the circuit court's jurisdiction, defendant implicitly consented to that court's exercise of personal jurisdiction.

HATHAWAY and MCCORMACK, JJ., did not participate.

MICHIGAN INSURANCE COMPANY v NATIONAL LIABILITY & FIRE INSURANCE COMPANY, Nos. 144771 and 144792; Court of Appeals No. 301980. On January 10, 2013, the Court heard oral argument on the applications for leave to appeal the February 14, 2012, judgment of the Court of Appeals. On order of the Court, the applications are again considered. 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 Oakland Circuit Court for entry of an order granting summary disposition to the defendant. Pursuant to MCL 500.3114(1), the adult foster care resident injured as a pedestrian in this case is not a "relative" of the adult foster care corporation named in the insurance policy. Accordingly, the priority for payment of personal injury protection benefits rests with the plaintiff as the insurer of the owner of the vehicle involved in the accident, MCL 500.3115(1), and the Court of Appeals therefore erred by holding that the resident may be subject to coverage under the defendant's no-fault automobile insurance policy issued to the adult foster care corporation.

CAVANAGH, J., would deny leave to appeal.

HATHAWAY, J., did not participate.

BAXTER v GEURINK, No. 145205; Court of Appeals No. 301748. On order of the Court, the application for leave to appeal the April 24, 2012, judgment of the Court of Appeals is considered, and it is denied. The application for leave to appeal as cross-appellant is considered and, 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. Michigan generally follows the "raise or waive" rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387 (2008). Failure to timely raise an issue waives review of that issue on appeal. *Id.*, citing *Napier v Jacobs*, 429 Mich 222, 227 (1987). Because the plaintiffs did not challenge the hourly rate or the amount of time expended before the trial court, the issue regarding actual costs was not preserved for appellate review. Therefore, there is no need for an evidentiary hearing. We remand this case to the 61st District Court for entry of an order granting the defendant the entire amount of attorney fees and costs requested.

We do not retain jurisdiction.

HATHAWAY, J., did not participate.

PARKS v DEPARTMENT OF CORRECTIONS, No. 145873; Court of Appeals No. 306974. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order denying the plaintiff's complaint for habeas corpus. The Department of Corrections does not have authority to rescind a final order of discharge from parole once it is delivered to the parolee. *People v Holder*, 483 Mich 168 (2009). According to its own internal operating procedures, it is the responsibility of the Department of Corrections to accurately determine credit prior to delivering a parole discharge. We remand this case to the Court of Appeals for reconsideration of the defendant's complaint for habeas corpus consistent with this order.

We do not retain jurisdiction.

HATHAWAY, J., did not participate.

Leave to Appeal Denied January 18, 2013:

PEOPLE v HENLEY, No. 144643; Court of Appeals No. 306817.

HATHAWAY, J., did not participate.

HOFFMAN v BARRETT, No. 144875; reported below: 295 Mich App 649. On January 10, 2013, the Court heard oral argument on the application for leave to appeal the March 8, 2012, judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., would reverse the judgment of the Court of Appeals.

HATHAWAY, J., did not participate.

PEOPLE v DARIUS THOMAS, No. 145484; Court of Appeals No. 306932.

HATHAWAY, J., did not participate.

MILLER v S M HONG ASSOCIATES, INC, No. 145633; Court of Appeals No. 302016.

HATHAWAY, J., did not participate.

PEOPLE v GOURD, No. 145688; Court of Appeals No. 310748.

HATHAWAY, J., did not participate.

PEOPLE v MILES, No. 145940; Court of Appeals No. 302497.

HATHAWAY, J., did not participate.

SMITH v ROYAL OAK TOWNSHIP, No. 145963; Court of Appeals No. 303939.

HATHAWAY, J., did not participate.

HOME-OWNERS INSURANCE COMPANY v DOWNS, Nos. 146011 and 146012; Court of Appeals Nos. 301105 and 301775.

HATHAWAY, J., did not participate.

DAVIS v EMERGENCY FINANCIAL MANAGER FOR THE DETROIT PUBLIC SCHOOLS, No. 146187; Court of Appeals No. 313297.

HATHAWAY, J., did not participate.

In re TUCKER, No. 146382; Court of Appeals No. 308915. HATHAWAY, J., did not participate.

In re AUSTIN, No. 146441; Court of Appeals No. 312912. HATHAWAY, J., did not participate.

Leave to Appeal Granted January 24, 2013:

PEOPLE v STANLEY DUNCAN and PEOPLE v VITA DUNCAN, Nos. 146295 and 146296; Court of Appeals Nos. 312637 and 312638. The application for leave to appeal the November 29, 2012, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the witness was "unavailable" for the purposes of MRE 804(a). Pursuant to MCR 7.302(H)(1), we vacate as dicta those portions of the Court of Appeals' judgment and the Macomb Circuit Court's October 5, 2012, opinion discussing whether the admission of the complainant's preliminary examination testimony would violate the defendants' Confrontation Clause rights pursuant to *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The Clerk of the Court is directed to place this case on the April 2013 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than February 26, 2013, and appellees' brief and appendix, if appellees choose to submit an appendix, must be filed no later than March 22, 2013.

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.

Summary Disposition January 25, 2013:

MARSACK v MAEDEL, No. 145239; Court of Appeals No. 291153. 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 Sanilac Circuit Court for entry of summary disposition in favor of defendant Claudia Maedel. Because "MCR 2.102 does not provide the authority to issue a so-called 'third' summons," *Hyslop v Wojjusik*, 252 Mich App 500, 506 (2002), plaintiff's initial complaint "is deemed dismissed without prejudice" as to Maedel. MCR 2.102(E)(1). Because plaintiff did not file a new complaint until after the three-year statute of limitations expired, MCL 600.5805(10), and this action is not "commenced by the personal representative of the deceased person" to toll the statute of limitations pursuant to MCL 600.5852, defendant is entitled to summary disposition. MCR 2.116(C)(7).

SMITH v DEPARTMENT OF HUMAN SERVICES DIRECTOR, Nos. 145612, 145613, 145622, and 145623; Court of Appeals Nos. 309441 and 309894. On November 15, 2012, the Court heard oral argument on the applications for leave to appeal the June 26, 2012, judgment of the Court of Appeals. Subsequently, the Legislature passed, and the Governor signed, 2012 PA 607, which amends MCL 400.57a and specifies additional limitations on

the defendant to provide family independence program assistance. The defendant has now moved this Court to authorize compliance with the newly enacted § 57a, regardless of any potential conflict between that statute and the March 27, 2012, and April 10, 2012, orders of the Genesee Circuit Court. Pursuant to MCR 7.316(A)(7), the defendant's motion is granted. We vacate the provisions of the circuit court orders and the Court of Appeals' judgment to the extent that they conflict with the requirements of § 57a. In granting the defendant's motion, we make no statement as to the meaning, validity, or effect of 2012 PA 607. We further direct the parties to file supplemental briefs within 21 days of the date of this order, addressing whether any remaining questions regarding the defendant's actions prior to enactment of 2012 PA 607 are rendered moot in light of 2012 PA 607.

We retain jurisdiction.

MCCORMACK, J., did not participate.

PEOPLE V ENGLISH, No. 145765; Court of Appeals No. 308852. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for a determination of whether that court complied with its own practices regarding the filing of certificates stating that a transcript does not exist and deadlines for applications for leave to appeal.

We do not retain jurisdiction.

Leave to Appeal Granted January 25, 2013:

KENNEY V BOOKER, No. 145116; Court of Appeals No. 304900. On January 10, 2013, the Court heard oral argument on the application for leave to appeal the April 3, 2012, judgment of the Court of Appeals. The application is again considered, and it is granted. The parties shall address (1) the relationship between common law and statutory habeas corpus; (2) the standard for establishing a claim for habeas corpus relief, including whether there is a difference between the standard for providing relief at common law and by statute, MCL 600.4301 *et seq.*; (3) the scope of the limitations on habeas corpus found in MCL 600.4310; (4) the effect, if any, of the availability of other means of review on claims for habeas corpus relief generally, and specifically in the context of parole revocation; (5) the validity and scope of the "radical defect" requirement in habeas corpus cases, including whether such requirement is limited solely to defects in subject matter or personal jurisdiction; (6) the standard of review applicable to habeas corpus claims, including if there is a difference at common law and by statute; (7) the type(s) of relief that may be granted to successful habeas corpus claimants; and (8) whether habeas corpus principles recognize a distinction between executive detention and judicially ordered detention and, if so, the significance of that distinction.

The Clerk of the Court is directed to place this case on the May 2013 session calendar for argument and submission. Appellant's brief and

appendix must be filed no later than March 12, 2013, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than April 12, 2013.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied January 25, 2013:

In re DOUGLAS ESTATE, Nos. 145763 and 145764; Court of Appeals Nos. 298330 and 298723.

CAVANAGH, J., would grant leave to appeal.

CAPITAL ONE BANK v GREEN, No. 144038; Court of Appeals No. 301968.

PEOPLE v BULEY, No. 144064; Court of Appeals No. 301790.

PEOPLE v SEMA'J LAWSON, No. 144411; Court of Appeals No. 299798.

PEOPLE v SULLIVAN, No. 144813; Court of Appeals No. 298601.

HAMMOUD v HAMMOUD, No. 144986; Court of Appeals No. 302619.

PEOPLE v GOUDLOCK, No. 145067; Court of Appeals No. 303256.

ALLOR v DECLARK, INC, No. 145104; Court of Appeals No. 300953.

PEOPLE v CLOUD, No. 145245; Court of Appeals No. 309016.

PEOPLE v JIMMY BENNETT, No. 145409; Court of Appeals No. 308356.

PEOPLE v DEJONGE, No. 145528; Court of Appeals No. 295168.

PEOPLE v LAPINE, No. 145562; Court of Appeals No. 309429.

PONTE v HAZLETT, Nos. 145590 and 145591; Court of Appeals Nos. 298193 and 298194.

U S BANK NATIONAL ASSOCIATION v TICOR TITLE INSURANCE COMPANY, No. 145593; Court of Appeals No. 295735.

ORCO INVESTMENTS, INC v CITY OF ROMULUS, No. 145624; Court of Appeals No. 303744.

PEOPLE v BUCK, No. 145625; Court of Appeals No. 300702.

PEOPLE v TOTH, No. 145679; Court of Appeals No. 304226.

PEOPLE v TREMAIN, No. 145694; Court of Appeals No. 309286.

PEOPLE v DONOVAN WILSON, No. 145707; Court of Appeals No. 308646.

In re DONALD E MASSEY REVOCABLE TRUST DATED DECEMBER 13, 2001, No. 145745; Court of Appeals No. 310619. The motion to seal this Court's record is granted. The Court finds that there is good cause to seal the record, consistent with the May 4, 2011, Wayne County Probate Court's order to seal court records, the October 31, 2011, Wayne Circuit Court's order to seal court records, and the June 20, 2012, Court of Appeals order sealing that court's files. There is no less restrictive means to adequately and effectively protect the specific interests asserted. See MCR 7.313(A), (D), and MCR 8.119(F)(1). The application for leave to appeal the July 13, 2012, order of the Court of Appeals is considered, and it is denied.

ENVISION BUILDERS, INC v CITIZENS INSURANCE COMPANY OF AMERICA, Nos. 145767 and 145768; Court of Appeals Nos. 303652 and 303668.

CAVANAGH, J., not participating due to a familial relationship with counsel of record.

PEOPLE v STILES, No. 145805; Court of Appeals No. 302206.

HORSESHOE LAKE CORPORATION v CARLSON, No. 145832; Court of Appeals No. 304695.

NORTH POINTE INSURANCE COMPANY v SIMPSON, No. 145838; Court of Appeals No. 304118.

R & M VENTURES, LLC v WONSEY ESTATE, No. 145844; Court of Appeals No. 304241.

CITY OF RIVER ROUGE v CITY OF ECORSE, No. 145845; Court of Appeals No. 303920.

PEOPLE v JIMMIE ROGERS, No. 145855; Court of Appeals No. 304892.

COATES v ALGER CORRECTIONAL FACILITY WARDEN, No. 145861; Court of Appeals No. 307096.

PEOPLE v THORNSBERRY, No. 145896; Court of Appeals No. 309763.

GOLDBERG v WLEZNIAK, No. 145898; Court of Appeals No. 301439.

PEOPLE v ORLANDO, No. 145900; Court of Appeals No. 309517.

PEOPLE v VELEZ, No. 145914; Court of Appeals No. 310613.

PEOPLE v BANCROFT, No. 145956; Court of Appeals No. 297810.

PEOPLE v INDIA TAYLOR, No. 145970; Court of Appeals No. 301662.

In re ELEANOR V MIREK TRUST, No. 145973; Court of Appeals No. 303695.

PEOPLE v JASON BROWN, No. 145990; Court of Appeals No. 305153.

FINDLING v KLOIAN, No. 145996; Court of Appeals No. 306849.

PEOPLE v WILLIAM NELSON, No. 146008; Court of Appeals No. 310124.

PEOPLE v PENZIEN, No. 146027; Court of Appeals No. 311398.

PEOPLE v KAREEN HALL, No. 146031; Court of Appeals No. 305353.

PEOPLE v FRENCH, No. 146034; Court of Appeals No. 310554.

PEOPLE v ANTHONY MCGOWAN, No. 146035; Court of Appeals No. 299386.

PEOPLE v JOIE BELL, No. 146058; Court of Appeals No. 305103.

KOKAS v CITIZENS INSURANCE COMPANY OF AMERICA, No. 146061; Court of Appeals No. 303592.

PEOPLE v BAILEY, No. 146064; Court of Appeals No. 305987.

PEOPLE v DAVID REESE, No. 146068; Court of Appeals No. 305356.

PEOPLE v MATHISON, No. 146071; Court of Appeals No. 306637.

PEOPLE v MCMAHON, No. 146072; Court of Appeals No. 302037.

PEOPLE v TABATHA DAWSON, No. 146074; Court of Appeals No. 304573.

PEOPLE v GENTRY, No. 146099; Court of Appeals No. 305644.

OLD CF, INC v REHMANN GROUP, INC, No. 146105; Court of Appeals No. 307484.

PEOPLE v SANDBERG, No. 146107; Court of Appeals No. 310329.

PEOPLE v SANDBERG, No. 146109; Court of Appeals No. 310346.

PEOPLE v JOSEPH LONG, No. 146110; Court of Appeals No. 303430.

PEOPLE v CARROLL, No. 146260; Court of Appeals No. 308229.

BUCHANAN v WALTERS, No. 146302; Court of Appeals No. 311195.

Superintending Control Denied January 25, 2013:

DEVANEY v ATTORNEY GRIEVANCE COMMISSION, No. 146017.

Leave to Appeal Before Decision by the Court of Appeals Denied January 25, 2013:

WYOMING CHIROPRACTIC HEALTH CLINIC v AUTO-OWNERS INSURANCE COMPANY, No. 146220; Court of Appeals No. 313176.

Reconsideration Denied January 25, 2013:

WALGREEN COMPANY v RDC ENTERPRISES, LLC, No. 144651; Court of Appeals No. 293608. Leave to appeal denied at 493 Mich 868.

PEOPLE v ISADORE DEAN, No. 143152; Court of Appeals No. 296183. Leave to appeal denied at 493 Mich 881.

PEOPLE v ANDRE EDWARDS, No. 143502; Court of Appeals No. 294826. Leave to appeal denied at 493 Mich 881.

PEOPLE v CRAIGHEAD, No. 144415; Court of Appeals No. 301465. Leave to appeal denied at 493 Mich 867.

CAVANAGH, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

PEOPLE v SCOTT JONES, No. 144509; Court of Appeals No. 304553. Leave to appeal denied at 492 Mich 865.

LUCIO v GREAT LAKES CASUALTY INSURANCE COMPANY, No. 144603; Court of Appeals No. 299786. Leave to appeal denied at 493 Mich 852.

PEOPLE v GRANAAS, No. 144609; Court of Appeals No. 299576. Leave to appeal denied at 493 Mich 855.

PEOPLE v PINDER, No. 144624; Court of Appeals No. 306098. Leave to appeal denied at 493 Mich 868.

PEOPLE v MARKS, No. 144626; Court of Appeals No. 301118. Leave to appeal denied at 492 Mich 865.

PEOPLE v CURRIE, No. 144665; Court of Appeals No. 305882. Leave to appeal denied at 493 Mich 868.

PEOPLE v RAIHALA, No. 144745; Court of Appeals No. 307407. Leave to appeal denied at 492 Mich 866.

PEOPLE v PHILLIP TOWNSEND, No. 144761; Court of Appeals No. 303179. Leave to appeal denied at 493 Mich 868.

PEOPLE v HAROLD ROGERS, No. 144820; Court of Appeals No. 306248. Leave to appeal denied at 493 Mich 868.

THOM v PALUSHAJ, No. 144840; Court of Appeals No. 301568. Leave to appeal denied at 493 Mich 865.

US MOTORS v GENERAL MOTORS EUROPE, No. 145002; Court of Appeals No. 299901. Leave to appeal denied at 493 Mich 866.

PEOPLE v BORKOWSKI, No. 145112; Court of Appeals No. 308489. Leave to appeal denied at 492 Mich 868.

PEOPLE v BOWERS, No. 145185; Court of Appeals No. 301811. Leave to appeal denied at 493 Mich 869.

EASTBROOK HOMES, INC v DEPARTMENT OF TREASURY, No. 145192; Court of Appeals No. 299612; reported below: 296 Mich App 336. Leave to appeal denied at 493 Mich 882.

PEOPLE v HAMILTON, No. 145263; Court of Appeals No. 309304. Leave to appeal denied at 493 Mich 882.

Leave to Appeal Denied January 30, 2013:

PEOPLE v NICOLE ROBERTS, No. 146555; Court of Appeals No. 313458.

Leave to Appeal Denied February 1, 2013:

GREENSTEIN v FARMINGTON PUBLIC SCHOOLS, No. 146285; Court of Appeals No. 306268.

In re ADAMS/CRIGLER MINORS, No. 146453; Court of Appeals No. 308982.

In re ADAMS/CRIGLER MINORS, No. 146455; Court of Appeals No. 308983.

Application for Leave to Appeal Dismissed on Stipulation February 1, 2013:

CUMMINGS v LEWIS, No. 145445; Court of Appeals No. 303386.

Summary Disposition February 6, 2013:

DESAI v ALLYN, No. 144818; Court of Appeals No. 300330. 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. The Washtenaw Circuit Court's sanction award included $342 incurred on April 14, 2010, for services that were not incurred in connection with the plaintiff's complaint for divorce. That amount must be subtracted from the $10,044.25 for which the appellant and the plaintiff are jointly and severally liable to the defendant. The sanction award is $9,702.25. In all other respects, leave to appeal is denied.

UNITED SERVICES AUTOMOBILE ASSOCIATION v RIMBEY, No. 145188; Court of Appeals No. 299307. 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. The trial court clearly erred in awarding the defendants attorney fees pursuant to MCL 500.3148(1), because the plaintiff's initial refusal to pay benefits under the no-fault act was based on a legitimate question of factual uncertainty as to whether Rana Reyes suffered "accidental bodily injury" pursuant to MCL 500.3105(1) and (4). *Ross v Auto Club Group*, 481 Mich 1, 11 (2008). In all other respects, leave to appeal is denied.

PEOPLE v WILDING, No. 145530; Court of Appeals No. 309245. 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 JAMES NELSON, No. 145536; Court of Appeals No. 306864. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for the appointment of substitute appellate counsel. The record shows that initially appointed appellate counsel moved to withdraw because of a breakdown of the attorney-client relationship. The record does not show

that counsel determined or advised the court that there was no nonfrivolous issue to raise on appeal, and counsel's motion did not comply with MCR 7.211(C)(5) or AO 2004-6, Standard 5. Under the circumstances of this case, the circuit court erred in granting the motion to withdraw without appointing substitute appellate counsel. On remand, newly appointed appellate counsel may file an application for leave to appeal to the Court of Appeals within 12 months of the date of the circuit court's order appointing counsel, as, at the time the defendant was sentenced, he was entitled to file an application within 12 months of sentencing. See former MCR 7.205(F)(3).

WIRELESS TOYZ FRANCHISE, LLC v CLEAR CHOICE COMMUNICATION, INC, No. 145843; Court of Appeals No. 303619. 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 reasons stated in the Court of Appeals dissenting opinion, and we reinstate the March 29, 2011 order of the Oakland Circuit Court, denying the defendants' motion to vacate the arbitration award and confirming the award.

PEOPLE v KEITH MOORE, No. 145912; Court of Appeals No. 303750. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals' judgment's resolution of the claim of ineffective assistance of counsel advanced in the defendant's Standard 4 brief, and we remand this case to the Court of Appeals for reconsideration of that issue. See *Haines v Kerner*, 404 US 519, 520 (1972). In declining to review the defendant's ineffective assistance claims, the Court of Appeals "stress[ed]" that the "defendant made no effort to expand the record by moving to remand or for a new trial or evidentiary hearing below, nor [did] he suggest these remedies on appeal," yet the defendant's Standard 4 brief contained two requests for a remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), and the defendant attached to his Standard 4 brief his affidavit, those of the three witnesses whom he contends defense counsel erred in failing to interview or call, and the allegedly deficient warrant affidavit that defense counsel failed to challenge. See *People v Hawkins*, 468 Mich 488, 498-499 (2003). In all other respects, leave to appeal is denied. The motion to remand to the trial court is denied.

We do not retain jurisdiction.

PEOPLE v JIMMIE NELSON, No. 146024; Court of Appeals No. 301253. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of the defendant's remaining issues. Even absent concrete proof of a particular act causing death, the circumstantial evidence was legally sufficient, when viewed in the light most favorable to the prosecution, to prove beyond a reasonable doubt that the defendant caused the victim's death with malice. In all other respects, leave to appeal is denied.

HAGERTY v BOARD OF MANISTEE COUNTY ROAD COMMISSIONERS, Nos. 146047 and 146048; Court of Appeals No. 304369 and 304439. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of

the Court of Appeals' judgment that held that the defendant is not entitled to the protection of governmental immunity, and we vacate the remainder of the Court's analysis because it is unnecessary to the disposition of the case. The plaintiff's decedent was fatally injured when the vehicle she was driving left an unpaved road in Manistee County and hit a tree. The plaintiff alleged that this accident occurred when an oncoming motorist caused a cloud of dust to rise from the roadway, causing the decedent to lose her orientation, drive into soft sand on the edge of the road, and veer off the roadway. This theory of causation failed to point to a condition of the highway in need of repair. A dust cloud rising from an unpaved road is not a defect in the physical structure of the roadbed, as required for liability to arise under the governmental tort liability act highway exception, MCL 691.1402(1). *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 176-177 (2000). Moreover, a plaintiff cannot recover in a claim where the sole proximate cause of the injury is a natural substance that has accumulated over a highway. See *Haliw v Sterling Hts*, 464 Mich 297, 311 (2001). An accumulation of gravel, whether natural or otherwise, does not implicate the defendant's duty to maintain the highway in "reasonable repair." *Paletta v Oakland Co Rd Comm*, 491 Mich 897 (2012); *Buckner Estate v City of Lansing*, 480 Mich 1243 (2008). We remand this case to the Manistee Circuit Court for entry of an order granting summary disposition to the defendant pursuant to MCR 2.116(C)(7).

PEOPLE V GEIERMAN, No. 146238; Court of Appeals No. 305107. 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 and reinstate the defendant's conviction for felonious assault because the evidence was sufficient to sustain his conviction for that offense. The defendant broke into a home, threatened to strike the occupants with what appeared to be a small bat or club, and thus attempted "to commit a battery or [committed] an unlawful act that place[d] another in reasonable apprehension of receiving an immediate battery." *People v Nickens*, 470 Mich 622, 628 (2004) (quotation marks and citations omitted). The Court of Appeals is required to view the evidence in a light most favorable to the prosecution. It was not empowered to substitute its judgment for that of the circuit court. *People v Wolfe*, 440 Mich 508, 515-516 (1992).

Leave to Appeal Granted February 6, 2013:

HENRY V LABORERS LOCAL 1191 and RAMSEY V LABORERS LOCAL 1191, Nos. 145631 and 145632; Court of Appeals Nos. 302373 and 302710. The parties shall include among the issues to be briefed (1) whether, regardless of the public body involved, the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., or the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 401 *et seq*., preempt Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA; (2) whether a union employee's report to a public body of suspected illegal activity or participation in an investigation

thereof is of only peripheral concern to the NLRA or the LMRDA so that the employee's claims under the WPA are not preempted by federal law; and (3) whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act.

The Attorney General and the Labor and Employment Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied February 6, 2013:

ERIE INSURANCE EXCHANGE v LAKE CITY INDUSTRIAL PRODUCTS, INC, No. 145774; Court of Appeals No. 302889.

PEOPLE v MORRIS, No. 145828; Court of Appeals No. 307496.
CAVANAGH, J., would grant leave to appeal.

HOLMES v ET4, INC, No. 145831; Court of Appeals No. 303954.

Order Entered February 6, 2013:

PEOPLE v ARTHUR, No. 145702; Court of Appeals No. 301762. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for an evidentiary hearing regarding the decision to keep the defendant in shackles during the trial. We order the trial court to articulate with particularity, on the record, its reasons for requiring the defendant to wear shackles at his jury trial. The court shall receive evidence and make findings of fact regarding (1) whether the physical restraints were justified under *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005), and (2) whether those restraints were visible to any jurors, either during jury selection or afterward. We direct the trial court to commence the hearing within 35 days of the date of this order. We further order that court to submit a transcript of the hearing, along with its findings of fact and conclusions of law, to the Clerk of this Court within 28 days of the conclusion of the hearing.

We retain jurisdiction.

Interim Suspension Order Entered February 8, 2013:

In re MCCREE, No. 146461. On order of the Court, the motions for immediate consideration are granted. The petition for interim suspension is considered, and it is granted. The respondent, Wayne Circuit Judge Wade H. McCree, is suspended without pay, effective immediately, until further order of this Court. The respondent's salary will be held in escrow pending the final resolution of these disciplinary proceedings. 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 February 8, 2013:

In re FORFEITURE OF BAIL BOND (PEOPLE v GASTON), No. 146033; Court of Appeals No. 305004. The parties shall address (1) whether a court's failure to comply with the 7-day notice provision of MCL 765.28 bars forfeiture of a bail bond posted by a surety and (2) whether *In re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482 (2007), holding that the 7-day notice provision is directory rather than mandatory, was correctly decided.

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 February 8, 2013:

VITTIGLIO v VITTIGLIO, Nos. 145825 and 145826; reported below: 297 Mich App 391.

MARKMAN, J. (*concurring*). Although I concur in the order, I write separately because I believe the Court of Appeals reached the right result for the wrong reasons in its published opinion. In particular, I believe the Court of Appeals incorrectly concluded that settlements regarding marital property distributions constitute "domestic relations cases" for purposes of MCR 3.216, because only cases "as to child custody, parenting time, child support, or spousal support," as set forth in MCL 552.502(m), constitute "domestic relations cases" for purposes of this rule. Moreover, the Court of Appeals incorrectly concluded in the alternative that the settlement was exempt from the statute of frauds, MCL 566.106 and MCL 566.108, because the settlement occurred "by act or operation of law." However, the settlement did not occur by "act" because neither MCR 3.216 nor any act of the Legislature allows such a settlement, and it did not occur by "operation of law" because this Court has long understood "operation of law" to indicate "the manner in which a party acquires rights without any act of his own." *Merdzinski v Modderman*, 263 Mich 173, 175 (1933) (citation and quotation marks omitted). Plaintiff clearly acted in an affirmative and voluntary manner in reaching a settlement with defendant. Notwithstanding what I believe are the foregoing defects in the Court of Appeals' analysis, it is ultimately correct that plaintiff is bound by the settlement for three reasons: (1) plaintiff waived any objection to the mediation by expressly agreeing to the mediation through her counsel's signature on the January 11, 2011, order requiring the parties to go to mediation and then failing to timely object to the mediation under MCR 3.216(D); (2) plaintiff affirmed to the mediator that his recorded summary of the parties' agreement was accurate, and she agreed to the recited terms as a full and final binding settlement of the case; and (3) defendant gave plaintiff a check for $1.2

million in reliance on the settlement agreement, which was sufficient partial performance to take the oral settlement out of the statute of frauds and render it enforceable. See *Giordano v Markovitz*, 209 Mich App 676, 679 (1995).

PEOPLE v CROWELL, No. 145967; Court of Appeals No. 305466.

BARRY COUNTY TREASURER v KLINGE, No. 146607; Court of Appeals No. 308783.

Summary Disposition March 4, 2013:

MURRAY v ITC HOLDINGS CORP, No. 145795; Court of Appeals No. 310776. 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.

VIVIANO, J., did not participate.

HODGE v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 146118; Court of Appeals No. 308723. 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 a similar issue is presented in the case of *Moody v Getwell Med Transp*, 491 Mich 923 (2012), which we remanded to the Court of Appeals for consideration as on leave granted by order dated May 23, 2012.

VIVIANO, J., did not participate.

PEOPLE v HERSHEY, No. 146125; Court of Appeals No. 309183. 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 offense variable (OV) 16 (property obtained, damaged, lost, or destroyed) and OV 19 (interference with the administration of justice) were correctly scored and whether the defendant, by failing to object to the scoring of these offense variables at sentencing, forfeited or waived any scoring errors.

VIVIANO, J., did not participate.

Leave to Appeal Denied March 4, 2013:

PEOPLE v KELLY, No. 144361; Court of Appeals No. 301023.

VIVIANO, J., did not participate.

DAN JOINT VENTURE III, LP v HOFMEISTER, No. 144756; Court of Appeals No. 300777.

VIVIANO, J., did not participate.

JACOB v BALD MOUNTAIN WEST, No. 144886; Court of Appeals No. 304487.

VIVIANO, J., did not participate.

PEOPLE v CORNWELL, No. 145360; Court of Appeals No. 301660.

VIVIANO, J., did not participate.

PEOPLE v HOLT, No. 145425; Court of Appeals No. 302381.
VIVIANO, J., did not participate.

PEOPLE v JEREMY JOHNSON, No. 145482; Court of Appeals No. 308417.
VIVIANO, J., did not participate.

READ LUMBER & HARDWARE INC v LAMKIN, No. 145682; Court of Appeals No. 303597.
VIVIANO, J., did not participate.

CITY OF BLOOMFIELD HILLS v FROLING, No. 145727; Court of Appeals No. 299721.
VIVIANO, J., did not participate.

PEOPLE v GEORGE, No. 145790; Court of Appeals No. 304299.
VIVIANO, J., did not participate.

PEOPLE v LOGAN, No. 145818; Court of Appeals No. 303269.
VIVIANO, J., did not participate.

35160 JEFFERSON AVENUE, LLC v HARRISON CHARTER TOWNSHIP, No. 145879; Court of Appeals No. 303152.
VIVIANO, J., did not participate.

PEOPLE v STALLWORTH, No. 145883; Court of Appeals No. 311109.
VIVIANO, J., did not participate.

PEOPLE v SNERLING, No. 145884; Court of Appeals No. 311300.
VIVIANO, J., did not participate.

BONNER v BALLY TOTAL FITNESS OF THE MIDWEST, INC, No. 145893; Court of Appeals No. 302782.
VIVIANO, J., did not participate.

PEOPLE v BURIEL, No. 145894; Court of Appeals No. 304873.
VIVIANO, J., did not participate.

GONZALES v GONZALES, No. 145899; Court of Appeals No. 306838.
VIVIANO, J., did not participate.

SAAD v AURORA LOAN SERVICES, LLC, No. 145901; Court of Appeals No. 304813.
VIVIANO, J., did not participate.

PEOPLE v RAYMOND KING, No. 145902; reported below: 297 Mich App 465.
CAVANAGH, J., would grant leave to appeal.
VIVIANO, J., did not participate.

BP PRODUCTS NORTH AMERICA INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 145910; Court of Appeals No. 295279.
VIVIANO, J., did not participate.

PEOPLE v BRIDGEFORTH, No. 145915; Court of Appeals No. 304274.
VIVIANO, J., did not participate.

PEOPLE v CARDENAS-BORBON, No. 145927; Court of Appeals No. 307598.
VIVIANO, J., did not participate.

PEOPLE v RYAN BROWN, No. 145933; Court of Appeals No. 307687.
VIVIANO, J., did not participate.

DYKES v SINGH, No. 145938; Court of Appeals No. 299346.
VIVIANO, J., did not participate.

PEOPLE v WILLIAM SPENCER, No. 145945; Court of Appeals No. 308103.
VIVIANO, J., did not participate.

PEOPLE v MORNINGSTAR, No. 145950; Court of Appeals No. 310540.
VIVIANO, J., did not participate.

PEOPLE v NETTLES, No. 145951; Court of Appeals No. 310787.
VIVIANO, J., did not participate.

PEOPLE v KEVIN HILL, No. 145952; Court of Appeals No. 307621.
VIVIANO, J., did not participate.

BROWN v SUMMERFIELD TOWNSHIP, No. 145955; Court of Appeals No. 304979.
VIVIANO, J., did not participate.

BRONSON METHODIST HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN and BRONSON METHODIST HOSPITAL v PROGRESSIVE MICHIGAN INSURANCE COMPANY, Nos. 145999 and 146000; reported below: 298 Mich App 192.
VIVIANO, J., did not participate.

PEOPLE v MCCLURE, No. 146006; Court of Appeals No. 308386.
VIVIANO, J., did not participate.

PEOPLE v BOPP, No. 146021; Court of Appeals No. 308360.
VIVIANO, J., did not participate.

PEOPLE v ALLINGHAM CORPORATION, No. 146045; Court of Appeals No. 306120.
VIVIANO, J., did not participate.

GREENVILLE MANUFACTURING, LLC v NEXTENERGY CENTER, No. 146049; Court of Appeals No. 304229.
VIVIANO, J., did not participate.

PEOPLE v WILLFORD, No. 146052; Court of Appeals No. 311809.
VIVIANO, J., did not participate.

PEOPLE v CHRISTOPHER ALLEN, No. 146053; Court of Appeals No. 311526.
VIVIANO, J., did not participate.

PEOPLE v FRYER, No. 146055; Court of Appeals No. 302152.
VIVIANO, J., did not participate.

HERRON-BURGESS v COCA COLA COMPANY, No. 146056; Court of Appeals No. 308735.
VIVIANO, J., did not participate.

PEOPLE v STEVE BOGARD, No. 146057; Court of Appeals No. 310087.
VIVIANO, J., did not participate.

UNIT 67, LLC v HUDSON, No. 146060; Court of Appeals No. 312359.
VIVIANO, J., did not participate.

PEOPLE v MORRISSEY, No. 146067; Court of Appeals No. 306901.
VIVIANO, J., did not participate.

PEOPLE v KELLY, No. 146077; Court of Appeals No. 309008.
VIVIANO, J., did not participate.

PEOPLE v PATTERSON, No. 146084; Court of Appeals No. 305821.
VIVIANO, J., did not participate.

LASALLE BANK MIDWEST, NA v ABERNATHY, No. 146086; Court of Appeals No. 304111.
VIVIANO, J., did not participate.

PEOPLE v FURMAN, Nos. 146092, 146093, 146094, and 146095; Court of Appeals Nos. 305536, 305538, 305541, and 305543.
VIVIANO, J., did not participate.

PEOPLE v GERENCER, No. 146101; Court of Appeals No. 310189.
VIVIANO, J., did not participate.

MERLO CONSTRUCTION COMPANY, INC v CITIZENS INSURANCE COMPANY OF AMERICA, No. 146108; Court of Appeals No. 304184.
VIVIANO, J., did not participate.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v MAPLE POINTE CONDOMINIUM ASSOCIATION, No. 146114; Court of Appeals No. 307910.
VIVIANO, J., did not participate.

PEOPLE v DICKERSON, No. 146121; Court of Appeals No. 304609.
VIVIANO, J., did not participate.

PEOPLE v LYNCH, No. 146122; Court of Appeals No. 311334.
VIVIANO, J., did not participate.

PEOPLE v ARNETT, No. 146123; Court of Appeals No. 30553.
VIVIANO, J., did not participate.

PEOPLE v MCKINNEY, No. 146127; Court of Appeals No. 305093.
VIVIANO, J., did not participate.

TRUSS v OAKS CORRECTIONAL FACILITY WARDEN, No. 146130; Court of Appeals No. 310468.
VIVIANO, J., did not participate.

PEOPLE v DANIEL COLEMAN, No. 146137; Court of Appeals No. 305480.
VIVIANO, J., did not participate.

RADFORD v HURLEY HEALTH SERVICES, No. 146138; Court of Appeals No. 304725.
VIVIANO, J., did not participate.

PEOPLE v EISON, No. 146147; Court of Appeals No. 306109.
VIVIANO, J., did not participate.

PEOPLE v RANDALL, No. 146148; Court of Appeals No. 304042.
VIVIANO, J., did not participate.

PEOPLE v DOUGLAS BURNS, No. 146149; Court of Appeals No. 305037.
VIVIANO, J., did not participate.

PEOPLE v RAYMOND HARRIS, No. 146150; Court of Appeals No. 303745.
VIVIANO, J., did not participate.

PEOPLE v JANUARY, No. 146152; Court of Appeals No. 306148.
VIVIANO, J., did not participate.

PEOPLE v FRITZ, No. 146154; Court of Appeals No. 301411.
VIVIANO, J., did not participate.

TORRES v FERROUS PROCESSING & TRADING COMPANY, No. 146155; Court of Appeals No. 308550.
VIVIANO, J., did not participate.

PEOPLE v KENNETH LONG, No. 146158; Court of Appeals No. 305053.
VIVIANO, J., did not participate.

PEOPLE v ERNEST THOMPSON, No. 146160; Court of Appeals No. 311819.
VIVIANO, J., did not participate.

WALKER v GEICO GENERAL INSURANCE COMPANY, No. 146164; Court of Appeals No. 308829.
VIVIANO, J., did not participate.

GRAHAM v FIRST OF AMERICA BANK, No. 146175; Court of Appeals No. 308623.
VIVIANO, J., did not participate.

PEOPLE v RICHARD JOHNSON, No. 146176; Court of Appeals No. 307460.
VIVIANO, J., did not participate.

PEOPLE v WILBERT, No. 146177; Court of Appeals No. 311645.
VIVIANO, J., did not participate.

PEOPLE v RONALD GARDNER, No. 146188; Court of Appeals No. 305270.
VIVIANO, J., did not participate.

PEOPLE v TILLMAN, No. 146189; Court of Appeals No. 305354.
VIVIANO, J., did not participate.

PEOPLE v TURPEN, No. 146193; Court of Appeals No. 305386.
VIVIANO, J., did not participate.

PEOPLE v MELVIN TAYLOR, No. 146194; Court of Appeals No. 312146.
VIVIANO, J., did not participate.

PEOPLE v SWORD, No. 146197; Court of Appeals No. 301169.
VIVIANO, J., did not participate.

PEOPLE v NICHOLSON, No. 146222; Court of Appeals No. 304784.
VIVIANO, J., did not participate.

PEOPLE v DAVID CHAPMAN, No. 146225; Court of Appeals No. 305465.
VIVIANO, J., did not participate.

ABERDEEN OF BRIGHTON, LLC v CITY OF BRIGHTON, No. 146473; Court of Appeals No. 301826.
VIVIANO, J., did not participate.

Application for Leave to Appeal Dismissed March 4, 2013:

SMITH v EATON CORPORATION TORQUE CONTROLS, No. 146153; Court of Appeals No. 308484. On order of the Court, the application for leave to appeal the October 1, 2012, order of the Court of Appeals is considered, and it is dismissed. The decision of the Michigan Compensation Appellate Commission (MCAC) that the defendants seek to appeal is not a final order because it did not dispose of "all the claims" of the parties. MCR 7.202(6)(a)(1). This Court has jurisdiction only to consider appeals from final decisions or final orders of the MCAC. MCL 418.861a(14); *Lucas v Ford Motor Co*, 299 Mich 280 (1941).
VIVIANO, J., did not participate.

Superintending Control Denied March 4, 2013:

BOTIMER v ATTORNEY GRIEVANCE COMMISSION, No. 143254.
VIVIANO, J., did not participate.

Leave to Appeal Before Decision by the Court of Appeals Denied March 4, 2013:

VROOMAN v FORD MOTOR COMPANY, No. 146368; Court of Appeals No. 313437.
VIVIANO, J., did not participate.

Reconsideration Denied March 4, 2013:

CONVERSE v AUTO CLUB GROUP INSURANCE COMPANY, No. 142917; Court of Appeals No. 293303. Summary disposition at 493 Mich 877.
VIVIANO, J., did not participate.

PEOPLE v ROBERT MOORE, No. 144791; Court of Appeals No. 300281. Leave to appeal denied at 492 Mich 866. On order of the Court, the motion for reconsideration of this Court's September 4, 2012, order is considered. We modify the first sentence of the order to read: "On order of the Court, the motion to stay consideration of the application is denied as moot because the defendant has filed his supplemental brief and the requested stay is no longer necessary." The motion for reconsideration is denied, because it does not appear that the Court's order denying leave to appeal entered erroneously.

VIVIANO, J., did not participate.

PEOPLE v SANFORD, No. 145031; Court of Appeals No. 300852. Leave to appeal denied at 492 Mich 867.

VIVIANO, J., did not participate.

VANSLEMBROUCK v HALPERIN, No. 145153; Court of Appeals No. 309680. Leave to appeal before decision by the Court of Appeals denied at 493 Mich 902.

VIVIANO, J., did not participate.

COX v HURON-CLINTON METROPOLITAN AUTHORITY, No. 145325; Court of Appeals No. 303158. Leave to appeal denied at 492 Mich 870.

CAVANAGH, J., would grant consideration and, on reconsideration, would grant leave to appeal.

VIVIANO, J., did not participate.

PEOPLE v WILCHER, No. 145357; Court of Appeals No. 301487. Leave to appeal denied at 493 Mich 870.

VIVIANO, J., did not participate.

PEOPLE v DEVON BELL, No. 145402; Court of Appeals No. 295573. Leave to appeal denied at 493 Mich 870.

VIVIANO, J., did not participate.

PEOPLE v WARD, No. 145413; Court of Appeals No. 309823. Leave to appeal denied at 493 Mich 891.

VIVIANO, J., did not participate.

PEOPLE v WILLIE WRIGHT, No. 145441; Court of Appeals No. 302146. Leave to appeal denied at 493 Mich 870.

VIVIANO, J., did not participate.

PEOPLE v BRANTLEY, No. 145456; reported below: 296 Mich App 546. Leave to appeal denied at 493 Mich 877.

VIVIANO, J., did not participate.

PEOPLE v CRUMP, No. 145486; Court of Appeals No. 309364. Leave to appeal denied at 493 Mich 892.

VIVIANO, J., did not participate.

BALLARD v ATTORNEY GRIEVANCE COMMISSION, No. 145487. Superintending control denied at 493 Mich 872.

VIVIANO, J., did not participate.

DANIEL v PUBLIC STORAGE INCORPORATED, No. 145495; Court of Appeals No. 301563. Leave to appeal denied at 493 Mich 871.

VIVIANO, J., did not participate.

LASALLE BANK NATIONAL ASSOCIATION v MURRAY, No. 145541; Court of Appeals No. 305218. Leave to appeal denied at 493 Mich 871.

VIVIANO, J., did not participate.

PEOPLE v B J THOMAS, No. 145656; Court of Appeals No. 309193. Leave to appeal denied at 493 Mich 895.

VIVIANO, J., did not participate.

PEOPLE v GIDDIS, No. 145775; Court of Appeals No. 310730. Leave to appeal denied at 493 Mich 896.

VIVIANO, J., did not participate.

PEOPLE v FRANKLIN, No. 145791; Court of Appeals No. 309424. Leave to appeal denied at 493 Mich 897.

VIVIANO, J., did not participate.

Leave to Appeal Denied March 6, 2013:

RASZKOWSKI v CONSUMERS ENERGY COMPANY, No. 146698; Court of Appeals No. 312768.

VIVIANO, J., did not participate.

Leave to Appeal Denied March 8, 2013:

MICHIGAN FILM COALITION v STATE OF MICHIGAN, No. 145937; Court of Appeals No. 304000.

MARKMAN, J., concurred with the opinion of the dissenting judge in the Court of Appeals that plaintiff lacks standing. *Mich Film Coalition v Michigan*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2012 (Docket No. 304000) (JANSEN,J., dissenting).

VIVIANO, J., did not participate.

PEOPLE v FRANCIS PARKS, No. 146140; Court of Appeals No. 311749.

MARKMAN, J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately, however, to reiterate the concerns I expressed in *People v Touchstone*, 483 Mich 947, 948-949 (2009) (MARKMAN, J., dissenting), regarding the imposition of supervision fees. MCL 771.3c(1) clearly provides that in "determining the amount of the fee, the court shall consider the probationer's projected income and financial resources." The table contained in MCL 771.3c(1) then proceeds to instruct that if a probationer's projected monthly income is less than $250, the amount of such fee "shall" be zero dollars. There was evidence here that defendant had no income, and if that evidence was accurate, no fee should have been imposed. Yet, absent any explanation, the trial court assessed defendant a $75 monthly fee. Accordingly, I believe the trial court erred. However, defendant did not object at sentencing or raise this issue in any postsentencing motion, and

thus the issue is unpreserved. For that reason alone, I concur in the Court's order denying defendant's application for leave to appeal.

MCCORMACK, J., joined the statement of MARKMAN, J.

VIVIANO, J., did not participate.

HASLIP v BOTSFORD CONTINUING CARE CORPORATION, No. 146622; Court of Appeals No. 313729.

VIVIANO, J., did not participate.

In re NABERS/REED MINORS, No. 146644; Court of Appeals No. 308818.

VIVIANO, J., did not participate.

Reconsideration Denied March 8, 2013:

In re GOLDIE, No. 146096; Court of Appeals No. 307218. Leave to appeal before decision of the Court of Appeals denied at 493 Mich 902.

VIVIANO, J., did not participate.

Leave to Appeal Denied March 15, 2013:

In re MAYS, No. 146410; Court of Appeals No. 309577.

Summary Disposition March 20, 2013:

ROBBINS v VILLAGE CREST CONDOMINIUM ASSOCIATION, No. 144806; Court of Appeals No. 300842. 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 *Hoffner v Lanctoe*, 492 Mich 450 (2012).

LEE v FARMERS INSURANCE EXCHANGE, No. 145972; Court of Appeals No. 303217. 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 issue whether the trial court clearly erred in awarding the plaintiff attorney fees pursuant to MCL 500.3148(1). In all other respects, leave to appeal is denied.

Leave to Appeal Granted March 20, 2013:

PEOPLE v EARL, No. 145677; reported below: 297 Mich App 104. The application for leave to appeal the June 19, 2012, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the imposition of the increased Crime Victim's Rights Fund fee violated the defendant's rights under the Ex Post Facto Clauses, US Const, art I, § 10, and Const 1963, art 1, § 10.

The Attorney General, Prosecuting Attorneys Association of Michigan, and Criminal Defense Attorneys of Michigan are invited to file briefs

amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 20, 2013:

PEOPLE v CARY, No. 144951; Court of Appeals No. 307674.

CAMP RETREATS FOUNDATION, INC v MARATHON TOWNSHIP, No. 145363; Court of Appeals No. 304179.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, Nos. 145717 and 145718; reported below: 297 Mich App 332.

PEOPLE v ANTHONY SPRINGER, No. 146080; Court of Appeals No. 298386.

PEOPLE v MARSHA SPRINGER, No. 146115; Court of Appeals No. 298385.

Summary Disposition March 22, 2013:

In re PAROLE OF HOWARD, No. 145094; Court of Appeals No. 306804. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the November 2, 2010, order of the Monroe Circuit Court, which reversed the Michigan Parole Board's grant of parole, and we remand this case to the Monroe Circuit Court for reconsideration of the parole-decision challenge under the standard set forth in *In re Parole of Elias*, 294 Mich App 507 (2011). The motion to appoint counsel is denied.

Leave to Appeal Denied March 22, 2013:

SINTA v MCDONALD, No. 146490; Court of Appeals No. 313868.

CHAKKOUR v CHAKKOUR, Nos. 146627 and 146628; Court of Appeals Nos. 309854 and 310006.

Summary Disposition March 27, 2013:

TRACKHTENBERG v MCKELVY, No. 140150; Court of Appeals No. 285247. By order of April 27, 2010, the application for leave to appeal the October 27, 2009, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Trakhtenberg* (Docket Nos. 138875, after remand 143386). On order of the Court, the case having been decided on December 21, 2012, 493 Mich 38 (2012), the application is again considered. In *People v Trakhtenberg*, this Court held that Trakhtenberg was deprived of his right to the effective assistance of counsel. Given this, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Oakland Circuit Court's ruling that the defendant was entitled to summary disposition of the plaintiff's legal malpractice claim on a collateral estoppel theory. We further vacate the judgment of the

Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of our decision in *People v Trakhtenberg*.

We do not retain jurisdiction.

SMITH v DEPARTMENT OF HUMAN SERVICES DIRECTOR, Nos. 145612, 145613, 145622, and 145623; Court of Appeals Nos. 309447, 309894, 309447, and 309894. By order of January 25, 2013, the parties were directed to file supplemental briefs. In lieu of supplemental briefs, the parties have filed a joint motion to vacate the Court of Appeals decision and dismiss the applications for leave to appeal. On order of the Court, the motion is granted in part, and the applications for leave to appeal are dismissed with prejudice and without costs, and the Court of Appeals opinion at 297 Mich App 148 (2012) is vacated as moot.

MCCORMACK, J., did not participate.

VIVIANO, J., did not participate.

SCHARNITZKE v COCA-COLA ENTERPRISES, No. 146171; Court of Appeals No. 304515. Pursuant to MCR 7.302(H)(1), in lieu of granting the application for leave to appeal, we reverse that portion of the Court of Appeals judgment reversing the Worker's Compensation Appellate Commission's (WCAC's) dismissal of the plaintiff's cross-appeal as an abuse of discretion. It is undisputed that the plaintiff failed to timely file a cross-appeal on the forms mandated by the WCAC. Under R 418.4(3), no delayed cross-appeal is permitted. As a result, it was not an abuse of discretion for the WCAC to strictly enforce its rule. *Marshall v Jacobetti*, 447 Mich 544 (1994). 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.

In re APPLICATION OF INTERNATIONAL TRANSMISSION COMPANY FOR EXPEDITED SITING CERTIFICATE, Nos. 146383, 146384, 146386, and 147387; reported below: 298 Mich App 338. 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. The Michigan Public Service Commission correctly determined that issuance of an expedited siting certificate under 2008 PA 295 carries with it authorization to construct the transmission line that is the subject of the certificate. The Court of Appeals clearly erred in determining that Const 1963, art 4, § 25 would be violated if 2008 PA 295 authorizes such construction because 2008 PA 295 was enacted without re-enacting and publishing 1995 PA 30, which generally governs construction of electric transmission lines. 2008 PA 295, and particularly Part 4 of the act, provides a comprehensive legislative scheme for issuing expedited siting certificates, and clearly intends construction of approved transmission lines. Because 2008 PA 295 is an act complete in itself, Const 1963, art 4, § 25 is not violated. See *Alan v Wayne Co*, 388 Mich 210, 276-277 (1972), and *People v Mahaney*, 13 Mich 481, 496-497 (1865). In all other respects, the applications are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Granted March 27, 2013:

PEOPLE v JAMES HARRIS, No. 146212; Court of Appeals No. 304875. The application for leave to appeal the September 27, 2012, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the evidence was sufficient to sustain the defendant's conviction of extortion.

FRADCO, INC v DEPARTMENT OF TREASURY, No. 146333; reported below: 298 Mich App 292. The parties shall address: (1) whether the running of the 35-day time period in MCL 205.22(1) for an aggrieved taxpayer to file an appeal in the Tax Tribunal from a final assessment is triggered when the respondent Department of Treasury complies with the notice provision of MCL 205.28(1)(a), or is there an additional notice requirement under MCL 205.8 when a taxpayer has filed a proper written request designating an official representative to receive copies of letters and notices; and (2) whether the tolling ruling adopted by the Tax Tribunal and the Court of Appeals is contrary to the finality language of MCL 205.22(4) and (5).

The motion to stay the precedential effect of the published Court of Appeals opinion, *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292 (2012), is granted in part regarding the statutory tolling ruling, but denied in part regarding the respondent Department of Treasury's compliance with the mandate of MCL 205.8.

We further order that this case be argued and submitted to the Court together with the case of *SMK, LLC v Dep't of Treasury* (Docket No. 146335), at such future session of the Court as both cases are ready for submission.

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.

SMK, LLC v DEPARTMENT OF TREASURY, No. 146335; reported below: 298 Mich App 302. The parties shall address: (1) whether the running of the 35-day time period in MCL 205.22(1) for an aggrieved taxpayer to file an appeal in the Tax Tribunal from a final assessment is triggered when the respondent Department of Treasury complies with the notice provision of MCL 205.28(1)(a), or is there an additional notice requirement under MCL 205.8 when a taxpayer has filed a proper written request designating an official representative to receive copies of letters and notices; and (2) whether the tolling ruling adopted by the Tax Tribunal and the Court of Appeals is contrary to the finality language of MCL 205.22(4) and (5).

The motion to stay the precedential effect of the published Court of Appeals opinion, *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012), is granted in part regarding the statutory tolling ruling, but denied in part regarding the respondent Department of Treasury's compliance with the mandate of MCL 205.8.

We further order that this case be argued and submitted to the Court together with the case of *Fradco, Inc v Dep't of Treasury* (Docket No. 146333), at such future session of the Court as both cases are ready for submission.

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 March 27, 2013:

CURTISS v MENARD, INC, No. 145958; Court of Appeals No. 304665.

JOHNSON v JONES, No. 146117; Court of Appeals No. 308722.

Leave to Appeal Granted March 29, 2013:

CHERRYLAND ELECTRIC COOPERATIVE v BLAIR TOWNSHIP, Nos. 145340, 145341, and 145342; Court of Appeals Nos. 296829, 296830, and 296856. The parties shall include among the issues to be briefed: (1) whether a township assessor has an independent obligation to determine the true cash value of all property within the jurisdiction of a township (see MCL 211.2(2); MCL 211.10(1)), or whether, in determining true cash value, a township assessor is obligated to follow the personal tax reporting form approved by the State Tax Commission (see MCL 211.19(2); MCL 211.19(5)); and (2) whether these cases involve a mutual mistake of fact within the meaning of MCL 211.53a.

The State Bar of Michigan Taxation Section 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.

PEOPLE v GARRETT, No. 145594; Court of Appeals No. 307728. The parties shall include among the issues to be briefed: (1) by what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility that he is actually innocent of the crime in the context of a motion brought pursuant to MCR 6.508, and whether the defendant in this case qualifies under that standard; (2) whether the Michigan Court Rules, MCR 6.500, *et seq*. or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence; and (3) whether, if MCR 6.508(D) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions.

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.

MCCORMACK, J. (*concurring*).

In addressing the issues highlighted in this order, I encourage the parties to consider the following: (1) whether MCR 6.508(D)(2) bars relief premised on issues previously decided against defendant on direct appeal; (2) whether MCR 6.508(D)(2) bars a claim of ineffective assistance of

counsel when that claim is premised on an issue previously decided against defendant on direct appeal; (3) the scope of relief, if any, available to a defendant under MCR 7.316(A)(7) in light of MCR 6.508(D); and (4) whether, when the only grounds for relief properly presented under MCR 6.508(D) are insufficient to entitle defendant to relief under that provision, a court may nonetheless consider, in conjunction with those grounds, claims and evidence considered at an earlier stage of review.

MARKMAN, J., joined the statement of MCCORMACK, J.

In re APPLICATION OF THE DETROIT EDISON COMPANY TO INCREASE RATES, No. 145750; reported below: 297 Mich App 377. The parties shall address: (1) whether the Court of Appeals erred in concluding that MCL 460.6a(1) is subject to "reasonable but differing interpretations" and therefore ambiguous, see *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 166 (2004) (ambiguity arises where a provision of the law " 'irreconcilably conflict[s]' with another provision . . . or where it is *equally* susceptible to more than a single meaning"), citing *Klapp v United Ins Group Agency*, 468 Mich 459, 467 (2003); and (2) whether MCL 460.6a(1) requires that a refund to primary customers required after a utility implements increased rates or charges under that subsection be allocated to each primary customer that was over-charged on the basis of the amount paid by each primary customer.

Summary Disposition April 1, 2013:

PEOPLE V HARTWICK, No. 146089; Court of Appeals No. 312308. 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 (1) whether the defendant was entitled to dismissal of the marijuana-related charges under the immunity provision in § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424; (2) whether the defendant was entitled to dismissal of the charges under the affirmative defense in § 8(a) of the MMMA, MCL 333.26428(a); and (3) if the defendant was not entitled to dismissal, whether he is permitted to raise the § 8 affirmative defense at trial.

DAVID CONRAD, DDS V CERTAINTEED CORPORATION, No. 146369; Court of Appeals No. 308705. 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 TUTTLE, No. 146392; Court of Appeals No. 312364. 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 (1) whether the defendant was entitled to dismissal of the marijuana-related charges in Counts IV through VII of the second amended information under the immunity provision in § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424; (2) whether the defendant was entitled to dismissal of these charges under the affirmative defense in § 8(a) of the

MMMA, MCL 333.26428(a); and (3) if the defendant was not entitled to dismissal, whether he is permitted to raise the § 8 affirmative defense at trial.

Leave to Appeal Denied April 1, 2013:

GREEN v DEPARTMENT OF CORRECTIONS, No. 144123; Court of Appeals No. 302857.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

AM RODRIGUEZ ASSOCIATES, INC v CITY COUNCIL OF THE CITY OF THE VILLAGE OF DOUGLAS, No. 144654; Court of Appeals No. 299510.

JH BUSINESS CONSULTANTS, INC v TOWER AUTOMOTIVE OPERATIONS USA III, LLC, No. 144982; Court of Appeals No. 304592.

M & T BANK v RAMONDETTA, No. 145158; Court of Appeals No. 305123.

PEOPLE v JORDAN, No. 145286; Court of Appeals No. 308278.

CRANE v DIRECTOR OF ASSESSING FOR THE CHARTER TOWNSHIP OF WEST BLOOMFIELD, No. 145551; Court of Appeals No. 301878.

STAFFNEY v KINROSS CORRECTIONAL FACILITY WARDEN, No. 145706; Court of Appeals No. 310338.

LANDON v CITY OF FLINT, Nos. 145799, 145780, 145781, and 145782; Court of Appeals Nos. 301802, 301832, 301905, and 301919.

LANDON v TOWNSHIP OF MT MORRIS, No. 145804; Court of Appeals No. 301986.

LANDON v CITY OF FLINT, Nos. 145834, 145835, 145836, and 145837; Court of Appeals Nos. 301802, 301832, 301905, and 301919.

PEOPLE v CORNELIUS, No. 145841; Court of Appeals No. 305076.

NEW PROPERTIES, INC v LAKES OF THE NORTH ASSOCIATION, No. 145862; Court of Appeals No. 301910.

PEOPLE v AARON HINZMAN, No. 145876; Court of Appeals No. 308909.

PEOPLE v REBECCA HINZMAN, No. 145878; Court of Appeals No. 308910.

DUNN v WEST SHORELINE CORRECTIONAL FACILITY WARDEN, No. 145932; Court of Appeals No. 309214.

PAIGE v EVERHOME MORTGAGE COMPANY, No. 145948; Court of Appeals No. 304300.

PEOPLE v HOWZE, No. 145971; Court of Appeals No. 311012.

PEOPLE v CHRISTOPHER SMITH, No. 145982; Court of Appeals No. 308836.

PEOPLE v MYLES FREDERICK, No. 146016; Court of Appeals No. 310277.

PEOPLE v MINIX, No. 146050; Court of Appeals No. 310577.

PEOPLE v LEADINGHAM, No. 146051; Court of Appeals No. 309333.

PEOPLE v ACQUAAH, No. 146054; Court of Appeals No. 307424.

PEOPLE v EMERY, No. 146059; Court of Appeals No. 309208.

PEOPLE v BIJARRO, No. 146062; Court of Appeals No. 309280.

PEOPLE v HENDRIX, No. 146063; Court of Appeals No. 309638.

PEOPLE v ST ANN, No. 146065; Court of Appeals No. 311613.

PEOPLE v KIRKSEY, No. 146066; Court of Appeals No. 305953.

PEOPLE v DESMYTHER, No. 146069; Court of Appeals No. 311888.

PEOPLE v DOBBS, Nos. 146082 and 146083; Court of Appeals Nos. 305097 and 305098.

PEOPLE v BRANDON BELL, No. 146106; Court of Appeals No. 312152.

PEOPLE v POSEY, No. 146113; Court of Appeals No. 309530.

PEOPLE v HAROLD MARTIN, No. 146124; Court of Appeals No. 311507.

PEOPLE v DOUGLAS STEWART, No. 146129; Court of Appeals No. 303879.

PEOPLE v BLAKE, Nos. 146132 and 146134; Court of Appeals Nos. 311660 and 311665.

PEOPLE v HANSERD, No. 146133; Court of Appeals No. 305804.

PEOPLE v BURTON, No. 146139; Court of Appeals No. 298864.

PEOPLE v ROBERT PARKS, No. 146144; Court of Appeals No. 303683.

PEOPLE v MCCALL, No. 146145; Court of Appeals No. 306336.

SHIPMAN v STOUT RISIUS ROSS, INC, No. 146151; Court of Appeals No. 303288.

TMW ENTERPRISES, INC v DEPARTMENT OF TREASURY, No. 146163; reported below: 297 Mich App 590.

PEOPLE v JASEN THOMAS, No. 146165; Court of Appeals No. 301683.

LEMON v BOUDREAU, No. 146169; Court of Appeals No. 304642.

PEOPLE v CALDWELL, No. 146170; Court of Appeals No. 298791.

PEOPLE v JOHNSTON, Nos. 146172 and 146173; Court of Appeals Nos. 302477 and 302480.

VAN TOL, MAGENNIS & LANG, INC v WOODWARD, No. 146174; Court of Appeals No. 305313.

PEOPLE v ELLERY BENNETT, No. 146178; Court of Appeals No. 303025.

PEOPLE v BENTON, No. 146180; Court of Appeals No. 310050.

PEOPLE v BARTLEY, No. 146185; Court of Appeals No. 305813.

PEOPLE v RIGTERINK, No. 146186; Court of Appeals No. 307568.

PEOPLE v SCOTT, No. 146190; Court of Appeals No. 303671.

PEOPLE v GRUBBS, No. 146191; Court of Appeals No. 305433.

AMERISURE INSURANCE COMPANY v DEBRUYN PRODUCE COMPANY, No. 146192; reported below: 298 Mich App 137.

PEOPLE v WOODROW WILSON, No. 146195; Court of Appeals No. 312001.

PEOPLE v MCMILLAN, No. 146196; Court of Appeals No. 309731.

PEOPLE v VEGA, No. 146200; Court of Appeals No. 298749.

SLOMKA v HAMTRAMCK HOUSING COMMISSION, Nos. 146201 and 146202; Court of Appeals Nos. 298025 and 299211.

PEOPLE v MAX ROGERS, No. 146203; Court of Appeals No. 309505.

PEOPLE v WELCH, No. 146205; Court of Appeals No. 301873.

PEOPLE v BIRGE, No. 146207; Court of Appeals No. 305744.

PEOPLE v NOVAK, No. 146209; Court of Appeals No. 311775.

PEOPLE OF THE CITY OF TROY v HAGGARTY, No. 146219; Court of Appeals No. 305646.

PEOPLE v LEONDRE CARR, No. 146227; Court of Appeals No. 302370.

PEOPLE v ANTHONY ALLEN, Nos. 146231 and 146232; Court of Appeals Nos. 304645 and 305081.

PEOPLE v PETER PEREZ, No. 146233; Court of Appeals No. 305006.

MCPHERSON MANSION LLC v CITY OF HOWELL, No. 146237; Court of Appeals No. 305705.

LINDEBLAD v GRASMAN, No. 146239; Court of Appeals No. 306159.

PEOPLE v NACCARATO, No. 146242; Court of Appeals No. 305222.

PEOPLE OF THE CITY OF BAY CITY v HAMPTON, No. 146243; Court of Appeals No. 308849.

SOUTH LYON WOODS ASSOCIATES, LLC v CITY OF SOUTH LYON, No. 146246; Court of Appeals No. 305159.

HAZELTON v CF FICK AND SONS, INC, No. 146247; Court of Appeals No. 307024.

CAVANAGH, J., would grant leave to appeal.

JAVORSKY v HURON VALLEY SCHOOLS, No. 146248; Court of Appeals No. 308443.

PEOPLE v OBRIEN, No. 146249; Court of Appeals No. 311975.

BAKRI v MORTGAGE ELECTRONIC REGISTRATION SYSTEM, No. 146255; Court of Appeals No. 297962.

HUNT v LOWER HARBOR PROPERTIES, LLC, No. 146257; Court of Appeals No. 303960.

PEOPLE v ASHFORD, No. 146263; Court of Appeals No. 309833.

PEOPLE v CHORAZYCZEWSKI, No. 146265; Court of Appeals No. 305735.

EL-SAYED v MEHSEN GARMO, ROYSE, INC, No. 146267; Court of Appeals No. 304454.

PEOPLE v BUSH, No. 146269; Court of Appeals No. 305682.

PEOPLE v BARYLSKI, Nos. 146273 and 146274; Court of Appeals Nos. 302942 and 306650.

PEOPLE v HANEY, No. 146279; Court of Appeals No. 304248.

PEOPLE v BIVINS, No. 146280; Court of Appeals No. 305555.

DEZAAK MANAGEMENT, INC v AUTO-OWNERS INSURANCE COMPANY, No. 146281; Court of Appeals No. 307025.

In re CHADDAH, No. 146282; Court of Appeals No. 306978.

PEOPLE v SHAVONTAE WILLIAMS, No. 146283; Court of Appeals No. 301336.

PEOPLE v VINCENT WASHINGTON, No. 146286; Court of Appeals No. 305405.

JESSEE v WALGREEN COMPANY, No. 146297; Court of Appeals No. 306563.

CITIZENS INSURANCE COMPANY OF AMERICA v PROFESSIONAL TEMPERATURE HEATING AND AIR CONDITIONING, INC, Nos. 146299 and 146301; Court of Appeals No. 300524.

PEOPLE v BELL-COOK, No. 146300; Court of Appeals No. 305931.

PEOPLE v DELBRIDGE ALEXANDER, No. 146315; Court of Appeals No. 304854.

PEOPLE v MARTIN LEWIS, No. 146320; Court of Appeals No. 312391.

PEOPLE v HURSEY, No. 146323; Court of Appeals No. 312012.

PEOPLE v WILLIAM JESSIE BROWN, No. 146325; Court of Appeals No. 306201.

PEOPLE v ERIC JACKSON, No. 146326; Court of Appeals No. 312705.

PEOPLE v MOBLEY, No. 146327; Court of Appeals No. 307603.

PEOPLE v NAPIER, No. 146328; Court of Appeals No. 305277.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v RONALD ALLEN, No. 146331; Court of Appeals No. 304860.

PEOPLE v NICHOLAS KING, No. 146336; Court of Appeals No. 306132.

CJ's EXCAVATING, INC v CITY OF FRANKFORT, No. 146339; Court of Appeals No. 309849.

PEOPLE v GERALD PERRY, No. 146342; Court of Appeals No. 310506.

PEOPLE v SIMPSON, No. 146350; Court of Appeals No. 312343.

PEOPLE v RAO, No. 146355; Court of Appeals No. 289343.

PEOPLE v ELMORE, No. 146361; Court of Appeals No. 302408.

PEOPLE v COREY WALKER, No. 146363; Court of Appeals No. 301039.

PEOPLE v DANIELS, No. 146366; Court of Appeals No. 302808.

PEOPLE v SCOTT GRAHAM, No. 146367; Court of Appeals No. 306508.

PEOPLE v MICHAEL ANDERSON, No. 146370; reported below: 298 Mich App 178.

PEOPLE v JEROME POWELL, No. 146372; Court of Appeals No. 305542.

WILSON v KING, No. 146373; reported below: 298 Mich App 378.

PEOPLE v ANTIONNE MURPHY, No. 146375; Court of Appeals No. 298496.

PEOPLE v ALCARAZ, No. 146376; Court of Appeals No. 310366.

PEOPLE v MACOVEI, No. 146380; Court of Appeals No. 305577.

PEOPLE v BROOKS, No. 146388; Court of Appeals No. 305357.

ALEXANDER v CASSIDY, No. 146389; Court of Appeals No. 301860.

PEOPLE v MATTHEW MOORE, No. 146393; Court of Appeals No. 310823.

PEOPLE v CHESTER GARDNER, No. 146395; Court of Appeals No. 304449.

PEOPLE v PATRIDGE, No. 146396; Court of Appeals No. 307248.

PEOPLE v GEORGE MOORE, No. 146399; Court of Appeals No. 297993.

PEOPLE v BURNETTE, No. 146409; Court of Appeals No. 312431.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

BONSU v OCWEN LOAN SERVICING, LLC, No. 146412; Court of Appeals No. 307638.

PEOPLE v RAYNADA JONES, No. 146416; Court of Appeals No. 307000.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v DARRELL CARPENTER, No. 146421; Court of Appeals No. 307811.

BALLERINI v DEPARTMENT OF CORRECTIONS, No. 146424; Court of Appeals No. 307226.

CLARK v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 146432; Court of Appeals No. 310394.

PEOPLE v MARK MARVIN, No. 146439; Court of Appeals No. 312673.

PEOPLE v MCDUFF, No. 146475; Court of Appeals No. 313162.

MOORE v WALGREENS COMPANY, No. 146476; Court of Appeals No. 303768.

AUTO CLUB INSURANCE ASSOCIATION v FRANKENMUTH MUTUAL INSURANCE COMPANY, No. 146487; Court of Appeals No. 305592.

PEOPLE v SHERWOOD, Nos. 146495, 146497, 146499, and 146501; Court of Appeals Nos. 313017, 313018, 313028, and 313058.

TORRES v KINROSS CORRECTIONAL FACILITY WARDEN, No. 146504; Court of Appeals No. 311348.

PEOPLE v ASHENHURST-GALLINA, No. 146508; Court of Appeals No. 309450.

BLACKBURN v GRENQUIST, No. 146534; Court of Appeals No. 309921.

PEOPLE v MCFARLAND, No. 146594; Court of Appeals No. 304045.

WARNER NORCROSS & JUDD, LLP v RDD INVESTMENT CORPORATION, No. 146702; Court of Appeals No. 312779.

In re KOWALSKI, No. 146712; Court of Appeals No. 311187.

Superintending Control Denied April 1, 2013:

LANE v ATTORNEY GRIEVANCE COMMISSION, No. 146258.

CARLSON v ATTORNEY GRIEVANCE COMMISSION, No. 146451.

Order Entered April 1, 2013:

In re HONORABLE DIANE M HATHAWAY, No. 146460. The Judicial Tenure Commission having filed a written withdrawal of the motion for immediate consideration, petition for interim suspension, and request for appointment of master, the motion, petition, and request are dismissed.

Reconsideration Denied April 1, 2013:

SEXTON-WALKER v GREAT EXPRESSIONS DENTAL CENTERS, PC, No. 145274; Court of Appeals No. 302513. Leave to appeal denied at 493 Mich 901.

PEOPLE v JAMES TAYLOR, No. 145333; Court of Appeals No. 307168. Leave to appeal denied at 493 Mich 901.

GRIEVANCE ADMINISTRATOR v WIDENBAUM, No. 145418. Leave to appeal denied at 493 Mich 901.

PEOPLE v MOSS, No. 145420; Court of Appeals No. 307954. Leave to appeal denied at 493 Mich 892.

PEOPLE v BLANKENSHIP, No. 145639; Court of Appeals No. 309196. Leave to appeal denied at 493 Mich 918.

PEOPLE v RAGLAND, No. 145665; Court of Appeals No. 306906. Leave to appeal denied at 493 Mich 895.

PEOPLE v VARTINELLI, No. 145685; Court of Appeals No. 308509. Leave to appeal denied at 493 Mich 918.

PEOPLE v BURKE, No. 145696; Court of Appeals No. 307702. Leave to appeal denied at 493 Mich 918.

PEOPLE v DARRIUS GREENE, No. 145830; Court of Appeals No. 293513. Leave to appeal denied at 493 Mich 919.

PEOPLE v OBAR ELLIS, No. 145904; Court of Appeals No. 303095. Leave to appeal denied at 493 Mich 920.

Summary Disposition April 3, 2013:

RUGIERO v DINARDO, Nos. 145577, 145578, 145579, 145580, 145581, 145582, 145583, and 145584; Court of Appeals Nos. 301829, 302192, 302228, 302936, 302963, 303259, 303707, and 307630. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals related to the imposition of attorney fees, and we remand this case to the Wayne Circuit Court for an evidentiary hearing regarding whether the fees granted in the court's earlier interim awards pursuant to MCR 3.206(C) should be imposed as a final matter or otherwise modified as the evidence and circumstances may warrant. 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 Granted April 3, 2013:

TER BEEK v CITY OF WYOMING, No. 145816; reported below: 297 Mich App 446. The parties shall include among the issues to be briefed: (1) whether the defendant city's zoning code ordinance, which prohibits any use that is contrary to federal law, state law, or local ordinance, is subject to state preemption by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.; and (2) if so, whether the MMMA is subject to

federal preemption by the federal Controlled Substances Act (CSA), 21 USC 801 *et seq.*, on either impossibility or obstacle conflict preemption grounds. See 21 USC 903.

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.

MAJESTIC GOLF, LLC v LAKE WALDEN COUNTRY CLUB, No. 145988; reported below 297 Mich App 305.

PEOPLE v TANNER, No. 146211; Court of Appeals No. 310668.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 3, 2013:

HUDDLESTON v TRINITY HEALTH MICHIGAN, No. 146041; Court of Appeals No. 303401. 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 submit briefs within 42 days of the date of this order addressing whether the Court of Appeals erred when it concluded that the plaintiff suffered a compensable injury; whether it misapplied *Sutter v Biggs*, 377 Mich 80 (1966); and whether its decision is contrary to *Henry v Dow Chemical Co*, 473 Mich 63 (2005).

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.

Leave to Appeal Denied April 3, 2013:

In re TIEMANN, Nos. 145416 and 145417; reported below: 297 Mich App 250.

ENGELHARDT v ST JOHN HEALTH SYSTEM–DETROIT–MACOMB CAMPUS, No. 145923; Court of Appeals No. 292143.

PEOPLE v ROUMMEL INGRAM, No. 145942; Court of Appeals No. 310422.

PEOPLE v RYAN JONES, No. 145995; Court of Appeals No. 307935.

Summary Disposition April 5, 2013:

PEOPLE v LUMBRERAS, No. 146547; Court of Appeals No. 311971. 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.

GARLAND v HARTMAN & TYNER, INC, No. 146564; Court of Appeals No. 313120. 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 5, 2013:

In re SANDERS, No. 146680; Court of Appeals No. 313385. The parties shall address whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents.

We further direct the appellant to promptly order preparation of transcripts of the adjudication hearing and any other proceeding where the appellant offered testimony on the record or asserted his right to an adjudication. The appellant shall forward copies of all prepared transcripts to this Court.

The motion for leave to file brief amicus curiae is granted. The Children's Law Section of the State Bar of Michigan is invited to file a brief 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 April 5, 2013:

PEOPLE V KIRCHER, No. 144740; Court of Appeals No. 306579.

MARKMAN, J. (*concurring*). A five-year prison sentence was imposed on this 66-year-old defendant, an apartment building owner, who when the bottom floor of his building flooded with sewage, and under what he viewed as emergency circumstances, pumped that sewage into a catch basin that ultimately led to the Huron River. Although what defendant did was clearly wrong and in violation of the law, I continue to question (as did two other justices when this case was originally before the Court) whether the Legislature in enacting MCL 324.3115(4) imposed what the lower courts viewed as a *mandatory* five-year prison sentence. See *People v Kircher*, 483 Mich 986 (2009) (MARKMAN, J., dissenting). However, because this is a motion for relief from judgment and this issue has already been decided against defendant and he has not established "good cause" for previously failing to raise his new issues, I concur that he is not entitled to relief under MCR 6.508(D).

CABALA V ALLEN, No. 146131; Court of Appeals No. 305250.

PEOPLE V HIGHERS, Nos. 146502 and 146503; Court of Appeals Nos. 311865 and 311875.

MCCORMACK, J., did not participate because of her prior involvement as counsel for a party.

In re SCP, No. 146686; Court of Appeals No. 308851.

Order Entered April 5, 2013:

PEOPLE V EVANS, No. 141381; Court of Appeals No. 290833. In conformity with the mandate of the Supreme Court of the United States, the judgment and opinion of this Court dated March 26, 2012 (reported at

491 Mich 1) and the judgment of the Court of Appeals entered May 13, 2010 are vacated. The judgment of the Circuit Court for the County of Wayne is affirmed.

Summary Disposition April 12, 2013:

LEFEVERS V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 144781; Court of Appeals No. 298216. On March 7, 2013, the Court heard oral argument on the application for leave to appeal the December 13, 2011, 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 vacate the December 13, 2011, judgment of the Court of Appeals and the January 31, 2012, order of the Court of Appeals denying the motion for reconsideration, and remand this case to the Wayne Circuit Court for further proceedings. The Court of Appeals erred by failing to recognize that the decision in *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), effectively disavowed *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), and *Gunsell v Ryan*, 236 Mich App 204 (1999), to the extent those decisions are inconsistent with *Frazier*. Specifically, *Frazier* effectively disavowed as dicta the portion of *Miller*, *supra*, stating: "Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle." 411 Mich at 640. *Frazier* also effectively disavowed the discussion of MCL 500.3106(1)(b) in *Gunsell*, *supra*, 236 Mich App at 210 n 5.

On remand, the circuit court shall reconsider the defendant's motion for summary disposition in light of *Frazier*, and shall allow the parties to expand the evidentiary record to the extent necessary for a determination whether the tailgate on the plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for purposes of MCL 500.3106(1)(b). For example, the parties shall be allowed to present evidence as to whether the tailgate was a constituent part of the "means in or by which [the contaminated soil was] carried or conveyed," and, if not, whether the tailgate was nonetheless an "article[], implement[], etc.," that was "mounted on the vehicle" and "used or needed for a specific purpose or activity."

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to vacate the Court of Appeals' judgment and remand the case to the trial court for further factual development.

In *Frazier v Allstate Ins Co*, 490 Mich 381, 385 (2011), a majority of this Court held that the "constituent parts of 'the vehicle' itself are not 'equipment' " for the purposes of MCL 500.3106(1)(b).[1] The majority

[1] Given the majority's decision to remand this case to the trial court, I express no opinion about the merits of the *Frazier* majority's interpretation of MCL 500.3106.

reasoned that excluding the constituent parts of a vehicle from the definition of "equipment" prevented that definition from "engulf[ing]" the definition of "vehicle." *Id*. Accordingly, the majority held that the passenger door of a noncommercial vehicle was a constituent part of the vehicle itself, not equipment. *Id*. at 386. The *Frazier* majority, however, only considered the outer bounds of what parts of a vehicle should be excluded from the definition of "equipment" under MCL 500.3106(1)(b). As a result, the particularities of what amounts to a constituent part of the vehicle, on one hand, and what amounts to equipment, on the other hand, was left unanswered by *Frazier*. Indeed, the *Frazier* majority found it unnecessary to define the term "constituent" within the context of its analysis under MCL 500.3106(1)(b), and the majority fails to do so in its order today.[2]

Moreover the majority's order assumes that the application of *Frazier* is straightforward and, under that guise, imposes a two-step analysis that will have the parties *first* address whether the tailgate was a "constituent part of the 'means in or by which [the contaminated soil was] carried or conveyed,' " and *only if* that question is answered in the negative will the parties be permitted to address the "specific purpose" of the tailgate as alleged equipment. I am uncertain regarding whether this two-step analysis was clearly contemplated by the *Frazier* majority, and such an analysis has the potential to result in an overly narrow definition of "equipment" that may be inconsistent with MCL 500.3106(b)(1).

Thus, I dissent from the majority's order because it leaves the parties and the courts below without a firm resolution of the issues that this Court asked the parties to address[3] and may result in an erroneous interpretation of MCL 500.3106(b)(1).

Leave to Appeal Denied April 12, 2013:

In re BANKS/KIMBLE, No. 146843; Court of Appeals No. 311934.

PEOPLE v CHAKKOUR, No. 146922; Court of Appeals No. 314726.

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[2] To resolve whether the tailgate on plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for the purposes of MCL 500.3106(1)(b), the majority remands the case to the trial court. But I question whether further factual development is needed to resolve this case. Instead of factual uncertainty, I believe that the difficulties in this case arise from the fact that the tailgate at issue stands in stark contrast to the passenger door considered by the *Frazier* majority—a point that the Court of Appeals, when denying defendant's motion for reconsideration in light of the majority opinion in *Frazier*, has already discussed in distinguishing *Frazier*. Thus, without greater elaboration from this Court regarding *Frazier*'s interpretation of MCL 500.3106(1)(b), I question the benefit of a remand.

[3] See, also, *Ile v Foremost Ins Co*, 493 Mich 915, 915-916 (2012) (MARILYN KELLY, J., dissenting).

Rehearing Denied April 12, 2013:

PEOPLE v WHITE, No. 144387. Reported below: 294 Mich App 622. Opinion at 493 Mich 187. The motion for rehearing is considered, and it is denied. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for rehearing.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

KIM v JP MORGAN CHASE BANK, No. 144690. Opinion at 493 Mich 98. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for rehearing.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

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* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

Reconsideration Denied April 12, 2013:

BOERTMANN v CINCINNATI INSURANCE COMPANY, No. 142936; Court of Appeals No. 293835. Summary disposition at 493 Mich 898. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for reconsideration.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

LYON CHARTER TOWNSHIP v MCDONALD'S USA, LLC, No. 143342; Court of Appeals No. 294074. Summary disposition at 493 Mich 906. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for reconsideration.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

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* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

ILE v FOREMOST INSURANCE COMPANY, No. 143627; Court of Appeals No. 295685. Summary disposition at 493 Mich 915. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for reconsideration.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

HOFFMAN v BARRETT, No. 144875; Court of Appeals No. 289011. Leave to appeal denied at 493 Mich 925. Reported below: 295 Mich App 649. We reaffirm the principle stated more than 100 years ago in *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), that "rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur." The same is true for reconsideration. Likewise, we elect to apply MCR 2.119(F)(3) to these cases, which states, "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id*. In this case, the moving party has failed to satisfy either of these requirements and has, therefore, failed to demonstrate grounds for reconsideration.

Further, the Court has published for comment proposed amendments of MCR 7.313(E) and MCR 7.313(F) to incorporate into the Court's rules the standards set forth in MCR 2.119(F)(3) with regard to motions for rehearing and reconsideration. The publication order that contains the proposed rule changes is attached.*

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* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

* [For the text of the proposed rule amendment see 493 Mich 1229—REPORTER.]

Leave to Appeal Denied April 19, 2013:

PEOPLE v ERICK CURRY, No. 146271; Court of Appeals No. 311554.

PEOPLE v PAHOSKI, No. 146278; Court of Appeals No. 305230.

PEOPLE v JOHNNY WILLIAMS, No. 144762; Court of Appeals No. 299484.

Summary Disposition April 26, 2013:

LAJOICE v NORTHERN MICHIGAN HOSPITALS, INC, Nos. 145946, 145947, 145964, 145965, 145977, and 145978; Court of Appeals Nos. 300684, 300788, 300684, 300788, 300684, and 300788. 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 and reinstate the Emmet Circuit Court's September 30, 2010, order granting the defendants' motions for summary disposition. 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.

Contrary to the Court of Appeals' holding, *Bush v Shabahang*, 484 Mich 156 (2009), does not apply here because the plaintiff did not file his notice of intent until after the period of limitations had expired and thus, unlike in *Bush*, the issue is not whether a defective notice of intent tolls the period of limitations. Rather, it is whether a complaint filed after the filing only of a defective notice of intent tolls the wrongful death saving provision. We have already answered that question in the negative in *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008). As *Boodt*, 481 Mich at 562-563, explains:

MCL 600.2912b(1) states that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(4) states that the "notice given to a health professional or health facility under this section shall contain a statement of at least all of the following . . . ." Therefore, a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4). Because plaintiff's notice of intent here did not contain all the information required under § 2912b(4), she could not have commenced an action. Therefore, her complaint and affidavit of merit could not have tolled the period of limitations. [Citation omitted.]

See also *Ligons v Crittenton Hosp*, 490 Mich 61, 74-75 (2011) ("once the limitations period has run, tolling is no longer available, even if a saving statute would still allow commencement of the action"). Because the plaintiff's complaint did not toll the saving period, and because the saving period has now expired, the plaintiff's action is time barred.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to extend the principle established by a majority of this Court in *Waltz v Wyse*, 469 Mich 642, 644 (2004)—that a defective notice of intent does not toll the wrongful-death saving provision under MCL

600.5852—to preclude plaintiff from amending the notice of intent despite the fact that plaintiff is entitled to such relief under *Bush v Shabahang*, 484 Mich 156 (2009). I continue to adhere to my dissenting opinion in *Waltz* explaining that MCL 600.5856 applies to toll the wrongful-death saving period. *Waltz*, 469 Mich at 655-672 (CAVANAGH, J., dissenting). Thus, in my view, it makes no difference that the *Bush* plaintiff relied on the statute of limitations, whereas plaintiff here relies on the wrongful-death saving period.

Irrespective of this Court's holding in *Bush*, it is my view that "when a notice of intent . . . is deficient, MCL 600.2301 should control and the deficiency should be disregarded if there is no effect on the substantial rights of a party." *Boodt v Borgess Med Ctr*, 481 Mich 558, 564 (2008) (CAVANAGH, J., dissenting). And under MCL 600.2301, an amendment is allowed " 'at any time' before judgment is rendered." *Id*. at 568, quoting MCL 600.2301; see, also, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 71-77 (2002) (MARILYN KELLY, J., dissenting). Further, the plain language of MCL 600.5856(a) clearly states that the filing of a complaint tolls the limitations period. *Kirkaldy v Rim*, 478 Mich 581, 586-587 (2007) (CAVANAGH, J., concurring in the result). Thus, despite any alleged defects in plaintiff's notice of intent, in my view, the wrongful-death saving period was tolled by the filing of the complaint, and plaintiff is entitled to amend the notice of intent to meet the requirements of MCL 600.2912b.

Accordingly, I respectfully dissent from the majority's order in this case.

HYDE PARK COOPERATIVE v CITY OF DETROIT, No. 146116; Court of Appeals No. 303143. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate footnote 5 of the Court of Appeals judgment because the issue was not properly before the Court of Appeals nor necessary to its decision. Moreover, we note that a claim for "money damages" such as the one rejected by this Court in *Lash v Traverse City*, 479 Mich 180, 191-197 (2007), is not identical to an action for a refund of an allegedly unlawful exaction. See, e.g., *Beachlawn Building Corporation v City of St. Clair Shores*, 370 Mich 128 (1963); *Bolt v City of Lansing*, 459 Mich 152 (1998). 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 Denied April 26, 2013:

ROACH v GMAC MORTGAGE, LLC, No. 146966; Court of Appeals No. 313255.

Reconsideration Denied April 26, 2013:

CHAKKOUR v CHAKKOUR, No. 146627; Court of Appeals No. 309854. Leave to appeal denied at 493 Mich 946.

Summary Disposition April 29, 2013:

PEOPLE v POINTER, No. 146284; Court of Appeals No. 302795. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of *Evans v Michigan*, 568 US ___; ___ S Ct ___; ___ L Ed 2d ___; 2013 WL 610197; 2013 US LEXIS 1614 (February 20, 2013).

Leave to Appeal Denied April 29, 2013:

CROMER v WARDEN, BARAGA CORRECTIONAL FACILITY, No. 144257; Court of Appeals No. 304267.

PEOPLE v RAYMOND HARRIS, No. 144763; Court of Appeals No. 306725.

PEOPLE v MCCRAY, No. 145292; Court of Appeals No. 309912.

PEOPLE v CANNON, No. 145316; Court of Appeals No. 306256.

7800 W OUTER ROAD HOLDING, LLC v COLLEGE PARK PARTNERS, LLC, No. 145628; Court of Appeals No. 303182.

PEOPLE v DELPIANO, No. 145866; Court of Appeals No. 304037.

PEOPLE v ERIC ANDERSON, No. 145966; Court of Appeals No. 301666.

PEOPLE v MERRITT, No. 145968; Court of Appeals No. 307260.

PEOPLE v VERNICE ROBINSON, No. 145981; Court of Appeals No. 309209.

PEOPLE v DEMETRIC MCGOWAN, No. 145987; Court of Appeals No. 308520.

PEOPLE v PRICE, No. 146005; Court of Appeals No. 309072.

PEOPLE v MCLEAN, No. 146010; Court of Appeals No. 308844.

PEOPLE v WICKER, No. 146015; Court of Appeals No. 309191.

PEOPLE v JAMAL THOMAS, No. 146018; Court of Appeals No. 309670.

PEOPLE v ANTHONY JONES, No. 146019; Court of Appeals No. 308515.

PEOPLE v CALVIN MARSHALL, No. 146020; Court of Appeals No. 311536.

PEOPLE v MCCONNELL, No. 146022; Court of Appeals No. 309052.

PEOPLE v ORICK, No. 146023; Court of Appeals No. 308580.

PEOPLE v NAYVON HILL, No. 146025; Court of Appeals No. 308704.

PEOPLE v DAMON BENTLEY, No. 146029; Court of Appeals No. 309054.

PEOPLE v SEEGARS, No. 146040; Court of Appeals No. 307671.

PEOPLE v STURGESS, No. 146070; Court of Appeals No. 311919.

PEOPLE v CAVIN, No.146075; Court of Appeals No. 312206.

PEOPLE v MARTY MILLER, No. 146076; Court of Appeals No. 311574.

PEOPLE v ALLISON, No. 146078; Court of Appeals No. 309684.

PEOPLE v BURRELL, No. 146079; Court of Appeals No. 308560.

LOUTTS v LOUTTS, No. 146100; reported below: 298 Mich App 21.

AUGUST v AUGUST, No. 146103; Court of Appeals No. 305768.

PEOPLE v JERRY LEWIS, No. 146112; Court of Appeals No. 311983.

PEOPLE v RUSS, No. 146142; Court of Appeals No. 307961.

PEOPLE v HERBERT, No. 146143; Court of Appeals No. 309181.

PEOPLE v SHAWN YOUNG, No. 146146; Court of Appeals No. 311116.

PEOPLE v POOLE, No. 146159; Court of Appeals No. 309508.

PEOPLE v TOMLINSON, No. 146166; Court of Appeals No. 309923.

PEOPLE v WILLIAM HILL, No. 146167; Court of Appeals No. 309959.

PEOPLE v WELLONS, No. 146182; Court of Appeals No. 311302.

CCXLS, LLC v DEPARTMENT OF TREASURY, No. 146198; Court of Appeals No. 297902.

PEOPLE v FREDERICK HARRIS, No. 146245; Court of Appeals No. 304521.

PEOPLE v SAGE LEWIS, No. 146250; Court of Appeals No. 304535.

PEOPLE v ROBERT HALL, No. 146253; Court of Appeals No. 306265.

PEOPLE v RIVNACK, No. 146262; Court of Appeals No. 304705.

PEOPLE v DAVID TURNER, No. 146268; Court of Appeals No. 307101.

PEOPLE v BELTOWSKI, No. 146272; Court of Appeals No. 304254.

PEOPLE v SZYMKOWKIAK, No. 146276; Court of Appeals No. 310939.

STANSKY v GWINN AREA COMMUNITY SCHOOLS, No. 146287; Court of Appeals No. 305287.

PEOPLE v GLYNN MILLS, No. 146292; Court of Appeals No. 303870.

PEOPLE v GERALD SIMS, No. 146293; Court of Appeals No. 298696.

PEOPLE v AARON HAYNES, No. 146294; Court of Appeals No. 307844.

PEOPLE v DONNA BROWN, No. 146322; Court of Appeals No. 306228.

PEOPLE v CULHANE, No. 146324; Court of Appeals No. 312519.

PEOPLE v READOUS, No. 146332; Court of Appeals No. 304765.

PEOPLE v GOIKE, No. 146351; Court of Appeals No. 312363.

PEOPLE v MADGE MATTHEWS, No. 146356; Court of Appeals No. 304215.

PEOPLE v WILFORD, No. 146359; Court of Appeals No. 303028.

PEOPLE v DEMARCUS CURRY, No. 146400; Court of Appeals No. 312817.

PEOPLE v HOLDEN, No. 146401; Court of Appeals No. 304364.

RICE v RICE, Nos. 146402, 146403, and 146404; Court of Appeals Nos. 295631, 295634, and 300271.

PEOPLE v PEARSON, No. 146406; Court of Appeals No. 308354.

PEOPLE v PRESTON, No. 146414; Court of Appeals No. 298796.

PEOPLE v LESTER, Nos. 146417 and 146418; Court of Appeals Nos. 313108 and 313141.

PEOPLE v SPENCER ALLEN, No. 146419; Court of Appeals No. 312259.

PEOPLE v DEANDRE HAWKINS, No. 146420; Court of Appeals No. 305965.

HODGES v HENRY FORD HOSPITAL, No. 146429; Court of Appeals No. 309648.

PEOPLE v MICHAEL TAYLOR, No. 146431; Court of Appeals No. 308463.

PEOPLE v BASS, No. 146437; Court of Appeals No. 311812.

PEOPLE v MENDE, No. 146438; Court of Appeals No. 305558.

PEOPLE v SEAN ROGERS, No. 146443; Court of Appeals No. 310689.

EMC MORTGAGE CORPORATION v AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY, No. 146444; Court of Appeals No. 298518.

PEOPLE v DANIEL PARRISH, No. 146446; Court of Appeals No. 303746.

DAVIS v GULLECKSON, No. 146448; Court of Appeals No. 307014.

PEOPLE v KYMON HARRIS, No. 146450; Court of Appeals No. 307926.

HAMOOD v STANOWSKI, No. 146463; Court of Appeals No. 304559.

PEOPLE v TERRISE JOHNSON, No. 146465; Court of Appeals No. 309416.

HOLCOMB v KELLY SERVICES, INC, No. 146471; Court of Appeals No. 313373.

PEOPLE v GONZALEZ, No. 146481; Court of Appeals No. 305628.

PEOPLE v PINKNEY, No. 146482; Court of Appeals No. 300214.

PEOPLE v JUSTIN WILLIAMS, No. 146484; Court of Appeals No. 305934.

PEOPLE v TREVIS JOHNSON, No. 146485; Court of Appeals No. 312950.

PEOPLE v BRYANT BENTLEY, No. 146486; Court of Appeals No. 308069.

PEOPLE v PENFIELD, No. 146488; Court of Appeals No. 312994.

DETARY v ADVANTAGE HEALTH PHYSICIANS, PC, No. 146491; Court of Appeals No. 308179.

PEOPLE v HENDRICKS, No. 146492; Court of Appeals No. 307636.

PEOPLE v STOKES, No. 146511; Court of Appeals No. 306909.

WENDY SABO & ASSOCIATES, INC v AMERICAN ASSOCIATES, INC, No. 146514; Court of Appeals No. 305757.

HARKNESS v BRICKMAN, No. 146516; Court of Appeals No. 305769.

BROWN v HOME-OWNERS INSURANCE COMPANY, No. 146517; reported below: 298 Mich App 678.

PEOPLE v MAYES, No. 146519; Court of Appeals No. 309392.

BELL v DEPARTMENT OF HUMAN SERVICES, No. 146522; Court of Appeals No. 306916.

PEOPLE v STEPHEN VAUGHN, No. 146526; Court of Appeals No. 310860.

PEOPLE v QUICK, No. 146529; Court of Appeals No. 306030.

PEOPLE v GERALD HUDSON, No. 146530; Court of Appeals No. 302876.

PEOPLE v JOSEPH DELVERT FREEMAN, No. 146535; Court of Appeals No. 309971.

PEOPLE v THEODORE MILLER, No. 146536; Court of Appeals No. 305763.

PEOPLE v METZELBURG, No. 146540; Court of Appeals No. 306397.

NWD, LLC v CHARTER TOWNSHIP OF ROYAL OAK, No. 146542; Court of Appeals No. 309599.

PEOPLE v BARD, No. 146544; Court of Appeals No. 313277.

PEOPLE v RANSOM No. 146548; Court of Appeals No. 306788.

PEOPLE v SAVANTE JOHNSON, No. 146553; Court of Appeals No. 313094.

PEOPLE v DEVI SMITH, No. 146554; Court of Appeals No. 306574.

PEOPLE v VANCE, No. 146558; Court of Appeals No. 303481.

PEOPLE v GREGORY HARRIS, No. 146559; Court of Appeals No. 306497.

PEOPLE v JEFFREY BARNES, No. 146561; Court of Appeals No. 307372.

PEOPLE v TAMERRA WASHINGTON, No. 146562; Court of Appeals No. 305604.

OBRZUT v POLISH DELI & BAKERY, INC, No. 146572; Court of Appeals No. 306382.

PEOPLE v TODD JOHNSON, No. 146582; reported below: 298 Mich App 128.

PITSCH RECYCLING & DISPOSAL, INC v IONIA COUNTY, No. 146593; Court of Appeals No. 302163.

BREARD v EMPLOYMENT GROUP, INC, No. 146601; Court of Appeals No. 310342.

PERKOVIC v HUDSON INSURANCE COMPANY, No. 146608; Court of Appeals No. 302868.

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PEOPLE v STANTON, No. 146651; Court of Appeals No. 305085.

MCFADDEN v AO SMITH, No. 146653; Court of Appeals No. 311730.

PEOPLE v DETRICK DAVIS, No. 146659; Court of Appeals No. 309368.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 146668; Court of Appeals No. 296640.

BP1, LLC v DDR CORPORATION, No. 146773; Court of Appeals No. 312579.

PEOPLE v MARCAEL DIXON, No. 146909; Court of Appeals No. 311060.

Superintending Control Denied April 29, 2013:

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 146539.

Reconsideration Denied April 29, 2013:

PEOPLE v NIEMIEC, No. 142431; Court of Appeals No. 298514. Leave to appeal denied at 493 Mich 890.

VIVIANO, J., did not participate because he was the Chief Judge of the 16th Judicial Circuit Court before his appointment to this Court.

GRIEVANCE ADMINISTRATOR v LYGIZOS, No. 145448. Leave to appeal denied at 493 Mich 892.

PEOPLE v LLOYD, No. 145565; Court of Appeals No. 307732. Leave to appeal denied at 493 Mich 894.

PEOPLE v DANTZLER, No. 145738; Court of Appeals No. 303252. Leave to appeal denied at 493 Mich 918.

PEOPLE v LACASSE, No. 145792; Court of Appeals No. 309017. Leave to appeal denied at 493 Mich 919.

PEOPLE v WILLIAM HALL, No. 145858; Court of Appeals No. 309507. Leave to appeal denied at 493 Mich 898.

PEOPLE v RAMSEY, No. 145859; Court of Appeals No. 308813. Leave to appeal denied at 493 Mich 919.

PEOPLE v HOBBS, No. 145888; Court of Appeals No. 306002. Leave to appeal denied at 493 Mich 920.

Summary Disposition May 1, 2013:

LANGTON v STATE OF MICHIGAN, No. 144722; Court of Appeals No. 300639. 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 September 29, 2010, order of the Court of Claims denying in part the defendant's motion for summary disposition. The Court of Appeals clearly erred in applying principles of direct liability to grant summary disposition to the defendant on the plaintiff's vicarious liability claim. "Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other." *Theophelis v Lansing General Hospital*, 430 Mich 473, 483 (1988) (internal quotation and citation omitted). Because the theory of vicarious liability is not concerned with the acts or omissions of the principal, the Court of Appeals erred in holding that the defendant was entitled to summary disposition because it did not have a duty to intervene.

SABATOS v CHERRYWOOD LODGE, INC, No. 146251; Court of Appeals No. 302644. 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 as on reconsideration granted in light of *Hoffner v Lanctoe*, 492 Mich 450 (2012).

CAVANAGH, J., would deny leave to appeal.

PEOPLE v MARK PORTER, No. 146381; Court of Appeals No. 298474. 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 issue raised by the defendant but not addressed by that court during its initial review of this case: whether the defendant was denied effective assistance of counsel because his trial counsel failed to object to the circuit court's unjustified shackling of the defendant during trial. See *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). 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 May 1, 2013:

PEOPLE v ALFONZO JOHNSON, No. 145477; Court of Appeals No. 304273. The parties shall address: (1) whether the amendment of the supplemental notice of intent to seek to enhance the defendant's sentence was contrary to MCL 769.13, and, if so, to what remedy, if any, the defendant is entitled; and (2) whether, if the original notice was defective

and no order was entered allowing the notice to be amended, the trial court had the authority to sentence the defendant as a fourth habitual offender.

We further order the Monroe Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys Association of Michigan, and the Criminal Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 1, 2013:

RAMBIN v ALLSTATE INSURANCE COMPANY, No. 146256; reported below: 297 Mich App 679. 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 plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person . . . using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414; *People v Laur*, 128 Mich App 453 (1983), and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied May 1, 2013:

STATE REPRESENTATIVE RICHARD HAMMEL v SPEAKER OF THE HOUSE OF REPRESENTATIVES, No. 145916; reported below: 297 Mich App 641.

COUNTY OF MASON v INDIAN SUMMER COOPERATIVE, INC, No. 145921; Court of Appeals No. 301952.

MICHIGAN ONE FUNDING, LLC v MCLEAN, No. 146102; Court of Appeals No. 303799.

MITCHELL v MCNEILUS TRUCK AND MANUFACTURING, INC, No. 146264; Court of Appeals No. 304124.

PEOPLE v BRIAN ROBERTS, No. 146311; Court of Appeals No. 301524.

PEOPLE v RITCHIE, No. 146313; Court of Appeals No. 310911.

PEOPLE v SHAKEISHA HALL, No. 146340; Court of Appeals No. 309540.

PEOPLE v RONALD LEE ALLEN, No. 146385; Court of Appeals No. 306298.

SPEELMAN v CITY OF LANSING, No. 146390; Court of Appeals No. 306532.

BELL v DEPARTMENT OF NATURAL RESOURCES, No. 146546; Court of Appeals No. 310701.

ATTORNEY GENERAL v CIVIL SERVICE COMMISSION, No. 146616; Court of Appeals No. 306685.

In re SHOLBERG ESTATE, No. 146721; Court of Appeals No. 307308.

Order Entered May 1, 2013:

In re HONORABLE KENNETH D POST, No. 145532. On order of the Court, the motion to strike the respondent's acceptance of the recommendation is denied. The Judicial Tenure Commission having issued a Decision and Recommendation, and the respondent 58th District Court Judge Kenneth D. Post having not filed a petition to reject or modify the Commission's Decision and Recommendation, we accept the recommendation of the Judicial Tenure Commission and order that the respondent be publicly censured and suspended for 30 days without pay, effective 21 days from the date of this order.

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 respondent and the examiner. We adopt the following findings of the Commission as our own:

1. Respondent is, and at all material times was, a judge of the 58th District Court in Hudsonville, Michigan, where he has served continuously since January 1, 1980.

2. As a judge, he is subject to all the duties and responsibilities imposed on judges by the Michigan Supreme Court, and he is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. Formal Complaint No. 90 ("Formal Complaint") is currently pending before the Michigan Judicial Tenure Commission ("the Commission"), with a trial date scheduled for December 17, 2012 before the appointed master, Judge John Pikkarainen (retired).

4. In lieu of a trial and to eliminate the need for a master to issue findings, the Respondent and Examiner agree to the stipulations below, as well as to the admissibility of the transcripts attached hereto.

5. The attached transcript Exhibit A (the "Official Transcript") entitled "People of the State of Michigan vs. Ethan Forrester Whale, 58th District Court (Ottawa County) Case No. HU-11-47997-SM,["] before the Hon. Kenneth D. Post, District Judge, on Friday, December 2, 2011 is a complete and accurate transcription of the proceedings.

6. Respondent also admits that Exhibit B is a copy of a transcript that was prepared subsequent to the hearing identified in Exhibit A by the court reporter for 58th District Court Chief Judge Bradley Knoll after Respondent found the defendant's attorney Scott Millard in contempt of court. Respondent does not challenge the accuracy of either transcript A or B.

7. Respondent admits that he knew that by sentencing Mr. Millard to jail for contempt that he would be remanding Mr. Millard to the physical custody of the Ottawa County Sheriff's Department. Respondent did not provide directions to the Ottawa County Sheriff's Department as to how or in what manner they should transport Mr. Millard.

8. If called as a witness, Mr. Millard would testify that the Ottawa County Sheriff's Department took him into custody, handcuffing his hands behind his back, and transporting him to, and booking him in, the Ottawa County Jail. Later in the morning of December 2, 2011, when he was transported to the 20th Circuit Court before Judge Edward Post (no relation to Respondent) on a motion for emergency stay, Mr. Millard was handcuffed and placed in leg shackles, both of which [were] then attached to a "belly chain" around his waist. Judge Edward Post reversed Mr. Millard's contempt of court conviction.

9. The parties stipulate that the Commission may review Respondent's answer to the Commission's request for comments and any attachments and materials he submitted in response to the matter and Respondent's Verified Answers to Formal Complaint No[.] 90.

10. The Commission may make findings of fact based on these stipulations and the transcript(s), as well as draw reasonable inferences from them. The Commission may also make conclusions of law and a recommended sanction regarding the judicial misconduct, if any, which may have occurred.

11. Respondent admits that some of his comments directed to and about Mr. Millard were improper and eroded public confidence in the judiciary in violation of the Code of Judicial Conduct 2A. Respondent also admits that his failing to be patient and dignified with Mr. Millard was contrary to the Code of Judicial Conduct 3A, thereby creating the appearance of impropriety.

12. Respondent contends that his actions did not violate Ethan Whale's Fifth Amendment right in the United States Constitution or Article [1], Section 17 or the Michigan State Constitution nor did Respondent violate Mr. Whale's Sixth Amendment right in the United States Constitution or Article [1], Section 20 of the Michigan State Constitution of the defendant in the underlying criminal matter. Respondent may include an affidavit on this issue in his brief to the Commission.

13. These stipulations and the transcript(s) shall serve in lieu of a master's report. The parties may proceed directly to argument before the Commission, as in MCR 9.216, as if the master had submitted a report containing the facts set forth herein. The parties may argue regarding the application of the law to the stipulated facts, but they may not argue against the stipulated facts. The parties may also argue about the inferences and conclusions that may be drawn from those facts and as to the appropriate sanction, if any.

14. The Commission may issue a Decision and Recommendation and may append a copy of these stipulations and the transcript(s) to that decision. The Commission shall file its Decision and Recommendation with the Supreme Court as a public document, pursuant to MCR 9.220. The parties further stipulate that this is *not* a consent resolution as contemplated by MCR 9.220(C).

15. The parties agree that these stipulations cover only the matters, cases or issues contained in the Formal Complaint and the substantive and procedural matters in them, and nothing herein precludes the Commission from investigating or pursuing other grievances that may be filed that are unrelated to the Formal Complaint.

16. Respondent acknowledges that he is entering these stipulations freely and voluntarily, that it is his own choice to do so, and that he is doing so in consultation with counsel. [Emphasis in original.]

The standards set forth in *Brown* are also being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

Respondent has admitted, and the Stipulations and attached transcripts show by a preponderance of the evidence, that Respondent breached the standards of judicial conduct and is responsible for the following:

a. Irresponsible or improper conduct that eroded public confidence in the judiciary, in violation of MCJC, Canon 2A; and

b. Failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, in violation of MCJC, Canon 3A(3).

In addition, although not admitted by Respondent, the Stipulations and attached transcripts show by a preponderance of the evidence, that Respondent breached the standards of judicial conduct and is responsible for 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. Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

d. 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 MCJC, Canon 1.

e. Failure to be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to MCJC, Canon 1.

f. Conduct involving impropriety and appearance of impropriety, contrary to MCJC, Canon 2A;

g. Failure to be faithful to the law, contrary to MCJC, Canon 3A(1);

h. Failure to avoid a controversial tone or manner in addressing counsel and failure to avoid the unnecessary interruption of counsel during arguments, in violation of MCJC, Canon 3A(8);

i. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2);

j. Conduct that is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3);

k. Conduct that violates the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4); and

1. Conduct that violates MCL 600.1701, addressing contempt.

After reviewing the recommendation of the Judicial Tenure Commission, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Kenneth D. Post be publicly censured and suspended from judicial office without pay for 30 days, effective 21 days from the date of this order. This order further stands as our public censure.

STATE OF MICHIGAN

58TH DISTRICT COURT - OTTAWA COUNTY

HUDSONVILLE, MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v File No. HU-11-047997-SM

ETHAN FORRESTER WHALE,

Defendant.

_____/

ARRAIGNMENT
BEFORE THE HONORABLE KENNETH D. POST - DISTRICT COURT JUDGE
Hudsonville, Michigan - December 2, 2011

APPEARANCES:

For the Defendant: Mr. Scott G. Millard P75153
Miel & Carr PLC
125 West Main Street
Post Office Box Eight
Stanton, Michigan 48888
(989) 831-5208

Recorded and Transcribed by: Marcia L. Walcott, CER 4050
(616) 662-6001

1 EXHIBIT A

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Hudsonville, Michigan

Friday, December 2, 2011 - 10:05 a.m.

THE COURT: Kaitlin Bultema; Beth Donovan; Bradley Gibbie, G-i-b-b-i-e; David Giese, G-i-e-s-e; Havlicek, Arthur; Laura Riegle; Lawrence Soitz II, and Ethan Whale. You are Ms. Bultema? Is that right?

MS. BULTEMA: Yes.

THE COURT: Ms. Bultema, you're here for arraignment on a Complaint that charges you with the offense of being a Minor in Possession of Alcohol on or about the 30th day of October, 2011, in Allendale Township, Ottawa County, at Country Place Apartments. This is a misdemeanor. It carries with it a maximum fine of 100, 200 or $500, depending on whether it's a first, second or third offense. Court costs are over and above the fine. On the second or third offense your license to drive a motor vehicle will be suspended by the Secretary of State for a period of six months or one year, depending on whether it's a second or a third offense.

(At 10:06 a.m., off the record)

(At 10:11 a.m., on the record)

THE COURT: And Mr. Whale, your offense is alleged to have occurred on or about the 12th day of November, 2011, in Allendale Township, Ottawa County, at Lubbers Stadium. Do you understand the charge against you, sir?

MR. WHALE: Yes, sir.

THE COURT: Do you understand the penalties as they were explained to the first young lady?

MR. WHALE: Yes, sir.

THE COURT: You received a sheet from the Court that explained your trial rights. Did you get a chance to read those?

MR. WHALE: Yes, sir.

THE COURT: And do you understand them?

MR. WHALE: Yes, sir.

THE COURT: Do you have any questions about the charge, the penalties or any of your trial rights?

MR. WHALE: No, sir.

THE COURT: How do you wish to plead?

MR. WHALE: Not guilty.

THE COURT: The Court will enter your plea. Are you going to be--where do you live, sir?

MR. WHALE: My home address is 3566 Buckingham, Berkley, Michigan 4--

THE COURT: And the phone number there?

MR. WHALE: It's (248) 225-9733.

THE COURT: And is that where you're living?

MR. WHALE: Currently, no.

THE COURT: Well, where do you live now?

MR. WHALE: Right now I'm at Saginaw Valley State University.

THE COURT: What's your cell--is that the phone number at home or your cell phone?

MR. WHALE: That is my cell phone.

THE COURT: What's your phone number at home?

MR. WHALE: (248) 217-7202.

THE COURT: 7202?

MR. WHALE: Yes.

THE COURT: And who--which one of your parents or both of your parents live there?

MR. WHALE: Yes, both of them.

THE COURT: Are you employed?

MR. WHALE: Yes, sir.

THE COURT: Where?

MR. WHALE: The Jewish Community Center of Metropolitan Detroit.

THE COURT: And the phone number there?

MR. WHALE: (248) 432-5000.

THE COURT: Do you have any other charges pending against you at this time?

MR. WHALE: No, sir.

THE COURT: Have you ever previously been convicted of any other offense?

MR. WHALE: Yes, sir.

THE COURT: I can't hear you.

MR. WHALE: Yes, sir.

THE COURT: What?

MR. WHALE: MIP.

THE COURT: I'm sorry?

MR. WHALE: An MIP.

THE COURT: Prior MIP in Saginaw in February?

MR. WHALE: Yes, sir.

THE COURT: Anything else besides that?

MR. WHALE: No, sir.

THE COURT: When they give you a drug test today, are you going to be clean or dirty?

MR. MILLARD: Mr. Whale is going to stand mute to that question, Your Honor.

THE COURT: He's not going to stand mute. He's either going to answer the question or I'm going to remand him to jail, because I'm setting bond. And I want to know the answer to the question. Now, the answer to the question is what, sir?

MR. MILLARD: Your Honor, Mr.--

THE COURT: Be quiet, please.

MR. WHALE: I would fail.

THE COURT: I'm sorry?

MR. WHALE: I would--

MR. MILLARD: Your Honor--

THE COURT: You can have a seat now.

MR. MILLARD: Your Honor, I'm--

THE COURT: Sit down.

MR. MILLARD: I'm counsel, Your Honor.

THE COURT: I'm encouraged. Both of you sit down.

(At 10:13 a.m., off the record)

(At 10:46 a.m., on the record)

THE COURT: Okay. Mr. Whale. Mr. Whale, as I understand it, you don't want to answer my questions with regards to whether--when the last time was you used controlled substances. Is that correct?

MR. MILLARD: Yes, Your Honor.

THE COURT: Not you. I'm not talking to you.

MR. MILLARD: I'm his attorney, Your Honor.

THE COURT: I'm encouraged. Mr. Whale?

MR. MILLARD: Your Honor--

MR. WHALE: Correct.

THE COURT: Okay. You go over and have a drug test now so that we can find out and get a baseline. You can go with the officer, and he'll assist you. Thank you very much.

MR. MILLARD: Thank you, Judge.

THE COURT: We'll be back in a few moments.

(At 10:47 a.m., off the record)

(At 11:07 a.m., on the record)

THE COURT: Mr. Whale, you can come on up here, please. Mr. Whale, when was the last time you used controlled substances?

MR. WHALE: A few weeks ago.

THE COURT: What date? Look at the calendar, please, sir.

MR. MILLARD: Come on, Your Honor. Mr.--Mr. Whale has a Fifth Amendment right. You--

THE COURT: Counsel, I'm setting bond. There's two ways we can do this. I can give him 30 days from the date that he last used to be clean and come back in for another drug test, or I'll remand him to jail until such time as he's clean, and then we'll go from there, and we'll let him out of jail.

MR. MILLARD: Your Honor, Mr. Whale was not--was not on bond.

THE COURT: He is now.

MR. MILLARD: Mr.--he is from the point of--

THE COURT: And that's why I want to try to keep him--

MR. MILLARD: --from today forward.

THE COURT: That's why I want to try to keep him clean.

MR. MILLARD: And I--

THE COURT: So when you tell him--would you please be quiet? I really appreciate that. Thank you.

MR. MILLARD: I apologize.

THE COURT: Mr. Whale, when was the last time that

you used controlled substances? Let me have the date, please, sir.

MR. MILLARD: Your Honor, Mr. Whale has a Fifth Amend--

THE COURT: I'm not charging him with use of controlled substance, counsel. He's not charged with that charge. I'm interested in getting a clean, honest bond response. Now, if you don't want to do that, you can leave; your call.

MR. MILLARD: Your Honor, Mr. Whale has a Sixth Amendment right to assist--effective assistance of counsel.

THE COURT: That's right. And that's not what he's getting at the moment.

MR. MILLARD: Your Honor, I--I strongly disagree with that. I've--

THE COURT: I'm glad.

MR. MILLARD: I've been nothing but respectful. And I will always be respectful to the Bench.

THE COURT: Then would you please let him answer my question?

MR. MILLARD: But, Your Honor, Mr. Whale will be on bond as of today. This--this Court has full power to--to set conditions of bond. One of those conditions I'm--I'm strongly suspecting is going to be that Mr. Whale show up and--and provide drug screening. And--and that's--and Mr. Whale is

fully willing to do that. I--Mr. Whale honestly doesn't really have an opinion if that's the condition that this Court sets.

But, Your Honor, I--Mr. Whale has a Fifth Amendment right not to make admissions. And, Your Honor, the--the manner in which this--this proceeding is being conducted strongly has the--at least I'm getting the sense that it--it threatens to tread on that Fifth Amendment right. I--I ask--I just ask, Your Honor, that we--this--this Court set a date that you wish for him to--to take drug testing. Mr. Whale will be there on time. Mr. Whale will do that. Mr. Whale--

THE COURT: Counsel, if I set that date as tomorrow, he's going to fail the drug test. Then I'm going to remand him to jail until such time as I find out when it is. All I'm asking him to do is tell me when he last used so that I can set it in an appropriate amount of time so that he will not be dirty and will not go to jail.

MR. MILLARD: And I--

THE COURT: And if you don't want him to do that--

MR. MILLARD: You--

THE COURT: --that's entirely up to you. Now, obviously I wouldn't do it tomorrow. But I could have him back Monday, and I could have him back Tuesday and Wednesday and Thursday and Friday until such time as he's clean. Do you really want him to do that?

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MR. MILLARD: Your Honor, I think the Court is fully empowered to do that. Certainly I don't want him to do that. I think it's extremely--it would be extremely--

THE COURT: It is only a violat--

MR. MILLARD: It would be very hard on--on an individual.

THE COURT: It is only a violation of the law, isn't it?

MR. MILLARD: Excuse me?

THE COURT: It's only a violation of the law, isn't it?

MR. MILLARD: A violation of the law what, Your Honor?

THE COURT: Using controlled substance, either alcohol or drugs.

MR. MILLARD: Your Honor, I think--I think it would be entirely reasonable to set Mr.--

THE COURT: I'm not interested in what you think. Haven't you gotten that yet?

MR. MILLARD: I have gotten that.

THE COURT: I really am not.

MR. MILLARD: And I understand that. And, Your Honor, the Court fully certainly has the right to not care what I say.

THE COURT: Thank you. Then be quiet.

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MR. MILLARD: However, Your Honor, I--

THE COURT: Be quiet. Thank you very much. Mr. Whalen--Whale. Excuse me. Mr. Whale, when was the last time that--the date that you last used controlled substances, sir?

MR. MILLARD: Your Honor, can we--

THE COURT: One more word, and I'm going to hold you in contempt. The first thing that I do when I hold somebody in contempt is I will give you a fine. The second thing I do, if you're in contempt again, is I'll remand you to jail. I don't want to do that, counsel.

MR. MILLARD: Your Honor--

THE COURT: This is a legitimate question. And I'm going to ask it in determining what the bond level is going to be. And he is going to answer it or you're going to go to jail. And then I'll start dealing with him. The choice is completely yours. I don't want to go down this road. Don't force me to go down there, sir.

MR. MILLARD: Your Honor--

THE COURT: Be quiet is what I told you, didn't I?

MR. MILLARD: Your--Your Honor, can--

THE COURT: Don't go there.

MR. MILLARD: Your Honor, respectfully I would just request that Mr. Whale have it set that he come in in two weeks and submit to a drug test.

THE COURT: I heard your request. Thank you. Mr.

Whale, what was the date that you last used, please, sir?

MR. MILLARD: Your Honor--

THE COURT: Mr. Whale--I'm not addressing you. Would you--

MR. MILLARD: This is--he has a--

THE COURT: --be quiet?

MR. MILLARD: --Fifth Amendment right not to be forced to make an admission.

THE COURT: He is not making an admission against his interest at this point. He's making an admission that will grant him to be released so that he can go about his business and come in on another day when he will be clean. And--

MR. MILLARD: Your Honor--

THE COURT: --if you don't like that, I'm sorry.

MR. MILLARD: Your--Your Honor, he was not on bond.

THE COURT: I don't give a rat's tail if he--

MR. MILLARD: He didn't have a condition of bond--

THE COURT: --was or he wasn't.

MR. MILLARD: --that prohibited that.

THE COURT: Counsel, will you be quiet?

MR. MILLARD: I--I--I cannot be quiet to this Court's insist--

THE COURT: One hundred dollars in contempt of Court, the first sanction. Now, if you want to keep going,

you name it, because we're going to do it by the days. I don't particularly want to go there. But you're more than welcome to help me. Mr. Whale--

MR. MILLARD: Your Honor, you're insisting that he make an admission. He has a Fifth Amendment right not to make an admission.

THE COURT: This is your second warning. I don't give a third. You make the call. And if you go, you're going to be there for the whole weekend. You make the call. Mr. Whale, when was the last time you used controlled substances?

MR. MILLARD: Your Honor--

THE COURT: Counsel, I'm holding you in contempt of Court. Remand him to the jail. Mr. Whale, we'll be back here on Monday morning. Mr. Whale, we'll be back here on Monday morning, and we'll do this again, with your attorney here to represent you. I want you here at 8:00 o'clock Monday morning. We're adjourned.

(At 11:14 a.m., off the record)

(At 11:56 a.m., on the record)

THE COURT: Mr. Millard.

MR. MILLARD: Yes, Judge.

THE COURT: Come on up here. Mr. Millard, you have been held in contempt of Court. And I am willing to set that and release you at this point if on Monday morning you're willing to have your client come in and appear and answer the

questions that I'm going to put to him. And if you're not willing to do that, you can go to jail at this point. You've made a record. You're more than welcome to appeal any decision that I make. The question is whether or not you want to spend the weekend in jail.

MR. MILLARD: Your Honor, humbly, I certainly do not want to spend the weekend in jail. I certainly have--

THE COURT: Did you hear my question to you? On Monday morning at 8:00 o'clock do you want to be here with your client so that he can answer the questions? He is going to be here. I can have you here, too, because I can have the jail bring you down.

MR. MILLARD: Yes, Your Honor. And I--I certainly appreciate that. I--I was down here covering for another counsel.

THE COURT: Mr. Heath.

MR. MILLARD: I'm sorry. Ms. Heath, Judge.

THE COURT: Ms. Heath.

MR. MILLARD: I--I would expect that Ms. Heath would be appearing on that day.

THE COURT: That's fine. But my question has to do with you.

MR. MILLARD: Yes, Judge.

THE COURT: I am not going to tolerate disrespect in the courtroom. When I tell you to be quiet and have somebody

else answer the question, that's what you do. And if you don't like that, you've made a record. You take it up on appeal. Now, would you like to go to jail for the weekend, or would you rather go home?

MR. MILLARD: Judge, I--I would really like to go home. I have trial prep to do this weekend. So I'd appreciate to be able to do that.

THE COURT: Do you think you can have your clients answer my questions when I ask them in the future?

MR. MILLARD: Your Honor, certainly within the--

THE COURT: I need a yes or a no answer to that.

MR. MILLARD: Yes, I think I could have my clients answer your questions, certainly.

THE COURT: Because you didn't today. And you continued to talk over my telling you to be quiet. Are you going to continue to do that also?

MR. MILLARD: No, Your Honor, unless my duty as an officer--

THE COURT: No, no.

MR. MILLARD: --of the Court--

THE COURT: Yes or no?

MR. MILLARD: --requires me to speak up.

THE COURT: It does not require you to argue with me in court at anytime.

MR. MILLARD: I--I humbly apologize if in any way I

made you feel that

THE COURT: It's not a question of how I feel.

MR. MILLARD: --I was arguing. I--

THE COURT: It's got nothing to do with my feelings. It has to do with whether or not I get the answers from your client that I request. And my question to you is are you going to allow them to answer that in the future?

MR. MILLARD: Your Honor, everything that he is required--

THE COURT: Yes or no?

MR. MILLARD: Yes, everything required by law, I would certainly instruct my client.

THE COURT: You know what? You're dancing, and I'm not dancing. He's yours. We're adjourned.

(At 11:58 a.m., proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF OTTAWA)

I certify that this is a complete, true and correct transcript of the proceedings and testimony taken in this case before Honorable Kenneth D. Post on December 2, 2011.

December 6, 2011

Marcia L. Walcott

Marcia L. Walcott, CER 4050
58th District Court
3100 Port Sheldon
Hudsonville, Michigan 49426
(616) 662-6001

STATE OF MICHIGAN

IN THE 58TH JUDICIAL DISTRICT COURT (OTTAWA COUNTY)

* * * * *

PEOPLE OF THE STATE OF MICHIGAN,

HU-11-47997-SM

vs.

ETHAN FORRESTER WHALE,

Defendant.

ARRAIGNMENT

BEFORE THE HONORABLE KENNETH D. POST, DISTRICT JUDGE

Hudsonville, Michigan - Friday, December 2ND, 2011

APPEARANCES:

For the People: N/A

For the Defendant: MR. SCOTT G. MILLARD (P75153)
Attorney for the Defendant
125 West Main Street
Post Office Box 8
Stanton, Michigan 48888
(989) 831-5208

RECORDED BY: Marcia Walcott CER4050

TRANSCRIBED BY: Joanna M. Meengs CER7288
Certified Electronic Recorder
58TH District Court
85 West Eighth Street
Holland, Michigan 49423
(616) 355-4311

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EXHIBIT B

TABLE OF CONTENTS

Hudsonville, Michigan

Friday, December 2nd, 2011, at 10:11 a.m.,

(Court, Counsel and all parties present)

THE COURT: Mr. Whale. Your offense is alleged to have occurred on, or about, the 12th day of November, 2011, in Allendale Township, Ottawa County, at Lubbers Stadium. Do you understand the charge against you sir?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the penalties as they were explained to the first young lady?

THE DEFENDANT: Yes, sir.

THE COURT: You received a sheet from the court that explains your trial rights. Did you get a chance to read those?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand them?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the charge, the penalties, or any of your trial rights?

THE DEFENDANT: No, sir.

THE COURT: How do you wish to plead?

THE DEFENDANT: Not guilty.

THE COURT: The Court will enter your plea. You going to be - - where do you live, sir?

THE DEFENDANT: My home address is 3566 Buckingham,

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Berkley, Michigan 4 - -

THE COURT: Do you have a phone number there?

THE DEFENDANT: (248) 225-9733.

THE COURT: And is that where you're living?

THE DEFENDANT: Currently, no.

THE COURT: Well where are you living at?

THE DEFENDANT: Right now I'm at Saginaw Valley State University.

THE COURT: What's your - - is that the phone number at home or your cell phone?

THE DEFENDANT: That is my cell phone.

THE COURT: What's your phone number at home?

THE DEFENDANT: (248) - -

THE COURT: Uh huh - -

THE DEFENDANT: - - 217-7202.

THE COURT: 7-2-0-2?

THE DEFENDANT: Yes.

THE COURT: And who - - which one of your parents, or both of your parents, live there?

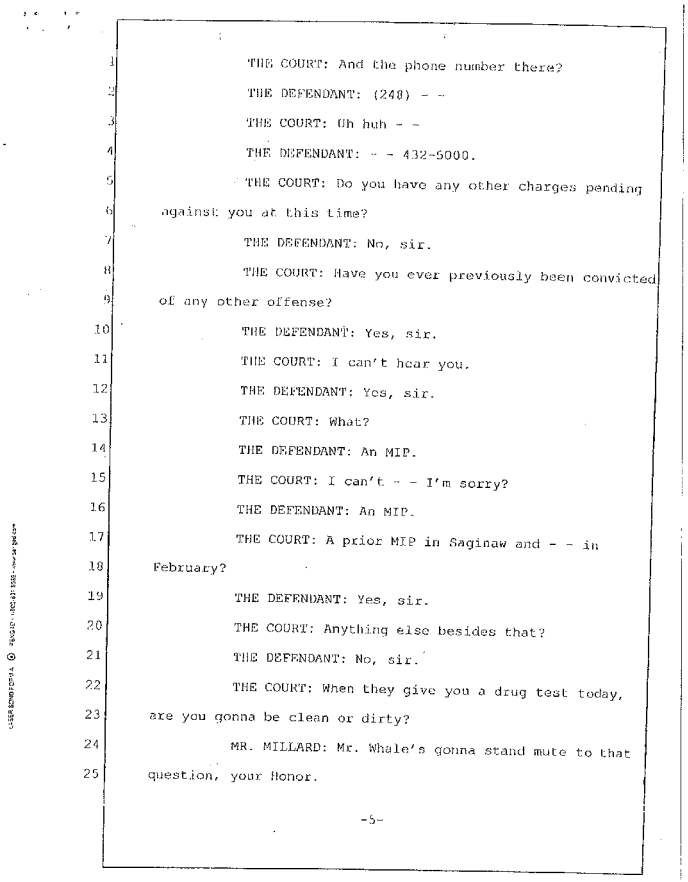
THE DEFENDANT: Yes, both of 'em.

THE COURT: Are you employed?

THE DEFENDANT: Yes, sir.

THE COURT: Where?

THE DEFENDANT: The Jewish Community Center of Metropolitan Detroit.



THE COURT: And the phone number there?

THE DEFENDANT: (248) - -

THE COURT: Uh huh - -

THE DEFENDANT: - - 432-5000.

THE COURT: Do you have any other charges pending against you at this time?

THE DEFENDANT: No, sir.

THE COURT: Have you ever previously been convicted of any other offense?

THE DEFENDANT: Yes, sir.

THE COURT: I can't hear you.

THE DEFENDANT: Yes, sir.

THE COURT: What?

THE DEFENDANT: An MIP.

THE COURT: I can't - - I'm sorry?

THE DEFENDANT: An MIP.

THE COURT: A prior MIP in Saginaw and - - in February?

THE DEFENDANT: Yes, sir.

THE COURT: Anything else besides that?

THE DEFENDANT: No, sir.

THE COURT: When they give you a drug test today, are you gonna be clean or dirty?

MR. MILLARD: Mr. Whale's gonna stand mute to that question, your Honor.

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THE COURT: He's not gonna stand mute. He's either gonna answer the question or I'm gonna remand him to jail, 'cuz I'm setting bond and I wanna know the answer to the question.

Now, the answer to the question is what, sir?

MR. MILLARD: Your Honor, Mr. - -

THE COURT: Be quiet. Please.

THE DEFENDANT: I'd fail.

THE COURT: I'm sorry?

THE DEFENDANT: I would - -

MR. MILLARD: Your Honor - -

THE COURT: You can have a seat now.

MR. MILLARD: Your Honor, I'm - -

THE COURT: Sit down.

MR. MILLARD: I'm counsel, your Honor - -

THE COURT: I'm encouraged. Both of you sit down.

(At 10:13:41 a.m., proceedings interrupted for unrelated matters)

(At 10:46:30 a.m., proceedings continue)

THE COURT: Mr. Whale. As I understand it, you don't want to answer my questions with regards to whether - - when the last time was you used controlled substances. Is that correct?

MR. MILLARD: Yes, your Honor.

THE COURT: Not you. I'm not talking to you.

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MR. MILLARD: I'm his attorney, your Honor.

THE COURT: I'm encouraged. Mr. Whale?

MR. MILLARD: Your Honor - -

THE DEFENDANT: Correct.

THE COURT: Okay. You go over and have a drug test now so that we can find out and get a baseline. You can go with the officer and he'll assist you. Thank you very much.

MR. MILLARD: Thank you, Judge.

THE COURT: We'll be back in a few moments.

(At 10:46:56 a.m., proceedings adjourned)

(At 11:07:55 a.m., proceedings reconvene)

THE COURT: Mr. Whale, when was the last time you used controlled substances?

THE DEFENDANT: A few weeks ago.

THE COURT: What date? Look at the calendar, please, sir.

MR. MILLARD: (inaudible 11:08:03) your Honor. Mr. - - Mr. Whale has a Fifth Amendment right - -

THE COURT: Counsel, I'm setting bond. There's two ways we can do this. I can give him 30 days from the date that he last used to be clean, and come back in for another drug test; or I'll remand him to jail until such time as he's clean, and then we'll go from there.

MR. MILLARD: But your - -

THE COURT: I won't let him outta jail.

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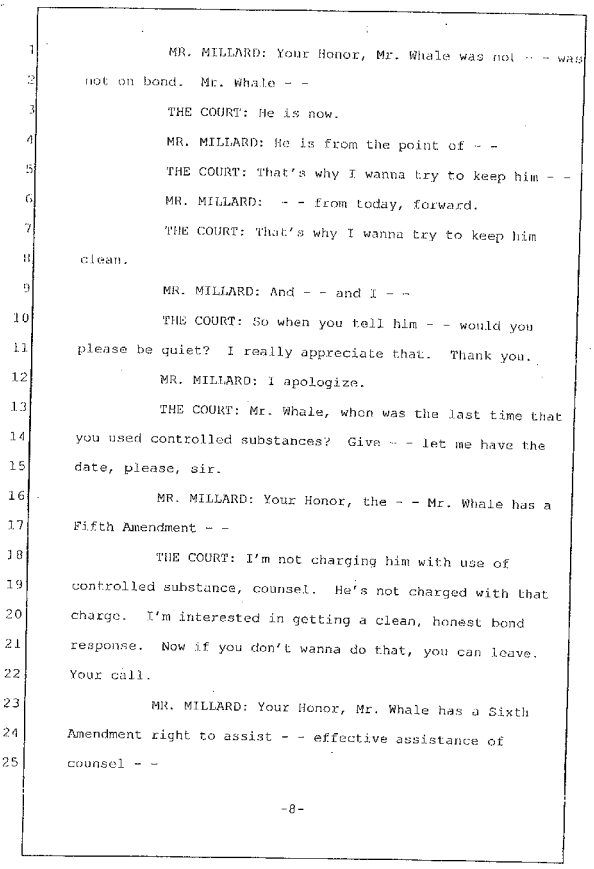

MR. MILLARD: Your Honor, Mr. Whale was not - - was not on bond. Mr. Whale - -

THE COURT: He is now.

MR. MILLARD: He is from the point of - -

THE COURT: That's why I wanna try to keep him - -

MR. MILLARD: - - from today, forward.

THE COURT: That's why I wanna try to keep him clean.

MR. MILLARD: And - - and I - -

THE COURT: So when you tell him - - would you please be quiet? I really appreciate that. Thank you.

MR. MILLARD: I apologize.

THE COURT: Mr. Whale, when was the last time that you used controlled substances? Give - - let me have the date, please, sir.

MR. MILLARD: Your Honor, the - - Mr. Whale has a Fifth Amendment - -

THE COURT: I'm not charging him with use of controlled substance, counsel. He's not charged with that charge. I'm interested in getting a clean, honest bond response. Now if you don't wanna do that, you can leave. Your call.

MR. MILLARD: Your Honor, Mr. Whale has a Sixth Amendment right to assist - - effective assistance of counsel - -

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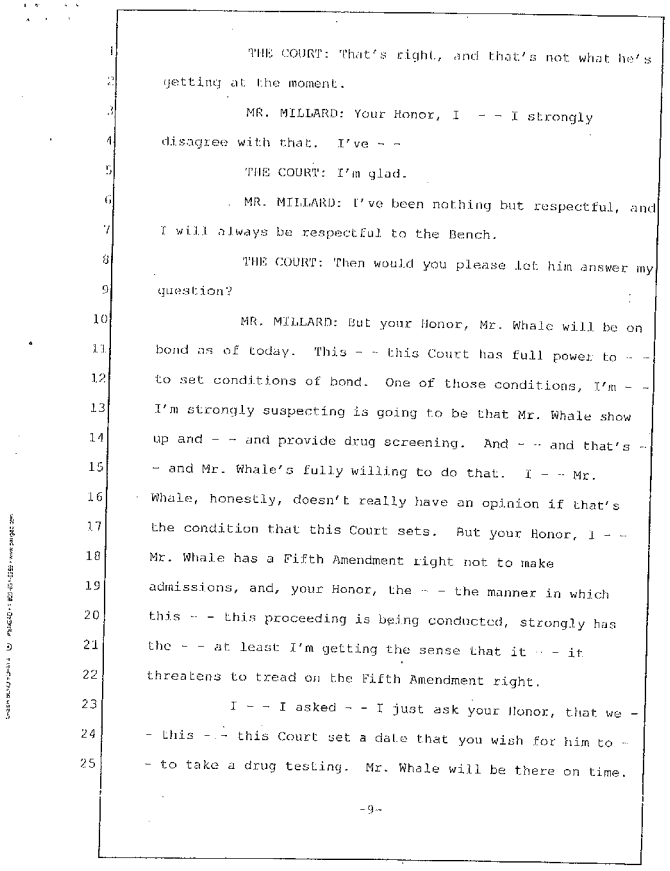

THE COURT: That's right, and that's not what he's getting at the moment.

MR. MILLARD: Your Honor, I - - I strongly disagree with that. I've - -

THE COURT: I'm glad.

MR. MILLARD: I've been nothing but respectful, and I will always be respectful to the Bench.

THE COURT: Then would you please let him answer my question?

MR. MILLARD: But your Honor, Mr. Whale will be on bond as of today. This - - this Court has full power to - - to set conditions of bond. One of those conditions, I'm - - I'm strongly suspecting is going to be that Mr. Whale show up and - - and provide drug screening. And - - and that's - - and Mr. Whale's fully willing to do that. I - - Mr. Whale, honestly, doesn't really have an opinion if that's the condition that this Court sets. But your Honor, I - - Mr. Whale has a Fifth Amendment right not to make admissions, and, your Honor, the - - the manner in which this - - this proceeding is being conducted, strongly has the - - at least I'm getting the sense that it - - it threatens to tread on the Fifth Amendment right.

I - - I asked - - I just ask your Honor, that we - - this - - this Court set a date that you wish for him to - - to take a drug testing. Mr. Whale will be there on time.

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Mr. Whale will do that. Mr. Whale - -

THE COURT: Counsel, if I set that date as tomorrow, he's gonna fail the drug test. Then I'm gonna remand him to jail until such time as I find out when it is. All I'm asking him to do is tell me when he last used so that I can set it at an appropriate amount of time so that he will not be dirty, and will not still go to jail.

MR. MILLARD: And I - - I'm - -

THE COURT: But you don't want him to do that.

MR. MILLARD: You - -

THE COURT: That's entirely up to you. Now, obviously, I wouldn't do it tomorrow, but I could have him back Monday. And I could have him back Tuesday, and Wednesday, and Thursday and Friday, until such time as he's clean. Do you really want him to do that?

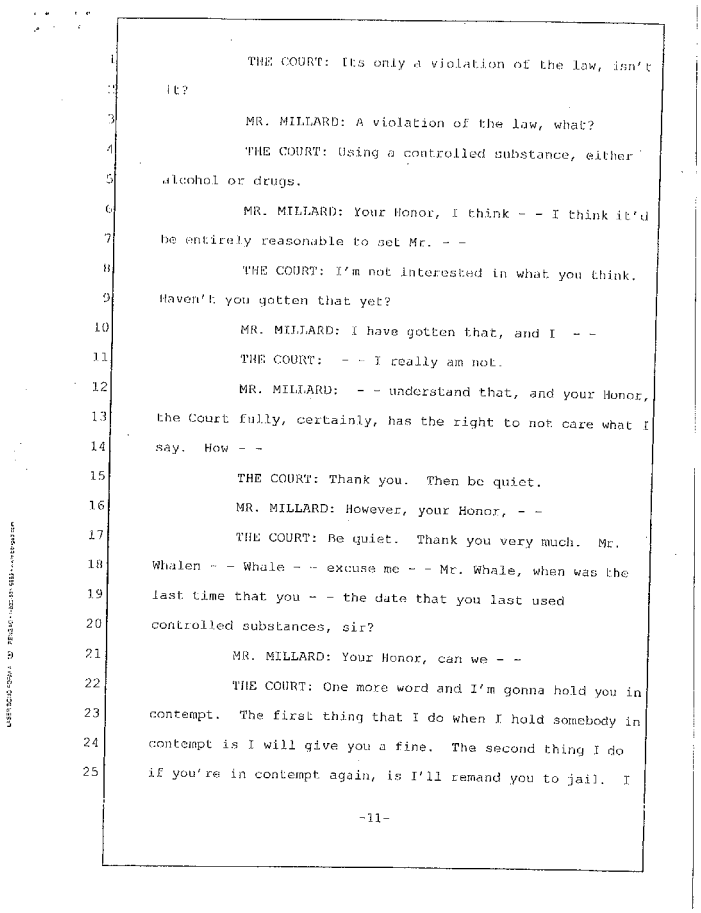
MR. MILLARD: Your Honor, I - - I think the Court's fully in power to do that, certainly. I don't want him to do that. I think that's extremely - - it would be extremely - -

THE COURT: It is only a viola - -

MR. MILLARD: - - it would be very hard on a - - an individual - -

THE COURT: It is only a violation of law, isn't it?

MR. MILLARD: Excuse me?



THE COURT: Its only a violation of the law, isn't it?

MR. MILLARD: A violation of the law, what?

THE COURT: Using a controlled substance, either alcohol or drugs.

MR. MILLARD: Your Honor, I think - - I think it'd be entirely reasonable to set Mr. - -

THE COURT: I'm not interested in what you think. Haven't you gotten that yet?

MR. MILLARD: I have gotten that, and I - -

THE COURT: - - I really am not.

MR. MILLARD: - - understand that, and your Honor, the Court fully, certainly, has the right to not care what I say. How - -

THE COURT: Thank you. Then be quiet.

MR. MILLARD: However, your Honor, - -

THE COURT: Be quiet. Thank you very much. Mr. Whalen - - Whale - - excuse me - - Mr. Whale, when was the last time that you - - the date that you last used controlled substances, sir?

MR. MILLARD: Your Honor, can we - -

THE COURT: One more word and I'm gonna hold you in contempt. The first thing that I do when I hold somebody in contempt is I will give you a fine. The second thing I do if you're in contempt again, is I'll remand you to jail. I

-11-

don't wanna do that, counsel.

MR. MILLARD: Your Honor - -

THE COURT: This is a legitimate question and I'm going to ask it in determining what the bond level is going to be, and he's going to answer it, or you're going to go to jail and then I'll start dealing with him. The choice is completely your's. I don't wanna go down this road, so don't force me to go down there, sir.

MR. MILLARD: Your Honor, - -

THE COURT: Be quiet is what I told you, didn't I?

MR. MILLARD: Your - - your Honor, can - -

THE COURT: Don't go there.

MR. MILLARD: Your Honor, respectfully, I would just request that Mr. Whale have it set that he come in in two weeks and submit to a drug test.

THE COURT: I heard your request. Thank you. Mr. Whale, what was the date that you last used, please, sir?

MR. MILLARD: Your Honor, - -

THE COURT: Mr. Whale - - I'm not addressing you.

MR. MILLARD: Its his Fifth - -

THE COURT: Would you be quiet? - -

MR. MILLARD: - - Amendment right not to be forced to make an admission.

THE COURT: He is not making an admission and - - against his interests at this point. He's making an

-12-

admission that will grant him to be released so that he can go about his business and come in on another day when he'll be clean.

MR. MILLARD: Your Honor - -

THE COURT: And if you don't like that, I'm sorry.

MR. MILLARD: Your - - your Honor, he was not on bond.

THE COURT: I don't give a rat's tail if he was or he wasn't.

MR. MILLARD: He didn't have the condition of bond that pro - - prohibited that.

THE COURT: Counsel, will you be quiet?

MR. MILLARD: I - - I can - - I cannot be quiet to this Court's insistence - -

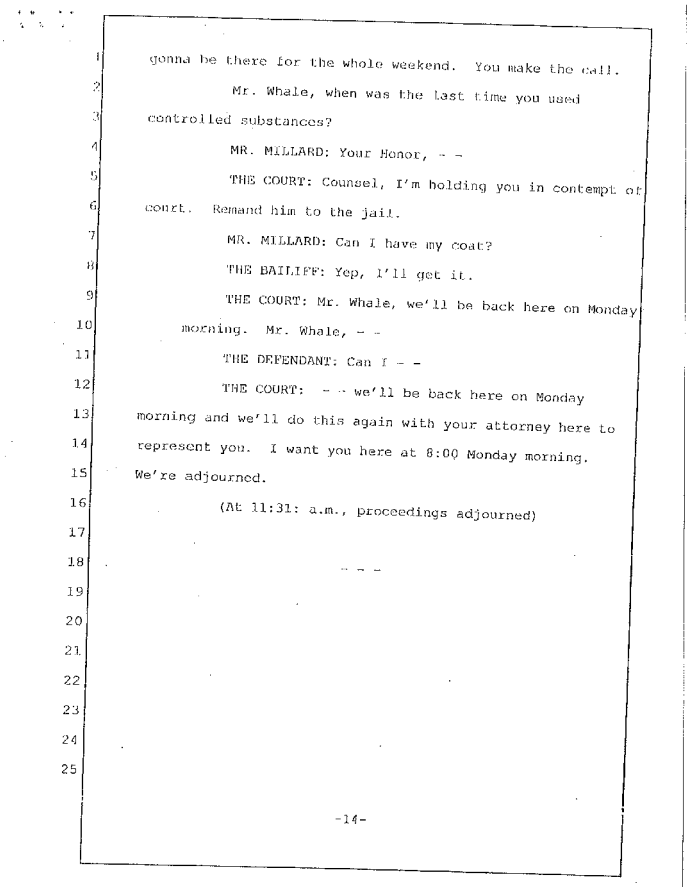
THE COURT: One hundred dollars in contempt of court. First sanction. Now, if you wanna keep going, you name it, because we're gonna do it by the days. I don't particularly wanna go there, but you're more than welcome to help me.

Mr. Whale - -

MR. MILLARD: Your Honor, your insisting that he make an admission. He has a Fifth Amendment right not to make an admission.

THE COURT: This is your second warning. I don't give a third. You make the call. And if you go, you're

-13-



gonna be there for the whole weekend. You make the call.

Mr. Whale, when was the last time you used controlled substances?

MR. MILLARD: Your Honor, - -

THE COURT: Counsel, I'm holding you in contempt of court. Remand him to the jail.

MR. MILLARD: Can I have my coat?

THE BAILIFF: Yep, I'll get it.

THE COURT: Mr. Whale, we'll be back here on Monday morning. Mr. Whale, - -

THE DEFENDANT: Can I - -

THE COURT: - - we'll be back here on Monday morning and we'll do this again with your attorney here to represent you. I want you here at 8:00 Monday morning. We're adjourned.

(At 11:31: a.m., proceedings adjourned)

- - -

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SEPARATE RECORD

(At 11:55 a.m., Beginning of Separate Record)

THE COURT: Good thinking. The show is just beginning. You won't get better tickets anyplace. I'd sit up close if I were you.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: The front row is good. Actually, his P number is 8 - - 6-8-6-6-1.

THE RECORDER: No. No, that's someone - - his name is Mr. Millard - - Millard. Sandy got - -

THE COURT: Oh. Mr. Millard?

MR. MILLARD: Yes, Judge.

THE COURT: Come on up here. Mr. Millard, you have been held in contempt of court, and I'm willing to set that (sic) and release you at this point, if, on Monday morning, you're willing to have your client come in and appear and answer the questions that I'm going to put down here. If you're not willing to do that, you can go jail at this point. You've made a record, you're more than welcome to appeal any decision I make. The question is whether or not you wanna spend the weekend in jail.

MR. MILLARD: Your Honor, humbly, I - - I certainly do not wanna spend the weekend in jail. I certainly - -

THE COURT: Did you hear my question to you? On

Monday morning, at 8:00, do you wanna be here with your client so that he can answer the questions? He's going to be here.

MR. MILLARD: Your - -

THE COURT: I can have you here, too, because I can have the jail bring you down.

MR. MILLARD: Yes, your Honor, and I - - I certainly appreciate that. I - - I was down here covering for another counsel.

THE COURT: Mr. Heath.

MR. MILLARD: Ms. - - I'm sorry, Ms. Heath, Judge.

THE COURT: Ms. Heath.

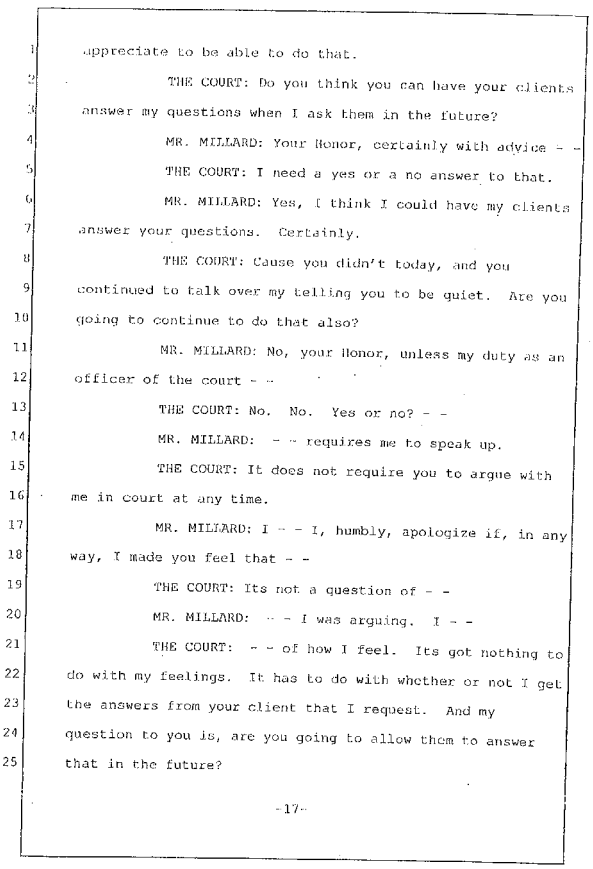
MR. MILLARD: I - - I would expect that Ms. Heath would be appearing on that day.

THE COURT: That's fine. But my question has to do with you.

MR. MILLARD: Yes, Judge.

THE COURT: I am not going to tolerate disrespect in the courtroom. When I tell you to be quiet and have somebody else answer the question, that's what you do. If you don't like that, you've made a record, you take it up on appeal. Now, would you like to go to jail for the weekend, or would you rather go home.

MR. MILLARD: Judge, I - - I would really like to go home. I have trial prep to do this weekend. So I would



appreciate to be able to do that.

THE COURT: Do you think you can have your clients answer my questions when I ask them in the future?

MR. MILLARD: Your Honor, certainly with advice - -

THE COURT: I need a yes or a no answer to that.

MR. MILLARD: Yes, I think I could have my clients answer your questions. Certainly.

THE COURT: Cause you didn't today, and you continued to talk over my telling you to be quiet. Are you going to continue to do that also?

MR. MILLARD: No, your Honor, unless my duty as an officer of the court - -

THE COURT: No. No. Yes or no? - -

MR. MILLARD: - - requires me to speak up.

THE COURT: It does not require you to argue with me in court at any time.

MR. MILLARD: I - - I, humbly, apologize if, in any way, I made you feel that - -

THE COURT: Its not a question of - -

MR. MILLARD: - - I was arguing. I - -

THE COURT: - - of how I feel. Its got nothing to do with my feelings. It has to do with whether or not I get the answers from your client that I request. And my question to you is, are you going to allow them to answer that in the future?

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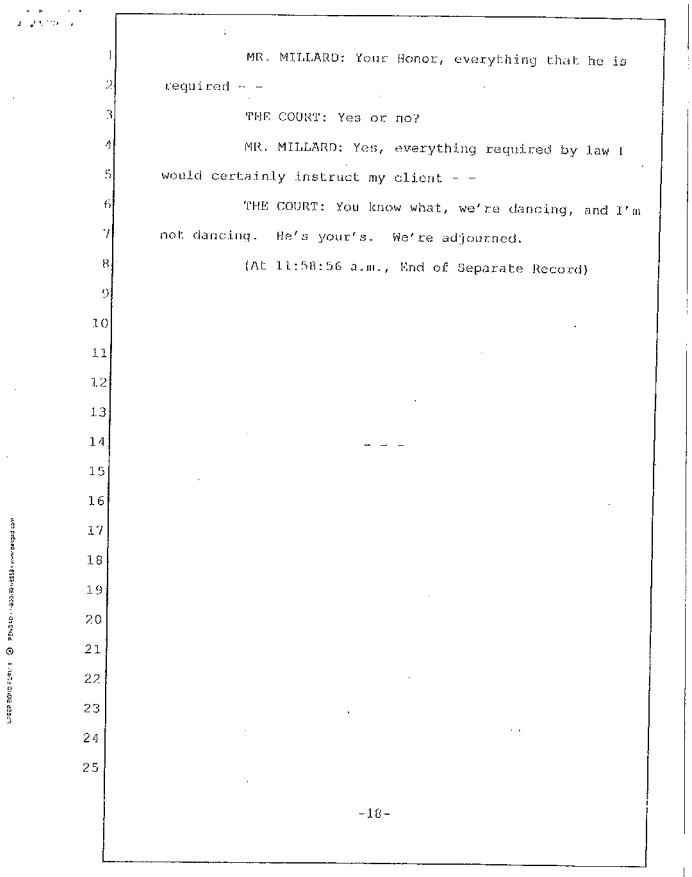

MR. MILLARD: Your Honor, everything that he is required - -

THE COURT: Yes or no?

MR. MILLARD: Yes, everything required by law I would certainly instruct my client - -

THE COURT: You know what, we're dancing, and I'm not dancing. He's your's. We're adjourned.

(At 11:58:56 a.m., End of Separate Record)

- - -

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STATE OF MICHIGAN)

COUNTY OF OTTAWA)

Jeanna M. Meengs, Certified Electronic Recorder for the 58th District Court, State of Michigan, does hereby certify that the foregoing Arraignment for Ethan Whale, file HU-11-47997-SM, pages 1 through 19, inclusive, comprises a true and accurate transcript of the recorded proceedings as provided to me held before the Honorable Kenneth D. Post, District Court Judge, on Friday, December 2nd, 2011.

Jeanna M. Meengs, CER7288
Certified Electronic Recorder
58th District Court
85 West Eighth Street
Holland, Michigan 49423
(616) 355-4311

Holland, Michigan
December 6th, 2011

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Summary Disposition May 3, 2013:

PEOPLE v ANDRE HUNTER, No. 146210; Court of Appeals No. 297542. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Wayne Circuit Court's determination that the defendant's attorney testified credibly at the hearing held pursuant to *People v Ginther*, 390 Mich 436 (1973). To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney's performance was not based on strategic decisions, but was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney's error, a different outcome was reasonably probable. This is a mixed question of law and fact. Findings of fact are reviewed for clear error; questions of law are reviewed de novo. *People v Armstrong*, 490 Mich 281, 289-290 (2011). The trial court clearly erred in finding that the defendant's attorney was credible. We therefore vacate those portions of the Court of Appeals opinion relying on the trial court's credibility determination to affirm the defendant's conviction in the face of his claims of ineffective assistance of counsel. We remand this case to the Court of Appeals for reconsideration of the defendant's ineffective assistance claims in light of this order. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

CAVANAGH, J., would grant leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 3, 2013:

PEOPLE v ALAN TAYLOR, No. 145491; Court of Appeals No. 295275. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the trial court's jury instructions expanded the definition of "contiguous" beyond the reasonable scope of MCL 324.30301(1)(m)(i) and Mich Admin Code, R 281.921(1)(b)(ii), and, if so, whether that expansion constituted an unforeseeable judicial enlargement of a criminal statute that deprived the defendant of due process.

PEOPLE v GARRISON, No. 146626; Court of Appeals No. 307102. At oral argument, the parties shall address whether the victims' travel expenses were properly included in the amount of restitution that the defendant was ordered to pay. See MCL 780.766 and MCL 769.1a. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 3, 2013:

FARMERS INSURANCE EXCHANGE v MICHIGAN INSURANCE COMPANY, Nos. 144144, 144145, and 144159; Court of Appeals Nos. 298984 and 298985. 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, 2012. The applications for leave to appeal the October 18, 2011, judgment of the Court of Appeals are denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J., did not participate.

PEOPLE v SAMS, No. 146364; Court of Appeals No. 306443.

Order Entered May 3, 2013:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2012 PA 348 AND 2012 PA 349, No. 146595. On order of the Court, the motion for leave to file brief amicus curiae is granted. The request by the Governor for an advisory opinion on the constitutionality of 2012 PA 348 and 2012 PA 349 is considered. We invite the Michigan Solicitor General to file a brief in this case within 35 days from the date of this order expressing the views of the state of Michigan as to whether this Court should grant the Governor's request for an advisory opinion. Specifically, we ask the Solicitor General to address: (1) why prompt resolution of the constitutional question regarding application to the Civil Service Commission is necessary to guide the State Employer in its fall contract negotiations with civil service employees; (2) why this matter warrants this Court's present intervention when § 14(4) of 2012 PA 348 and § 10(6) of 2012 PA 349 explicitly grant "exclusive original jurisdiction over any action challenging the validity of [the pertinent subsections]" in the Court of Appeals, which "shall hear the action in an expedited manner;" (3) given that there are adversarial proceedings already pending in several courts, and in light of the non-precedential nature of an advisory opinion, see *Anway v Grand Rapids R Co*, 211 Mich 592, 603 (1920); *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 460 n 1 (1973), how this Court's intervention in the absence of an actual case and controversy would necessarily aid in resolution of the issues presented rather than produce confusion and delay; and (4) the value of an advisory opinion from this Court addressing federal equal protection issues since federal courts are not bound by state court determinations on federal constitutional issues, see *Woods v Holy Cross Hosp*, 591 F2d 1164, 1171-1172 (CA 5, 1979).

The request by the Governor for an advisory opinion remains pending.

CAVANAGH, J. (*dissenting*). I do not join the majority's decision to invite the Solicitor General to file a brief in this matter. I believe that this Court is well equipped to decide whether, under the circumstances, it would be an appropriate exercise of discretion to grant the Governor's request for an advisory opinion without inviting comment from the Solicitor General regarding the "views of the state of Michigan." Because the Governor's request remains pending, I do not believe that the majority's order should in any way affect pending adversarial proceedings, including those that are to be heard in an expedited manner.

MARKMAN, J. (*dissenting*). I would grant without further delay the Governor's request, submitted on January 28, 2013, for an advisory opinion addressing the constitutionality of specific provisions of Public Acts 348 and 349 of 2012 (the "right-to-work" laws) and therefore respectfully dissent. In my judgment, (1) the request for such an advisory opinion constitutes a reasonable exercise of the constitutional authority of the chief executive of this state; (2) the issuance of an advisory opinion would constitute a reasonable exercise of the constitutional authority of this Court; (3) an advisory opinion would affirm this Court's role as the ultimate arbiter of Michigan law; (4) an advisory opinion would, if the right-to-work laws are ultimately determined to be constitutional, facilitate their orderly implementation; (5) an advisory opinion would minimize the possibility of protracted litigation concerning the validity of the right-to-work laws; and (6) an advisory opinion would demonstrate comity by this Court with a coordinate branch of state government.

The Michigan Constitution states:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date. [Const 1963, art 3, § 8.]

Considering that this Court possesses this authority, it is difficult to imagine an instance in which its exercise would be more necessary and proper than in the present case. The right-to-work laws, proponents and opponents agree, will have a substantial effect upon both employees and employers, public and private, and upon the economy, throughout this state, and these statutes have been the subject of substantial legal dispute and controversy.

If there is an obvious purpose behind the advisory opinion clause of the Constitution, it is to facilitate the resolution of legal disputes of precisely the sort raised by this case. The Governor has sought to expedite the process by which a bill becomes a law and a law becomes genuine public policy. I would accommodate without further delay his request for an advisory opinion not because this is or should be a *compliant* court, but because it is and should be a *responsible* court, ensuring that the constitutional processes of government are respected and that the people's will, as expressed both in the laws enacted by their representatives and in their constitutions, is faithfully upheld. The Governor's request constitutes a rational response to a judicial culture in which the decision-making of courts has been extended into an increasingly broad array of public policy areas. By granting his request, this Court would expedite the process of judicial review, and thereby expedite the process by which some measure of certainty can be brought to laws having a broad and significant economic effect upon this state.

The Governor asserts in his letter seeking an advisory opinion that the state's current collective-bargaining agreements expire on December 31, 2013, that negotiations regarding new contracts will likely begin this summer, and that, in his judgment, it is imperative for the negotiating parties to "know definitively whether the new contracts must comply with Public Act 349 before those negotiations commence . . . ." Though

the Governor speaks only to the effects of uncertainty on the public sector, the impact on the private sector will likely be equally significant considering that Michigan is one of the most heavily unionized states in the country. Thus, whatever the ultimate decision of this Court concerning the constitutionality of the right-to-work laws, I would act in response to the Governor's exercise of his constitutional authority, and in the exercise of this Court's own authority, to promote certainty and clarity with regard to these laws. This undoubtedly is one of those "solemn occasions" contemplated by our Constitution for invocation of the advisory opinion process.

Additionally, the provisions of the right-to-work laws granting the Court of Appeals exclusive original jurisdiction over actions challenging the validity of certain core provisions of the laws (vis-á-vis our trial courts, *not* this Court, compare Const 1963, art 6, § 13 with Const 1963, art 3, § 8) have utterly no effect upon the prerogative of this Court to issue advisory opinions. To the contrary, I see these provisions as further evidence of the importance and time-sensitivity of the issues surrounding the implementation and administration of these laws, and of the Legislature's and the Governor's desire to reduce to the extent possible levels of uncertainty in these regards. Through the advisory-opinion process, the Governor can ensure that the issues with which *he* is concerned can be considered with expedition by this Court, as opposed to the issues with which *private litigants* are concerned being considered by the Court of Appeals and subject to further layers of appeal.

It also appears that all four issues raised by the Governor pose relatively abstract questions of law that this Court would readily be able to address without the development of a factual record in the lower courts. While the usual prerequisite for this Court's exercise of jurisdiction is the presence of an actual case or controversy, the advisory opinion clause of our Constitution establishes an exception to this requirement, and the questions posed in the Governor's request are questions that are readily susceptible to resolution by this Court absent a specific case or controversy.

Perhaps most importantly, the Governor's request must be viewed against the backdrop of a policy-making process of which it has become an increasingly ubiquitous and routine part that controversial pieces of legislation, such as the right-to-work laws, must, following legislative and executive approval, now make a third stop—at the judiciary—before they are viewed as fully legitimate and enforceable public policies. The advisory opinion enables this Court, at the request of either the executive or the legislative branches, to promptly resolve a dispute that otherwise might languish within the judiciary. In this regard, two recent illustrations come to mind of what increasingly occurs when controversial legislation morphs into litigation, in both instances arising within the federal judiciary: an abortion statute enacted by our state Legislature enjoined for more than five years and a constitutional amendment enacted by a vote of the people barring race-based affirmative action now delayed for what has been in excess of seven years. If we must suffer 'government by judiciary,' at least let this be done with expedition. It is understandable that the Governor might be concerned about a similar fate befalling the right-to-work laws, and he and the people of this state

are entitled to a resolution of the laws' constitutionality at some point before their enactment has become a distant and dim memory.

Further militating in favor of a response to the request for an advisory opinion is that the Michigan Constitution's system of separated powers not only requires that each branch of state government in its relationship with the others assert and defend its prerogatives when necessary, but compels that each also demonstrate comity with the others whenever possible. It is not as if requests for advisory opinions have been made frequently or frivolously by the Governor or the Legislature, as it appears that the present request is only the fifth this Court has received over the past decade. On the rare occasions on which requests *are* made, this Court should act reasonably to accommodate them. Demonstrating respect for the other branches of government burnishes the reputations of both this Court and state government as a whole. For similar reasons, I have previously favored accommodating reasonable requests for advisory opinions by both the Governor and the Legislature and for answers to certified questions sought by the federal judiciary.

All additional delays aside, I am separately troubled by the Court's unprecedented action in requesting that the Solicitor General weigh into the advisory-opinion process at this stage. Our constitution invests the *Governor* with the authority to seek an advisory opinion, and it invests *this Court* with the authority to grant (or to not grant) such a request. As much as I have long held in high regard the Office of the Solicitor General (and the Office of the Attorney General under whose auspices the Solicitor General carries out its duties), I would not introduce a second office of the executive branch to opine upon the merits of the exercise of authority by another office of that branch. The question now before this Court does not pertain to the substantive merits of the issues presented by the Governor, but only whether these should be addressed and answered by this Court. If this Court ultimately grants the request for an advisory opinion, the Office of the Solicitor General is well situated to represent either, or perhaps both, sides in addressing the legal merits of the questions posed; however, it has no special standing, nor any constitutional status, as does the Governor, to assert that the circumstances of this state pose a sufficiently "solemn occasion" as to which this Court's advisory opinion authority should be exercised. Rather, the advisory opinion process at this stage is best understood to operate in reliance upon the *Governor's* judgment and *this Court's* assessment of that judgment alone.

Finally, I am persuaded that the Governor's request for an advisory opinion should be granted without further delay on the basis of the following considerations: (1) multiple lawsuits, brought by both supporters and opponents of the right-to-work laws, and by both public and private parties, are pending in federal court, state circuit courts, and the Court of Appeals; by postponing a decision on the present request, only this Court—the one judicial body directly responsible to the people of this state as their court of last resort in construing Michigan laws—will be uninvolved at this critical juncture in addressing the legal merits of the newly enacted right-to-work laws; (2) delays in the implementation of these laws have seemingly emerged as a strategy or tactic on the part of

some opponents of the right-to-work laws; on behalf of himself and the representative majority in this state, the Governor is entitled to resist such strategies and tactics and this Court need not be oblivious to what is transpiring in assessing the merits of an advisory opinion; and (3) federal courts have increasingly undertaken to decide issues that were once viewed as coming within the primary purview of the state judiciary, and this Court acts properly to protect its prerogatives to the best of its ability by addressing matters involving Michigan law. There is little doubt in my mind that by our not acting promptly in addressing the issues raised by the Governor, federal courts will in quick order fill this vacuum—to the detriment of both this Court and the people who elect its justices, and to the detriment of traditional constitutional principles of judicial federalism.

For these reasons, I would grant, without further delay, the Governor's request for an advisory opinion on the constitutionality of the right-to-work laws, and I would promptly schedule oral arguments in this regard. The issues raised here are those that should be addressed at this time by the highest court of this state.

Summary Disposition May 10, 2013:

PEOPLE v DUSTIN MARSHALL, No. 146241; reported below: 298 Mich App 607. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate Part II of the Court of Appeals judgment. The Court of Appeals erred in holding that there was no prosecutorial misconduct when the prosecutor, in closing, argued that witnesses were recanting because they were intimidated by spectators in the courtroom. We recognize that "[p]rosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Bahoda*, 448 Mich 261, 282 (1995) (internal citations omitted). Here, however, there was no evidence that the courtroom spectators were intimidating the witnesses. Thus, the prosecutor's argument was not based on evidence in the record, and was improper. The Court of Appeals also erred in holding that there was no misconduct based on the prosecutor's argument that defendant had the intent to kill the victim because children lived in the neighborhood where defendant fired his gun. Defendant was charged with assault with intent to commit murder, MCL 750.83. As we stated in *People v Taylor*, this crime requires a specific intent to kill. 422 Mich 554, 567 (1985). Behavior that might otherwise establish malice in the context of murder, such as callous disregard for human life, is insufficient. *Id*. Because this line of argument was irrelevant to the prosecutor's burden of proof, it was improper. However, the Court of Appeals nevertheless reached the correct result as to the issue of prosecutorial misconduct because defendant failed to preserve these arguments, and the misconduct did not affect his substantial rights. *People v Carines*, 460 Mich 750, 763 (1999). In all other respects, the application for leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

OLNEY v OAKLAND PEBBLE CREEK HOUSING ASSOCIATES, No. 147019; Court of Appeals No. 312255. 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 further order that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied May 10, 2013:

LAMPHIERE v ABRAHAM, Nos. 146309, 146310, 146317, and 146318; Court of Appeals Nos. 306354 and 306544.

YOUNG, C.J. (*concurring*). I concur in the denial of leave. The circuit court granted summary disposition to defendants because plaintiff's inebriation caused him to fall off a balcony. The Court of Appeals correctly affirmed the circuit court's ruling under MCL 600.2955a(1) that plaintiff's inebriation "was 50% or more the cause of" this fall. However, the Court reversed in part because "medical testimony established at least a question of fact regarding whether a separate and distinct injury arose out of the delay in seeking medical treatment . . . ." *Lamphiere v Abraham*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2012 (Docket Nos. 306354 and 306544), p 4.

The Court of Appeals correctly determined that the existence of this separate and distinct injury is a question of fact. I write only to clarify the questions that the Court of Appeals did *not* answer. To begin with, the Court of Appeals' decision still requires plaintiff to prove that the injury was, in fact, separate and distinct from the injury that plaintiff suffered when he fell off a balcony. Moreover, the Court of Appeals did not deny the relevance of plaintiff's inebriation to the alleged separate and distinct injury arising out of the delay in seeking medical treatment. Indeed, the facts that plaintiff's inebriation caused his original injury and that plaintiff had a history of passing out from severe intoxication suggest that plaintiff's inebriation may have contributed to defendants' failure to recognize the necessity of immediate medical treatment.

Because the circuit court's review of defendants' intoxication defense only looked to the cause of plaintiff's *initial* injury, the Court of Appeals' partial reversal of summary disposition simply does not examine the extent to which plaintiff's inebriation caused the alleged separate and distinct injury that arose out of the delay in seeking medical treatment.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to address what precisely constitutes the "event" for purposes of MCL 600.2955a(1), when an intoxicated person (plaintiff) has injured himself and caused the very state of affairs leading to the necessity of 'good samaritan conduct' and given rise to the potential liability (of defendants) arising from that conduct. Although the concurring justice is correct that defendants can still argue "that plaintiff's inebriation may have contributed to defendants' failure to recognize the necessity of immediate medical treatment," the Court of Appeals' decision to treat the "event" for purposes of

MCL 600.2955a(1) as "the delay in seeking medical treatment" effectively renders irrelevant all the evidence concerning how *plaintiff came to be injured by his own intoxication in the first place*. Such a restrictive view of the "event" simply seems inconsistent with a statute that affords an absolute defense when a person's intoxication has constituted more than 50 percent of the cause of the "event" that resulted in his injury. At the same time, such an arbitrarily compartmentalized view of the "event" substantially dilutes the protections deriving from 'good samaritan status' in our state. Because I believe that this Court should carefully assess the relationship between MCL 600.2955a and the 'good samaritan rule,' so as to enable each to remain vital and relevant parts of the law, I respectfully dissent.

In re BROCKITT, No. 146965; Court of Appeals No. 311097.

POLICE & FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT v PARAMOUNT LIMITED, LLC, No. 146978; Court of Appeals No. 311460.

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 September 19, 2012:

PROPOSED AMENDMENT OF MCR 3.616.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.616 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm>.

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 3.616. PROCEEDING TO DETERMINE CONTINUATION OF VOLUNTARY FOSTER CARE SERVICES.

(A)-(D) [Unchanged.]

(E) Ex Parte Petition; Filing, Contents, Service. Within 150 days after the signing of a voluntary foster care agreement, the Department of Human Services shall file with the family division of the circuit court, in the county where the youth resides, an ex parte petition requesting the court's determination that continuing in voluntary foster care is in the youth's best interests.

(1)-(2) [Unchanged.]

(3) Service. The Department of Human Services shall serve the petition on

(a) the youth; and

(b) ~~the court that had jurisdiction pursuant to MCL 712A.2(b) during the neglect/abuse proceeding, if different than the court in which the petition is filed; and~~

~~(c)~~ the foster parent or parents, if any.

(F) Judicial Determination. The court shall review the petition, report, and voluntary foster care agreement filed pursuant to subrule (E), and then make a determination whether continuing in voluntary foster care is in the best interests of the youth.

(1) Written Order; Time. The court shall issue an order that includes its determination and individualized findings that support its determination. The findings shall be based on the Department of Human Services' written report and other information filed with the court. The order must be signed and dated within 21 days of the filing of the petition.

(2) Service. The court shall serve the order on

(a)~~(i)~~ the Department of Human Services;

(b)~~(ii)~~ the youth; and

(c)~~(iii) the court that had jurisdiction pursuant to MCL 712A.2(b), if different than the court in which the petition is filed; and~~

~~(iv)~~ the foster parent or parents, if any.

(G) Confidential File. The Department of Human Services and the youth are entitled to access to the records contained in the file, but otherwise, the file is confidential.

Staff Comment: The proposed amendments of MCR 3.616 would provide that the files of a young adult foster care youth are confidential, but may be accessed by the youth and by DHS. The proposal further would eliminate the requirement that the petition and order be served on the previous court in which the youth's child protection case was disposed because the case is no longer active. This order also corrects numbering of subsection (F)(2)(i)-(iv) so that the subsections are labeled with letters (a)-(c).

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 January 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-20. Your comments and the comments of others will be posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed>.

PROPOSED AMENDMENT OF MCR 3.925.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.925 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm>.

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 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D) [Unchanged.]

(E) Retention and Destruction of Court Case Files and Other Court Records. This subrule governs the retention and destruction of court case files and other court records, as defined by MCR 8.119(D).

(1) Destruction Generally; Effect. The court may destroy its case files and other court records only as prescribed by this rule and the approved General Records Retention and Disposal Schedule #16 — Michigan Trial Court. ~~at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed.~~ Destruction of a file does not negate, rescind, or set aside an adjudication.

(2) Register of Actions, Indexes, and Orders.

The register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; the order of adjudication and the order terminating jurisdiction for each delinquency case; the latest dispositive order for each designated case; and the order appointing a guardian and any order dismissing, terminating, or revoking a guardian for each juvenile guardianship case.

(~~2~~3) Delinquency and Motor Vehicle Code Case Files ~~and Records~~.

(a) ~~The~~ Except as provided in subrule (2), the court ~~must~~ may destroy the diversion ~~record~~ case file of a juvenile ~~within 28 days~~ after the juvenile becomes 17 years of age.

(b) ~~The~~ Except as provided in subrule (2), the court ~~must~~ may destroy all case files of matters heard on the consent calendar ~~within 28 days~~ after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained permanently as a nonpublic record.

(c) Except as provided by subrules (2), (3)(a), and (3)(b), the court ~~must~~ may destroy the legal records in the case files ~~and records~~ pertaining to a person's juvenile offenses when the person becomes 30 years ~~old~~ of age. The social records in the case files pertaining to a person's juvenile offenses may be destroyed three years after entry of the order terminating jurisdiction of that person or when the person becomes 18 years old, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2). The court must destroy the records in traffic and local ordinance case files opened by issuance of a citation pursuant to the motor vehicle code or a local corresponding ordinance when the person becomes 30 years of age.

(d) If the court destroys its case files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the

information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.

(~~3~~4) Child Protective Case Files~~ and Records~~.

~~(a) The~~ Except as provided in subrule (2), the court~~, for any reason,~~ may destroy the legal records in the child protective proceeding case files ~~and records~~ pertaining to a child~~, other than orders terminating parental rights,~~ 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminating jurisdiction of that child or when the child become 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(2).

~~(b) All orders terminating parental rights to a child must be kept as a permanent record of the court.~~

(5) Personal Protection Proceeding Case Files. The court may destroy the legal and social records in personal protection proceeding case files pertaining to a juvenile respondent three years after the expiration date of the personal protection order or the latest dispositive order on a violation of the personal protection order, or when the juvenile respondent becomes 18 years of age, whichever is later.

(6) Juvenile Guardianship Case Files. The court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian.

(7) Probation Case Files. The court may destroy the records in probation case files pertaining to a juvenile three years after an order terminating jurisdiction or when the juvenile becomes 18 years of age, whichever is later.

(F)-(G) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.925 would clarify rules and procedures for retention and destruction of various records in juvenile cases.

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 January 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-12. Your comments and the comments of others will be posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed>.

PROPOSED AMENDMENT OF MCR 3.976.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.976 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before

adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm>.

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 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1)-(2) [Unchanged.]

(3) Continuing Foster Care Pending Determination on Termination of Parental Rights. If the court determines at a permanency planning hearing that the child should not be returned home, it may order the agency to initiate proceedings to terminate parental rights. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. If the court orders the agency to initiate proceedings to terminate parental rights, the order must specify the date, or the time within which the petition must be filed. In either case, the petition must be filed no later than 28 days after the date the permanency planning hearing is concluded. The court is not required to order the agency to initiate proceedings to terminate parental rights if one or more of the following apply:

(a)-(c) [Unchanged.]

If the court does not require the agency to initiate proceedings to terminate parental rights under this provision, the court shall state on the record the reason or reasons for its decision.

(4) [Unchanged.]

Staff Comment: This proposed amendment would require a court to indicate on the record the reason that no petition for termination of parental rights need be filed, thus providing a record to future auditors who review the state's foster care program that the court explicitly chose the option.

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 January 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-13. Your comments and the

comments of others will be posted at <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed>.

Orders Entered October 24, 2012:

PROPOSED AMENDMENT OF MCR 2.512.

On order of the Court, this is to advise that the Court is considering amendments of Rule 2.512 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 on the Court's website at SupremeCourt/rules/Pages/Public-Administrative-Hearings.aspx.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.512. INSTRUCTIONS TO JURY.

(A)-(C) [Unchanged.]

(D) Model Civil Jury Instructions and Model Criminal Jury Instructions.

(1) The Committee on Model Civil Jury Instructions and the Committee on Model Criminal Jury Instructions appointed by the Supreme Court ~~has~~ have the authority to adopt model ~~civil~~ jury instructions ~~(M Civ JI)~~ and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, ~~the~~ each committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model ~~civil~~ jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions or ~~it's~~ a predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever ~~the~~ a committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model ~~civil~~ jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.

Staff Comment: The Court has determined that the function of adopting, amending, and repealing model criminal jury instructions should be structured similar to that for model civil jury instructions. As part of that structural change, the Court is considering an amendment that would require trial courts to use model jury instructions in criminal cases under the same circumstances in which they are used in civil cases, i.e., if the instructions are applicable, accurately state the applicable law, and are requested by a party.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-18. Your comments and the comments of others will be posted on the Supreme Court's website at the following:<http://www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.

PROPOSED AMENDMENTS OF MCR 3.913, 3.963, 3.965, AND 3.974.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.913, 3.963, 3.965, 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 on the Court's website at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Pages/Public-Administrative-Hearings.aspx.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.913. REFEREES.

(A) Assignment of Matters to Referees.

(1) [Unchanged.]

(2) Attorney and Nonattorney Referees.

(a) [Unchanged.]

(b) Child Protective Proceedings. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under MCR 3.974(B). In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B).

(c)-(d) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 3.963. ~~PROTECTIVE~~ ACQUIRING PHYSICAL CUSTODY OF CHILD.

(A) Taking Custody Without Court Order.

(1) An officer may without court order remove a child from the child's surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to ~~conclude that the health, safety, or welfare of the child is endangered~~ believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical damage or harm to the child.

(2) An officer who takes a child into protective custody under this rule shall immediately notify the Department of Human Services. While awaiting the arrival of the Department of Human Services, the child shall not be held in a detention facility.

(3) If a child taken into protective custody under this subrule is not released, the Department of Human Services shall immediately contact the designated judge or referee as provided in subrule (D) to seek an ex parte court order for placement of the child pursuant to subrule (B)(4).

(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, ~~upon~~ after presentment of ~~proofs as required by~~ a petition or affidavit of facts to the court, the ~~judge or referee~~ court has reasonable ~~grounds~~ cause to believe that ~~conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation,~~

~~but is temporarily located off the reservation, child is subject to exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.~~ all the following conditions exist, together with specific findings of fact:

(a) The child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical damage or harm to the child.

(b) The circumstances warrant issuing an order pending the hearing.

(c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

(d) No remedy other than protective custody is reasonably available to protect the child.

(e) Continuing to reside in the home is contrary to the child's welfare.

(2) ~~The written order must indicate that the judge or referee has determined that continuation in the home is contrary to the welfare of the child and must state the basis for that determination.~~The court may include in such an order authorization to enter specified premises to remove the child.

(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 preliminary hearing, whether there has been a central registry clearance, and whether a criminal history check has been initiated.

(4) Ex parte Placement Order. If an officer has taken a child into protective custody without court order under subsection (A), or if the Department of Human Services is requesting the court grant it protective custody and placement authority, the Department of Human Services shall present to the court a petition or affidavit of facts and request a written ex parte placement order. If a judge finds all the factors in subrule (B)(1)(a)-(e) are present, the judge may issue a placement order; if a referee finds all the factors in subrule (B)(1)(a)-(e) are present, the referee may issue an interim placement order pending a preliminary hearing. The written order shall contain specific findings of fact. It shall be communicated, electronically or otherwise, to the Department of Human Services.

(C) Arranging for Court Appearance. An officer or other person who takes a child into protective custody must:

(1) immediately attempt to notify the child's parent, guardian, or legal custodian of the protective custody;

(2) inform the parent, guardian, or legal custodian of the date, time, and place of the preliminary or emergency removal hearing scheduled by the court;

(3) immediately bring the child to the court for preliminary hearing, or immediately contact the court for instructions regarding placement pending ~~preliminary~~ the hearing;

(4) if the court is not open, DHS must contact the person designated under MCR ~~3.934(B)(2)~~ subrule (D) for permission to place the child pending ~~preliminary~~ the hearing;

(5) ensure that the petition is prepared and submitted to the court;

(6) ~~prepare~~ file a custody statement ~~similar to the statement required for detention of a juvenile as provided in MCR 3.934(A)(4) and submit it to~~ with the court that includes:

(a) a specific and detailed account of the circumstances that led to the emergency removal, and

(b) the names of persons notified and the times of notification or the reason for failure to notify.

(D) Designated Court Contact

(1) When the Department of Human Services seeks a placement order for a child in protective custody under subrule (A) or (B), DHS shall contact a judge or referee designated by the court for that purpose.

(2) If the court is closed, the designated judge or referee may issue an ex parte order for placement upon receipt, electronically or otherwise, of a petition or affidavit of facts. The order must be communicated in writing, electronically or otherwise, to the appropriate county DHS office and filed with the court the next business day.

RULE 3.965. PRELIMINARY HEARING.

(A) Time for Preliminary Hearing.

(1) [Unchanged.]

(2) Severely Physically Injured or Sexually Abused Child. When the ~~Family Independence Agency~~ Department of Human Services submits a petition in cases in which the child has been severely physically injured, as that term is defined in MCL 722.628(3)(c), or sexually abused, and subrule (A)(1) does not apply, the preliminary hearing must commence no later than 24 hours after the agency submits a petition or on the next business day following the submission of the petition.

(B) Procedure.

(1)-(9) [Unchanged.]

(10) The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or for other good cause shown. If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrule~~s~~ (C)~~and (D)~~.

(11) [Unchanged.]

(12) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrules (C)~~and (D)~~, if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:

(i) a member of the child's extended family,

(ii) a foster home licensed, approved, or specified by the child's tribe,

(iii) an Indian foster family licensed or approved by a non-Indian licensing authority,

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b). standards to be applied in meeting preference requirements above shall be prevailing social and cultural standards of Indian community in which parent or extended family resides or with which parent or extended family members maintain social and cultural ties.

(13) [Unchanged.]

(C) Pretrial Placement~~; Contrary to the Welfare Determination~~.

(1) [Unchanged.]

(2) Criteria. ~~If continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to home, but shall order the child placed in the most family-like setting available consistent with the child's needs.~~ The court may order placement of the child into foster care if the court finds all of the following:

(a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.

(b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (A).

(c) Continuing the child's residence in the home is contrary to the child's welfare.

(d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

(e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

(3) Contrary to the Welfare Findings. Contrary to the welfare findings must be made. If placement is ordered, the court must make a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding. If the "contrary to the welfare of the child" finding is placed on the record and not in a written statement of findings, it must be capable of being transcribed. The findings may be

made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness. If continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs.

(4) Reasonable Efforts Findings. Reasonable efforts findings must be made. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court. When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent removal of the child have been made or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable. Reasonable efforts to prevent a child's removal from the home are not required if a court of competent jurisdiction has determined that

(a) the parent has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638(1) and (2); or

(b) the parent has been convicted of 1 or more of the following:

(i) murder of another child of the parent,

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

(iii) aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent; or

(c) parental rights of the parent with respect to a sibling have been terminated involuntarily; or

(d) the parent is required to register under the Sex Offender Registration Act.

~~(4)~~(5)-~~(7)~~(8) [Renumbered, but otherwise unchanged.]

~~(D) Pretrial Placement; Reasonable Efforts Determination. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.~~

~~(1) When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, thecourt must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable.~~

~~(2) Reasonable efforts to prevent a the child's removal from the home are not required if a court of competent jurisdiction has determined that~~

~~(a) the parent has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638(1) and (2); or~~

~~(b) the parent has been convicted of 1 or more of the following:~~

~~(i) murder of another child of the parent,~~

~~(ii) voluntary manslaughter of another child of the parent,~~

~~(iii) aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, or~~

~~(iv) a felony assault that results in serious bodily injury to the child or another child of the parent; or~~

~~(c) parental rights of the parent with respect to a sibling have been terminated involuntarily.~~

~~(E)~~(D) [Relettered, but otherwise unchanged.]

RULE 3.974. POST-DISPOSITIONAL PROCEDURES; CHILD AT HOME.

(A) [Unchanged.]

(B) Emergency Removal; Protective Custody.

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order the child to be taken into protective custody ~~to protect the health, safety, or welfare of the child,~~ 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. ~~except, that i~~ 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) [Unchanged.]

(3) Emergency Removal Hearing. If the court orders the child to be taken into protective custody ~~to protect the child's health, safety, or welfare~~ 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. Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a)-(b) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The proposed changes of MCR 3.913, 3.963, 3.965, and 3.974 are intended to incorporate the statutory changes enacted in 2012 Public Act 163.

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 theyy can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When

filing a comment, please refer to ADM File No. 2012-19. Your comments and the comments of others will be posted on the Supreme Court's website at the following address: <http://www.courts.michigan.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-3-special-proceedings-and-actions.aspx>.

Order Entered November 7, 2012:

PROPOSED AMENDMENTS OF MCR 6.302 AND 6.310.

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.302 and Rule 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1)-(2) [Unchanged.]

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to ~~or recommended by the prosecutor~~; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow the sentence disposition~~it~~, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after ~~After~~ acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves ~~a prosecutorial sentence recommendation or~~ an agreement for a specific sentence, and the court states that it is unable to follow the agreement ~~or recommendation~~; the trial court shall then state the sentence it intends to impose, and provide the defendant opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(3) A defendant is not entitled to withdraw a plea under subsection (2)(a) or (2)(b) if defendant commits misconduct after plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.310 would eliminate the ability of a defendant to withdraw a plea if the defendant and prosecutor agree that the prosecutor will recommend a particular sentence, but the court chooses to impose a sentence greater than that recommended by the prosecutor. Further, the proposal would clarify that a defendant's misconduct that occurs between the time the plea is accepted and the defendant's sentencing may result in a forfeiture of the defendant's right to with draw a plea in either a *Cobbs* or *Killebrew* case.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-19. Your comments and the comments of others will be posted under ADM File No. 2011-19 at following address: <http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-6-criminal-procedure.aspx>.

Order Entered December 5, 2012:

PROPOSED AMENDMENT OF MCR 7.203.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.203 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on Court's website: <http://courts/mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A)-(C) [Unchanged.]

(D) Other Appeals and Proceedings. The court has jurisdiction over any other appeal or action established by law. An order concerning the assignment of a case to the business court under MCL 600.8301 *et seq.* shall not be appealed to the Court of Appeals.

(E)-(G) [Unchanged.]

Staff Comment: Under 2012 PA 333, an order by a court in which a case is assigned to a business court is not subject to appeal by right or leave in the Court of Appeals. The proposed amendment in this file would codify that prohibition in MCR 7.203(D).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-28. Your comments and the comments of other will be posted at the following: <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/matters/pages/default.aspx>.

Orders Entered January 23, 2013:

PROPOSED AMENDMENTS OF MCR 8.110.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.110 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or

rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.110. CHIEF JUDGE RULE.

(A) [Unchanged.]

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

~~(1)~~ The Supreme Court shall select a judge ~~of each trial court~~ to serve as chief judge of each trial court. Judges shall submit applications and otherwise participate in the selection of chief judges as requested by SCAO. ~~No later than September 1 of each odd-numbered year, each trial court with two or more judges may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.~~

(2) Unless a chief judge pro tempore or presiding judge is named by the Supreme Court, the chief judge shall select a chief judge pro tempore and a presiding judge of any division of the trial court. The chief judge pro tempore and any presiding judges shall fulfill such functions as the chief judge assigns.

(3) The chief judge, chief judge pro tempore, and any presiding judges shall serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore and any presiding judges serve at the pleasure of the chief judge.

(4) ~~Where exceptional circumstances exist, t~~The Supreme Court may appoint a judge of another court to serve as chief judge of a trial court.

a. Apart from the duties of a chief judge described under this rule, the chief probate judge has various obligations imposed by statute. If the chief judge of a probate court is not a probate judge, the senior probate judge shall serve as the chief probate judge in meeting the statutory obligations of a chief probate judge.

b. The senior probate judge is the judge with the longest service as a probate judge. If two judges have the same number of years of service, the judge who received the highest number of votes in the first election is the senior probate judge.

(C)-(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 8.110 is intended to update the rule to reflect today's emphasis on collaboration and local

sharing of resources, and the revisions would also clarify who is required to fulfill the statutory "chief" probate judge obligations.

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 May 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx.

PROPOSED AMENDMENTS OF MCR 8.111.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.111 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the 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 <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.111. ASSIGNMENT OF CASES.

(A)-(B) [Unchanged.].

(C) Reassignment.

(1) If a judge is disqualified or for other good cause cannot undertake an assigned case, the chief judge may reassign it to another judge by a written order stating the reason. To the extent feasible, the alternate judge should be selected by lot. The chief judge shall file the order with the trial court clerk and have the clerk notify the attorneys of record. The chief judge may also designate a judge to act temporarily until a case is reassigned or during a temporary absence of a judge to whom a case has been assigned.

(2) If a judge is reassigned under a concurrent jurisdiction plan or a family court plan, the successor judge will be assigned all cases filed after the date of reassignment, as well as any pending matters or postjudgment matters that relate to disposed cases. The chief judge shall submit a local administrative order under MCR 8.112 identifying the revised caseload distribution.

(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 8.111 would clarify that reassignment under a concurrent jurisdiction plan or family court plan is effective on the date of the reassignment, and the successor judge would handle not only the new cases that are filed in that court, but would also preside over any matters then pending or postjudgment matters that arise. A court would be required to submit a local administrative order to the State Court Administrative Office describing the revised caseload distribution when a reassignment occurs.

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 May 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>.

Orders Entered February 6, 2013:

PROPOSED ADMINISTRATIVE ORDER NO. 2013-X TO IMPLEMENT BUSINESS COURT STANDARDS.

On order of the Court, this is to advise that the Court is considering a proposed administrative order that would implement business court standards. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Business courts, as defined by MCL 600.8031, are specialized dockets within a circuit court. Business courts are intended to provide a case management structure that facilitates timely, effective, and predictable resolution of complex business cases. Specialized dockets improve the efficiency of the courts, which benefits all litigants. This order provides specific direction to circuit courts in the establishment of their business courts.

1. Each business court shall develop a local administrative order for operation of its business court docket. That local administrative order must be approved by the State Court Administrative Office in accordance with MCR 8.112(B).

2. Judges appointed to the business court must attend training provided by the Michigan Judicial Institute. Business court judges are encouraged also to participate in training provided by other organizations as local funding permits.

3. A business court judge should preside over the assigned business court cases from filing through disposition of the matter. If the business court judge is unable to preside over a business court matter, the chief judge may temporarily assign another judge to preside over the business court matter pursuant to MCR 8.111(C).

4. Courts shall establish specific case management practices for business court matters. These practices should reflect the specialized pretrial requirements for business court cases, and will typically include provisions relating to scheduling conferences, alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences.

5. Case management and scheduling conferences shall be conducted by the assigned business court judge. Courts should facilitate the processing of business court cases by utilizing electronic filing (if authorized by the Supreme Court), telephonic and video conferencing.

6. Business court opinions shall be transmitted to the SCAO within 7 days after the trial court enters the opinion. Court opinions generated as part of the business court docket must meet the requirements established by the SCAO.

7. Business courts shall maintain data as prescribed by the SCAO, and shall provide data to the SCAO upon request.

Staff Comment: The proposed administrative order would establish procedures for courts that are required to or choose to implement a business court.

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 May 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-36. Your comments and the comments of others will be posted at <http://www.courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>

PROPOSED AMENDMENTS OF MCR 2.112.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for

public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.112. PLEADING SPECIAL MATTERS.

(A-N) [Unchanged.]

(O) Business and Commercial Disputes.

(1) If a case involves a business or commercial dispute as defined in MCL 600.8031 and the court maintains a business court docket, a party shall file written notice with the party's initial pleading that the case meets the statutory requirements to be assigned to the business court. If a cross-claim, counterclaim, third-party complaint, amendment, or any other modification of the action includes a business or commercial dispute, a party shall file written notice with the party's pleading that the case meets the statutory requirements to be assigned to the business court.

(2) If a case does not initially include a business or commercial dispute but subsequently includes such a claim and a party failed to submit written notice or a party fails to submit written notice as required in subsection (1), a party shall file a motion for determination by the court that the case is eligible for assignment to the business court.

(3) If the court determines that the action meets the statutory requirements of MCL 600.8031, the court shall assign the case to the business court.

(4) A party may file a motion requesting the chief judge to review the court's determination under subsection 3.

Staff Comment: The proposed rule amendments of MCR 2.112 would provide a means to identify business court cases and the placement of those matters on the business court docket.

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 May 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http:/www.courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>

Orders Entered March 20, 2013:

PROPOSED AMENDMENTS OF MCR 2.403.

On order of the Court, this is to advise that the Court is considering an

amendment of Rule 2.403 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs

(1)-(7) [Unchanged.]

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order

(i) denying a timely motion for a new trial, ~~or~~

(ii) to set aside the judgment,

(iii) for rehearing or reconsideration, or

(iv) for other postjudgment relief.

(9)-(11) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.403(O)(8) would add a reference to a motion for rehearing or reconsideration (consistent with the Court of Appeals opinion in *Meemic Ins Co v DTE Energy Co*, 292 Mich App 278 [2011]), as well as a reference to other postjudgment motions to toll the period of time in which a party may file a request for case-evaluation sanctions.

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 July 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://www.cuorts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.

PROPOSED AMENDMENTS OF MCR 7.105, 7.111, AND 7.205.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 7.105, 7.111, and 7.205 of the Michigan Court Rules. Before determining whether the proposal should be adopted,

changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.105. APPLICATION FOR LEAVE TO APPEAL.

(A)-(C) [Unchanged.]

(D) Reply. Within 7 days after service of the answer, the appellant may file a reply brief that conforms to MCR 7.212(G).

~~(D)~~(E)-~~(F)~~(G) [Former subsections (D)-(F) are relettered, but otherwise unchanged.]

RULE 7.111. BRIEFS.

(A) Time for Filing and Service.

(1)-(2) [Unchanged.]

(3) Within 14 days after the appellee's brief is served on appellant, the appellant may file a reply brief. The brief must conform to MCR 7.212(G) and must be served on all other parties to the appeal.

(4) *Briefs in cross appeals*. The filing and service of briefs by a cross appellant and a cross appellee are governed by subrules (A)(1) ~~and (2)~~-(3).

~~(4)~~(5)-~~(5)~~(6) [Former subsections (4)-(5) renumbered, but otherwise unchanged.]

(B)-(D) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(C) [Unchanged.]

(D)Reply. A reply brief may be filed as provided by MCR 7.212(G).

~~(D)~~(E)-~~(G)~~(H) [Former subsections (D)-(G) are relettered, but otherwise unchanged.]

Staff Comment: The proposed changes would permit the filing of a reply brief in support of an application for leave to appeal in the circuit court and the Court of Appeals. The proposed changes were submitted by the Appellate Practice Section of the State Bar of Michigan.

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 July 1, 2013, at

P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-7-appellate-rules.aspx>.

Orders Entered April 3, 2013:

PROPOSED AMENDMENTS OF MCR 2.302.

On order of the Court, this is to advise that the court is considering an amendment of Rule 2.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice if 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 of public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.302. GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(3) [Unchanged.]

(4) Trial Preparation; Experts; Fees and Expenses. 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) Expert Expected to Testify.

~~(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. In the absence of a stipulation or an order under this subrule (B)(4)(a)(ii), the deposition may be used for any purpose permitted under the Michigan Rules of Evidence. On written stipulation or on order, the deposition of an expert may be available for limited purposes, including that the deposition is for discovery only and may be used only for impeachment. The stipulation or

order must specify the purposes for which the deposition may be used and provide for the allocation of the fees and expenses attributable to the deposition.

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

(b) Expert Not Expected to Testify. A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

(i) as provided in MCR 2.311, or

(ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Fees and Expenses.~~Unless manifest injustice would result~~

(i) If a deposition is taken under a stipulation or order under subrule (B)(4)(a)(ii), the stipulation or order controls payment of expenses and expert fees.~~the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and~~

(ii) In order cases, with respect to discovery obtained under subrule (B)(4)(a)~~(ii) or (iii)~~, the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the ~~fees and~~ expenses and expert fees reasonably incurred by the latter party in obtaining facts and opinions from the expert. Otherwise, the assessment or allocation of fees and expenses shall be reserved for determination after entry of judgment.

(d) Deposition for Use at Trial. A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.

(5)-(7) [Unchanged.]

(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1)-(6) [Unchanged.]

(7) that, consistent with subrule (B)(4)(a)(ii), a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8)-(9) [Unchanged.]

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D)-(E) [Unchanged.]

(F) Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may by written stipulation~~:~~

~~(1) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions; and~~

~~(2)~~ modify the procedures of these rules for ~~other methods of~~ discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.

(G)-(H) [Unchanged.]

Staff Comment: In addition to providing minor technical changes, the proposed amendments of MCR 2.302 would clarify that discovery-only depositions may be taken only by stipulation or court order. The amendment would also require that the stipulation or order explain how the costs of this type of deposition are to be allocated. These proposed amendments were submitted by the State Bar of Michigan Representative Assembly.

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 August 1, 2013 at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-02. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.

PROPOSED AMENDMENTS OF MCR 3.218.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.218 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.218. FRIEND OF THE COURT RECORDS; ACCESS.

(A) General~~Definitions~~. Friend of the court records are not subject to a subpoena issued under these Michigan Court Rules. Unless another rule specifically provides for the protection or release of friend of the court records, this rule governs. When used in this subrule, unless the context indicates otherwise,

(1) "record~~s~~" means ~~paper files, computer files, microfilm, microfiche, audio tape, video tape, photographs, and includes records as defined in MCR 1.109~~any case-specific information the friend of the court office maintains on any media;

(2) [Unchanged.]

(3) "confidential information" means

(a) staff notes from alternative dispute resolution, investigations, ~~mediation sessions,~~ and settlement conferences;

(b) ~~Family Independence Agency~~ any confidential information from the Department of Human Services child protective services ~~reports~~ unit or information included in any reports to protective services from a friend of the court office; (c)

(c) formal mediation records;

(d) communications from minors;

(e) friend of the court grievances filed by the opposing party and the responses;

(f) ~~a party's address or~~ any ~~other~~ information ~~if release is prohibited by~~ when a court order prohibits its release;

(g)-(h) [Unchanged.]

(4) Reference to an agency, office, officer, or capacity includes an employee or contractor working within the referenced agency or office, or an employee or caseworker acting on behalf of the referenced officer or working in the referenced capacity. (B)

(B) A friend of the court office must provide access to nonconfidential records to the following:

(1) A party,; third-party custodian,; guardian, guardian ad litem or counsel for a minor,; lawyer-guardian ad litem,; ~~and~~ an attorney of record,; and the personal representative of the estate of a party. ~~must be given access to friend of the court records related to the case, other than confidential information.~~

The friend of the court office must release records to a government agency at the request of a person in this subrule who can show that the information is necessary to allow the person to receive services from that government agency.

(2) An officer in the Judge Advocate General's office in any branch of the United States military, if the request is made on behalf of a service member on active duty otherwise identified in this subrule. (C)

(C) ~~A citizen advisory committee established under the Friend of the Court Act, MCL 552.501 *et seq.*,~~Unless the release is otherwise prohibited

by law, a friend of the court office must provide access to all nonconfidential and confidential records to the following:

(1) ~~shall be given access to a grievance filed with the friend of the court, and to information related to the case, other than confidential information;~~ Other agencies and individuals as necessary for the friend of the court to implement the state's plan under Title IV, Part D of the Social Security Act, 42 USC 651 *et seq.* or as required by the court, state law, or regulation that is consistent with this state's IV-D plan.

(2) The Department of Human Services, as necessary to report suspected abuse or neglect or to allow the Department of Human Services to investigate or provide services to a party or child in the case.~~may be given access to confidential information related to a grievance if the court so orders, upon clear demonstration by the committee that the information is necessary to the performance of its duties and that the release will not impair the rights of a party or the well-being of a child involved in the case.~~

~~When a citizen advisory committee requests information that may be confidential, the friend of the court shall notify the parties of the request and that they have 14 days from the date the notice was mailed to file a written response with the court. If the court grants access to the information, it may impose such terms and conditions as it determines are appropriate to protect the rights of a party or the well-being of a child.~~

(3) Other agencies that provide services under Title IV, part D of the Social Security Act, 42 USC 651 *et seq.*

(4) Auditors from state and federal agencies, as required to perform their audit functions of a friend of the court matter.

(5) Corrections, parole, or probation officers, in connection with a criminal action connected to the case for which the records are kept.

(6) Michigan law enforcement personnel who are conducting a civil or criminal investigation related directly to a friend of the court matter, and to federal law enforcement officers pursuant to a federal subpoena in a criminal or civil investigation.

(D) ~~Protective services personnel from the Family Independence Agency must be given access to friend of the court records related to the investigation of alleged abuse and neglect.~~A citizen advisory committee established under the Friend of the Court Act, MCL 552.501 *et seq.*

(1) shall be given access to a grievance filed with the friend of the court, and to information related to the case, other than confidential information.

(2) may be given access to confidential information related to a grievance if the court so orders, upon demonstration by the committee that the information is necessary to the performance of its duties and that the release will not impair the rights of a party or the well-being of a child involved in the case.

When a citizen advisory committee requests information that may be confidential, the friend of the court shall notify the parties of the request and that they have 14 days from the date the notice was mailed to file a written response with the court.

If the court grants access to the information, it may impose such terms and conditions as it determines are appropriate to protect the rights of a party of the well-being of a child.

(E) ~~The prosecuting attorney and personnel from the Office of Child Support and the Family Independence Agency must be given access to friend of the court records required to perform the functions required by title IV, part D of the Social Security Act, 42 USC 651 *et seq.*~~A friend of the court office may refuse to provide access to records in the friend of the court file if the friend of the court does not hold the original record and the requestor may request access from the holder of the original.

~~(F) Auditors from state and federal agencies must be given access to friend of the court records required to perform their audit functions.~~

~~(G)-(H)~~ [Redesignated as (F)-(G), but otherwise unchanged.]

Staff Comment: These proposed amendments would codify state and federal statutory and regulation revisions that have occurred in the last decade, and would add specificity and detail to the existing language in MCR 3.218.

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 August 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-3-special-proceedings-and-actions.aspx>.

Order Entered April 10, 2013:

PROPOSED AMENDMENTS OF MCR 7.313.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.313 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website: <http://courts/mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.313. MOTIONS IN SUPREME COURT.

(A)-(D) [Unchanged.]

(E) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed (the date of an opinion is stamped on the upper right corner of the first page):

(a)-(c) [Unchanged.]

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)-(4) [Unchanged.]

(F) 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 any 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.

Staff Comment: The proposed amendments would clarify that the decision whether to grant rehearing or reconsideration in the Michigan Supreme Court should be made consistent with the standard incorporated in MCR 2.119(F)(3), similar to the reference for consideration of such motions in the Court of Appeals contained in MCR 7.215(I)(l).

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 of Michigan and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-7-appellate-rules.aspx>.

Orders Entered May 1, 2013:

PROPOSED ADMINISTRATIVE ORDER NO. 2013-__ FOR THE ESTABLISHMENT OF VIDEOCONFERENCING STANDARDS.

On order of the Court, this is to advise that the Court is considering a proposed administrative order that would require the State Court Administrator to establish videoconferencing standards. 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 of public hearings are posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Proposed Administrative Order No. 2013-__:

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 proposed administrative order would require the State Court Administrator to establish videoconferencing standards and would require that the appellate and trial courts conform to those standards. Please note that this proposed administrative order is part of a group of documents in this file that has been published for comment, including proposed videoconferencing rules that would amend MCR 3.210, 3.215, and 6.104, and would adopt MCR 8.124, a new rule, and draft videoconferencing standards, which are attached at the end of that order.

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 September 1, 2013 at P.O. Box 30052, Lansing, MI 48909 or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-18. Your comments and the comments of others will be posted at <http://court.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/administrative-orders.aspx>

PROPOSED ADMINISTRATIVE ORDER 2013-__ FOR THE ESTABLISHMENT OF E-FILING STANDARDS TO BE USED BY MICHIGAN APPELLATE AND TRIAL COURTS.

On order of the Court, this is to advise that the Court is considering adoption of Administrative Order No. 2013-__. Before determining whether the proposed administrative order 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 order or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposed administrative order 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.

Proposed Administrative Order No. 2013-__:

To ensure the consistency in e-filing practices and procedures throughout the state of Michigan; to improve the service to the public, other agencies, and the judiciary; and to improve the performance and efficiency of e-filing operations, it is ordered that the State Court Administrator establish Michigan E-Filing 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 proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

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 September 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://courts.mi.gov/courts/michigansuprememcourt/rules/court-rules-admin-matters/pages/administrative-orders.aspx>

PROPOSED AMENDMENTS OF MCR 2.621 and 2.622.

On order of the Court, this is to advise that the Court is considering amendments of Rule 2.621 and Rule 2.622 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 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 at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

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

RULE 2.621. PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(A)-(D) [Unchanged.]

(E) Receivers. When necessary to protect the rights of a judgment

creditor, the court may appoint a receiver in a proceeding under subrule (A)(2), pending the determination of the proceeding held in conformance with MCR 2.622.

(F)-(H) [Unchanged.]

RULE 2.622. RECEIVERS ~~IN SUPPLEMENTARY PROCEEDINGS~~.

(A) For good cause shown, the court may appoint a receiver in any action or proceeding. A receiver appointed under this section is a fiduciary for the benefit of all persons appearing in the action or proceeding. For purposes of this rule, "receivership estate" means the entity, person, or property subject to the receivership.

(B) The order of appointment shall include provisions related to the following:

(1) bonding amounts and requirements as provided in subrule (G);

(2) identification of real and personal property of the receivership estate;

(3) procedures and standards related to the reasonable compensation of the receiver as provided in subrule (F);

(4) reports required to be produced and filed by the receiver, including the final report and accounting;

(5) a description of the duties, authority and powers of the receiver;

(6) a listing of property to be surrendered to the receiver; and

(7) any other provision the court deems appropriate.

(C) Appointment.

(1) The court shall defer to the petitioner's nomination of receiver, except for good cause shown. If the court finds good cause not to appoint the nominated receiver, the court shall make findings of fact as to any receiver considered for appointment regarding each of the following:

(a) experience in the operation and/or liquidation of the type of assets to be administered;

(b) relevant business, legal and receivership knowledge, if any;

(c) ability to obtain the required bonding if more than a nominal bond is required;

(d) any objections to any receiver considered for appointment;

(e) whether the receiver considered for appointment is disqualified under subrule (C)(2); and

(f) any other factor the court deems appropriate.

(2) Except as otherwise provided by law or by subrule (C)(3), a person or entity may not serve as a receiver or in any other professional capacity representing or assisting the receiver, if such person or entity:

(a) is a creditor or a holder of an equity security of the receivership estate:

(b) is or was an investment banker for any outstanding security of the receivership estate;

(c) has been, within three years before the date of the appointment of a receiver, an investment banker for a security of the receivership estate, or an attorney for such an investment banker, in connection with the offer, sale, or issuance of a security of the receivership estate;

(d) is or was, within two years before the date of the appointment of a receiver, a director, an officer, or an employee of the receivership estate or of an investment banker specified in subrule (b) or (c) of this section, unless the court finds the appointment is in the best interest of the receivership estate and that there is no actual conflict of interest by reason of the employment;

(e) has an interest materially adverse to the interest of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in the receivership estate or an investment banker specified in subrule (b) or (c) of this section, or for any other reason;

(f) has or represents an interest adverse to the receivership estate or stands in any relation to the subject of the action or proceeding that would tend to interfere with the impartial discharge of duties as an officer of the court.

(g) has, at any time within five years before the date of the appointment of a receiver, represented or been employed by the receivership estate or any secured creditor of the receivership estate as an attorney, accountant, appraiser, or in any other professional capacity and the court finds an actual conflict of interest by reason of the representation or employment;

(h) is an "insider" as defined by MCL 566.31(9);

(i) represents or is employed by a creditor of the receivership estate and, on objection of an interested party, the court finds an actual conflict of interest by reason of the representation or employment; or

(j) has a relationship to the action or proceeding that will interfere with the impartial discharge of the receiver's duties.

(3) Any person who has represented or has been employed by the receivership estate is eligible to serve for a specified limited purpose, if the court determines such employment or appointment is in the best interest of the receivership estate and if such professional does not represent or hold an interest materially adverse to the receivership estate.

(D)Duties.

(1) Within 7 days after entry of the order of appointment, the receiver shall file an acceptance of receivership with the court. The acceptance shall be served on all parties to the action.

(2) Unless otherwise ordered, within 28 days after the filing of the acceptance of appointment, the receiver shall provide notice of entry of the order of appointment to any person or entity having a recorded interest in all or any part of the receivership estate.

(3) The receiver shall file with the court an inventory of the property of the receivership estate within 35 days after entry of the order of appointment, unless an inventory has already been filed.

(4) The receiver shall account for all receipts, disbursements and distributions of money and property of the receivership estate.

(5) If there are sufficient funds to make a distribution to a class of creditors, the receiver may request that each creditor in the class of all creditors file a written proof of claim with the court. The receiver may contest the allowance of any claim.

(6) The receiver shall furnish information concerning the receivership estate and its administration as requested by any party to the action or proceeding.

(7) The receiver shall file with the court a final written report and final accounting of the administration of the receivership estate.

~~(A)~~ (E)Powers ~~and Duties~~.

(1) ~~A receiver of the property of a debtor appointed pursuant to MCL 600.6104(4) has, unless restricted by special order of the court,~~ Except as otherwise provided by law or by the order of appointment, a receiver has general power ~~and authority~~ to sue for and collect all ~~the~~ debts, demands, and rents ~~belonging to~~of the ~~debtor~~receivership estate, and to compromise ~~and~~or settle ~~those that are unsafe and of doubtful character~~claims.

(2) A receiver may ~~sue in the name of the debtor when it is necessary or proper to do so, and may apply for an order directing the tenants of real estate belonging to the debtor, or of which the debtor is entitled to the rents, to pay their rents to the receiver.~~liquidate the personal property of the receivership estate into money. By separate order of the court, a receiver may sell real property of the receivership estate.

~~(3) A receiver may make leases as may be necessary, for terms not exceeding one year.~~

~~(4) A receiver may convert the personal property into money, but may not sell real estate of the debtor without a special order of the court.~~

(~~5~~3) A receiver ~~is not allowed the costs of a suit brought by the receiver against an insolvent person from whom the receiver is unable to collect the costs, unless the suit is brought by order of the court or by consent of all persons interested in the funds in the receiver's hands.~~may pay the ordinary expenses of the receivership but may not distribute the funds in the receivership estate to a party to the action without an order of the court.

(~~6~~4) ~~A receiver may sell doubtful debts and doubtful claims to personal property at public auction, giving at least 7 days' notice of the time and place of the sale.~~A receiver may only be discharged on order of the court.

~~(7)A receiver must give security to cover the property of the debtor that may come into the receiver's hands, and must hold the property for the benefit of all creditors who have commenced, or will commence, similar proceedings during the continuance of the receivership.~~

(F) Compensation and Expenses of Receiver.

(1) A receiver shall be entitled to reasonable compensation for services rendered to the receivership estate.

(2) The order appointing a receiver shall specify:

(a) the source and method of compensation of the receiver;

(b) that interim compensation may be paid to the receiver after notice to all parties to the action or proceeding and opportunity to object as provided in subsection (5);

that all compensation of the receiver is subject to final review and approval of the court.

(3) All approved fees and expenses incurred by a receiver, including fees and expenses for persons or entities retained by the receiver, shall be paid or reimbursed as provided in the order appointing the receiver.

(4) The receiver shall file with the court an application for payment of fees and the original notice of the request. The notice shall provide that fees and expenses will be deemed approved if no written objection is filed with the court within 7 days after service of the notice. The receiver shall serve the notice and a copy of the application on all parties to the action or proceedings, and file a proof of service with the court.

~~(8) A receiver may not pay the funds in his or her hands to the parties or to another person without an order of the court.~~

(5) The application by a receiver, for interim or final payment of fees and expenses, shall include:

(a) A description in reasonable detail of the services rendered, time expended, and expenses incurred;

(b) The amount of compensation and expenses requested;

(c) The amount of any compensation and expenses previously paid to the receiver;

(d) The amount of any compensation and expenses received by the receiver from or to be paid by any source other than the receivership estate;

(e) A description in reasonable detail of any agreement or understanding for a division or sharing of compensation between the person rendering the services and any other person except as permitted in subpart (6).

If written objections are filed or if, in the court's determination, the application for compensation requires a hearing, the court shall schedule a hearing and notify all parties of the scheduled hearing.

(6) A receiver or person performing services for a receiver shall not, in any form or manner, share or agree to share compensation for services rendered to the receivership estate with any person other than a firm member, partner, employer, or regular associate of the person rendering the services except as authorized by order of the court.

~~(9) A receiver may only be discharged from the trust on order of the court.~~

(G) Bond.

~~(B) Notice When Other Action or Proceeding Pending; Appointment.~~In setting an appropriate bond for the receiver, the court may consider factors including but not limited to:

(1) The value of the receivership estate, if known;

(2) The amount of cash or cash equivalents expected to be received into the receivership estate;

(3) The amount of assets in the receivership estate on deposit in insured financial institutions or invested in U.S. Treasury obligations;

(4) Whether the assets in the receivership estate cannot be sold without further order of the court;

(5) If the receiver is an entity, whether the receiver has sufficient

assets or acceptable errors and omissions insurance to cover any potential losses or liabilities of the receivership estate;

(6) The extent to which any secured creditor is undersecured;

(7) Whether the receivership estate is a single parcel of real estate involving few trade creditors; and

(8) Whether the parties have agreed to a nominal bond.

~~(1) The court shall ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether another action or motion under MCR 2.621 is pending against the judgment debtor.~~

~~(2) If another action or motion under MCR 2.621 is pending and a receiver has not been appointed in that proceeding, notice of the application for the appointment of a receiver and of all subsequent proceedings respecting the receivership must be given, as directed by the court, to the judgment creditor prosecuting the other action or motion.~~

~~(3) If several actions or motions under MCR 2.621 are filed by different creditors against the same debtor, only one receiver may be appointed, unless the first appointment was obtained by fraud or collusion, or the receiver is an improper person to execute the trust.~~

~~(4) If another proceeding is commenced after the appointment of a receiver, the same person may be appointed receiver in the subsequent proceeding, and must give further security as the court directs. The receiver must keep a separate account of the property of the debtor acquired since the commencement of the first proceeding, and of the property acquired under the appointment in the later proceeding.~~

(H) Intervention. An interested person or entity may move to intervene. Any motion to intervene shall comply with MCR 2.209.

(I) Removal of Receiver. After notice and hearing, the court may remove any receiver for good cause shown.

~~(C) Claim of Adverse Interest in Property.~~

~~(1) If a person brought before the court by the judgment creditor under MCR 2.621 claims an interest in the property adverse to the judgment debtor, and a receiver has been appointed, the interest may be recovered only in an action by the receiver.~~

~~(2) The court may by order forbid a transfer or other disposition of the interest until the receiver has sufficient opportunity to commence the action.~~

~~(3) The receiver may bring an action only at the request of the judgment creditor and at the judgment creditor's expense in case of failure. The receiver may require reasonable security against all costs before commencing the action.~~

~~(D) Expenses in Certain Cases. When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and may direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them.~~

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 September 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-30. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.

PROPOSED NEW RULES OF MCR 2E.001 (ELECTRONIC FILING RULES FOR ALL MICHIGAN COURTS).

On order of the Court, this is to advise that the Court is considering a proposal to adopt new rules regarding electronic filing in Michigan courts. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://courts/mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its current form.

[The following language for electronic filing is new.]

SUBCHAPTER 2E.000. APPLICABILITY; CONSTRUCTION.

RULE 2E.001. APPLICABILITY; CITATION.

The rules in this chapter and the electronic filing policies and standards of the State Court Administrative Office (SCAO) govern the electronic filing and service of documents in all courts established by the constitution and laws of the State of Michigan, and may be referred to as "e-filing rules." Citation for these rules is governed by MCR 1.101.

RULE 2E.002. DEFINITIONS.

For purposes of this chapter:

(A) "Authorized user" means a user of the e-filing system who is registered to file documents through approved electronic means.

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

(C) "Electronic filing plan" means a plan prepared by a court and approved by SCAO.

(D) "Electronic filing system" means a system provided by a court, or vendor with court approval, that provides electronic transmission of information.

(E) "Electronic service" or "e-service" means the electronic service of information.

RULE 2E.003. ELECTRONIC-FILING PLANS.

Each court that implements e-filing shall adopt by local administrative order a plan that conforms to this chapter and the requirements of SCAO. The plan shall contain procedures that ensure document availability, security and integrity, and authentication of a document and its sender.

RULE 2E.004. SCOPE AND APPLICABILITY.

(A) A court whose electronic filing plan has been approved by SCAO may do any of the following, consistent with the rules of this chapter:

(1) Accept electronic filing and permit electronic service of documents;

(2) Issue electronic filing guidelines consistent with this chapter that are not in conflict with statewide standards established by SCAO. The guidelines must be incorporated in the court's local administrative order and posted prominently;

(3) Electronically issue, file, and serve notices, orders, opinions, and other documents, subject to the provisions of these rules and the statewide standards established by SCAO.

(B) Confidential information may be electronically filed or electronically served in compliance with statewide standards established by SCAO.

(C) Attachments, or discovery materials, submitted electronically shall be prepared in accordance with MCR 1.109(C) and policies and standards approved by SCAO. Exhibits to be used at trial shall be submitted to the judge in accordance with a local e-filing plan and as provided in MCR 2.516 and MCR 3.930.

RULE 2E.005. TRANSACTION FEES.

Transaction fees approved by the Supreme Court may be assessed. In addition, authorized users may be charged a reasonable convenience fee associated with credit card processing, electronic fund transfers, or other financial processing fees.

RULE 2E.006. SIGNATURES.

(A) A pleading, document, or instrument electronically filed or electronically served under this chapter shall be deemed to have been signed if it conforms to MCR 1.109(D).

(B) The filing party shall maintain documents containing handwritten signatures of third parties (e.g., affidavits and stipulations) and shall provide them to the other parties or the court upon request.

RULE 2E.007. OFFICIAL COURT RECORD.

The electronic version of a document filed with or generated by the court under this chapter is an official court record pursuant to MCR 1.109. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

RULE 2E.008. TRANSMISSION FAILURES.

In the event of a transmission failure, 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 it was first attempted to be sent electronically. The moving party must prove to the court's satisfaction that:

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

(2) the electronic filing system failed to process the transmission of the electronic document; and

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

SUBCHAPTER 2E.100. ELECTRONIC FILING.

RULE 2E.101. TIME AND EFFECT.

(A) A document filed electronically shall be considered filed with the court when the transmission to the electronic filing service provider is complete. The court's e-filing plan must state the time by which transmissions must be completed to be considered filed by the close of business on that day, but not later than 5:00 p.m.

(B) If the court rejects a submitted document pursuant to MCR 8.119(C), the court shall notify the filer of the rejection and the reason for the rejection. A rejected document shall not become part of the official court record.

RULE 2E.102. E-FILING TRANSACTION.

The electronic filing service provider shall maintain, in accordance with the *General Records Retention and Disposal Schedule #16 — Michigan Trial Courts*, a record that includes the date, time, size, and acceptance status of the transmission. The filer has the responsibility of ensuring that filings have been received by the e-filing system.

RULE 2E.103. PAYMENT OF FILING FEES.

A filing fee is due and payable at the time of the transmission of the electronic document unless the fee is waived by order of the court pursuant to MCR 2.002, the fee is not due or payable under MCR 7.202(3), or the court makes alternative arrangements with the filer in accord with the court's local plan. Failure to timely pay a filing fee may result in the rejection of the filing by the court.

RULE 2E.104. PUBLIC ACCESS TERMINALS.

The court must provide a public access terminal that is available during the hours the court is open to enable electronic filings in conformity with this chapter.

SUBCHAPTER 2E.200. ELECTRONIC SERVICE.

RULE 2E.201. GENERAL PROVISIONS.

(A) Service of process shall be accomplished electronically among authorized users through the electronic filing system in accordance with

these rules. Service of documents on other parties who are not authorized users must be completed in the traditional manner, according to Michigan Court Rules.

(B) Delivery of documents through the electronic filing service provider in conformity with these e-filing rules shall be considered valid and effective personal service.

RULE 2E.202. TIME AND EFFECT.

A document served electronically through an electronic filing service provider in conformity with all applicable requirements of this chapter shall be considered served when the transmission from the electronic filing service provider to the recipient's e-mail address is complete, except that for the purpose of computing time to respond, a document served after 5:00 p.m. local court time shall be deemed to have been served on the next day that is not a Saturday, Sunday, or legal holiday.

RULE 2E.203. E-SERVICE TRANSACTION.

The electronic filing service provider shall maintain, in accordance with the *General Records Retention and Disposal Schedule #16 — Michigan Trial Courts*, a record that includes the date, time, size, and acceptance status of the transmission. The transmission serves as proof of service.

Staff Comment: This series of proposed new "2E" rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2013-18. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-2-civil-procedures.aspx>.

DRAFT STANDARDS FOR E FILING.

1.0. DEFINITIONS

E-Filing means submitting court records for a filing in a case through electronic systems and processes in compliance with Michigan Court Rule 1.109(C) and all other applicable rules of procedure. E-filing includes filing a court record with accompanying data elements necessary to either establish an index of records for new cases or associate the record with an existing case in the case management system. E-filing may also be referred to using the acronym ECF (Electronic Court Filing) as established by The National Center for State Courts.

Electronic Court Records means those records as defined in Michigan Court Rule 1.109(A) that are filed with or maintained by the clerks of court in electronic format. Electronic court records are electronic records created, generated, sent, communicated, received, or stored by electronic means that are capable of being printed as paper, or transferred to archival media, without loss of content or material alteration of appearance. Court records may be created or converted to electronic formats by the filer and electronically filed with clerks of court who maintain them using electronic document management systems. Court records that have been filed in paper format may be converted to searchable electronic records using scanning technology. Electronic court records shall constitute the official record and are the equivalent to court records filed in paper.

Electronic Access to the Courts encompasses many levels of information, functionality, and case processing conducted in the judicial branch that may be completed by electronic means. Electronic access to the courts may include technology that permits e-filing, electronic access to documents, electronic calendaring, case management systems, records management systems, statistics, resource management systems, and e-commerce.

2.0. MICHIGAN COURTS E-FILING MANAGER

The Michigan Courts E-Filing Manager shall provide a single uniform processing point for all court e-filings. The E-Filing Manager shall be developed in compliance with e-filing court rules and these standards and to maintain interfaces with other existing statewide information systems.

2.1. E-Filing Manager Functionality

The E-Filing Manager shall have the following minimum functionality:

Phase I — January 2014

1. Utilize XML ECF 4.0. Standards
2. Accommodate bi-directional transmissions to/from courts
3. Accept electronic forms of payment
4. Consolidated electronic notification section

Phase II - TBD

1. Automated interface with other e-filing systems
2. Process for local validation
3. Process for nonattorneys and for self-represented users to access the system

Phase III — TBD

1. Integrate with other established statewide systems
2. Single statewide login
3. Uniform authentication method
4. Single point of access

3.0 ELECTRONIC TRANSMISSION/FILING OF DOCUMENTS

In accordance with Michigan Court Rules 1.109(C)(1) and 2E.003, a court must apply to the Supreme Court for authorization to accept the electronic transmission/filing of documents.

3.1.1. Uniform Personal Identification

Each person using an e-filing system must have a unique identifier.

3.1.2. Security

Any computer utilized to accept e-filings, particularly from sources external to the court, must be protected from unauthorized network intrusions, viruses, and worms, and must be isolated from other court networks or applications. Software and security devices such as antivirus software, firewalls, access control lists, and other filters must be utilized. Media capable of carrying viruses into court and clerk of court computers (e.g., computer networks and electronic media) must be scanned for viruses before processing.

3.1.3. Filing Process and Payment

The statewide E-Filing Manager (EFM) shall establish a means to accept payments of fees, fines, surcharges, and other financial obligations electronically, including the processing of applications to waive fees.

3.1.4. Remedy for Failure of Electronic Processes

Procedures for resolving controversies arising from the electronic filing process should be provided by the court. The e-filing system provider must maintain a record as required by MCR 2E.102 for reference in the event of controversy.

3.1.5. Retransmission of Electronic Filing

If, within 24 hours after filing information electronically, the filer discovers that the version of the document available for viewing through the Electronic Filing System is incomplete, garbled or otherwise does not depict the document as transmitted, the filer shall notify the clerk of court immediately and retransmit the filing if necessary.

3.1.6. Document Format

Any information that will become part of, or is related to, a court case file, and which is being transmitted electronically to the clerk of the court must be in a format that can be rendered with high fidelity to originals and is searchable.

3.1.7. Data Accompanying Submitted Documents

At a minimum, filers are required to transmit data identifying a submitted document, the case number, and fee information. If the document is initiating a new case, the filer must comply with captioning requirements in the Michigan Court Rules.

3.1.8. Embedded Hyperlinks

Each filed document must be self-contained. Hyperlinks embedded within a submission must refer only to information within the same document.

3.1.9. Non-Electronic Materials

Courts must accommodate the filing of materials that cannot be filed electronically.

3.1.10. Accommodation of Paper Submissions

Documents that are submitted in paper form shall be converted to an electronic format (i.e. a searchable document) to facilitate the creation of a single electronic case file.

3.1.11. Documents Exempt from Public Access

All filers must comply with the privacy/confidentiality provisions of Michigan Supreme Court Administrative Order No. 2006-2, Michigan

Court Rules, the Michigan Trial Court Case File Management Standards, and federal and state statutes. These requirements apply to all documents, including attachments.

3.1.12. Court Control of Records and Data Associated with Transmission of Records

Any record maintained by a vendor of an electronic document management system or an electronic filing system provider, or any data created by an electronic filing system provider during the transmission of records to the courts, is a court record as defined in MCR 1.109 and belongs to the court and shall not be sold, transferred, or otherwise used by the vendor or provider except as permitted by the Michigan Court Rules and these standards. A court may not enter into a contract with a vendor or provider to sell, transfer, or otherwise use a court record without the approval of the State Court Administrative Office. This standard also applies to records that are being maintained by an electronic filing system provider or other vendor for purposes of electronic service of those records.

3.1.13. Accessibility

In designing an e-filing system, courts shall take reasonable steps to make accommodations for the unique needs of indigent, self-represented, limited-English proficiency, disabled, or illiterate persons.

3.1.14. System Availability and Recovery Planning

Computer systems that are used for e-filing must protect electronically filed documents against system and security failures during periods of system availability. Additionally, contingencies for system failures and disaster recovery mechanisms must be established. Scheduled downtime for maintenance and updates should be planned, and a notification shall be provided to filers in advance of the outage.

Comment: These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

PROPOSED AMENDMENTS OF RULES 3.210, 3.215, AND 6.104 OF THE MICHIGAN COURT RULES AND PROPOSED NEW RULE 8.124 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering adoption of Rule 8.124 and amendments of Rules 3.210, 3.215, and 6.104 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 of public hearings are posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.210. 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 8.124.

(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 8.124.~~or other electronically reliable means.~~

(4) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 6.104. ARRAIGNMENT ON THE WARRANT OR COMPLAINT.

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology under MCR 8.124~~in accordance with MCR 6.006(A)~~.

(B) Place of Arraignment. An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. If the arrest occurs outside the county in which these courts are located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with subrule (C). In the alternative, the provisions of this subrule may be satisfied by use of two-way interactive video technology under MCR 8.124 ~~in accordance with MCR 6.006(A)~~.

(C)-(G) [Unchanged.]

[MCR 8.124 is a proposed new rule.]

RULE 8.124. VIDEOCONFERENCING.

(A) Definitions. In this subchapter:

(1) "Participants" include, but are not limited to, parties, counsel, and subpoenaed witnesses, but does 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 proceeding.

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

(3) In criminal trials and evidentiary hearings that occur as part of a criminal trial, the defendant shall either be physically present in the courtroom or shall consent to the use of videoconferencing technology for participation. In all other court proceedings that relate to criminal matters, the court may determine whether to use videoconferencing technology for the defendant's participation. In delinquency adjudications and evidentiary hearings that occur as part of a delinquency adjudication, the juvenile shall either be physically present in the courtroom or a parent, guardian, or the attorney for the juvenile shall consent to the use of videoconferencing technology for the juvenile's participation.

(4) 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 would allow courts to use videoconferencing in court 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, MCR 3.215, and MCR 6.104 would be necessary to include references to the new court rule. If the new rule is ultimately adopted, MCR 3.904, MCR 5.738a, and MCR 6.006, and Administrative Order No. 2007-01 would be rescinded. To provide context for consideration of the proposed rule, the proposed standards for the use of videoconferencing are attached below. In addition, the proposal includes a draft administrative order that would require SCAO to adopt videoconferencing standards, and require courts to comply with those standards.

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 September 1, 2013 at P.O. Box 30052, Lansing, MI 48909 or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-18. Your comments

and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx>, under the chapter affected by the proposed amendment or the proposed new rule.

STANDARDS FOR USE OF VIDEOCONFERENCING TECHNOLOGY IN COURTS

1. Interactive video technology equipment must be capable for 30fps. A preferred video quality is 4CIF or better, but resolution quality is at the discretion of the local court.

2. Either over the air or direct in-line court recording may be used.

3. Participants shall be able to see, hear, and communicate with each other.

4. Participants shall be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding.

5. Video and sound quality shall be sufficient to allow participants to observe the demeanor and nonverbal communications of other participants. Sound quality shall be sufficient to clearly hear what is taking place in the courtroom to the same extent as if the participant was present in the courtroom.

6. Courtroom camera(s) shall have the capability to scan the courtroom so that remote participants may observe other persons present and activities taking place in the courtroom during the proceedings.

7. In criminal matters, counsel for a defendant shall have the option to be physically present with the client at the remote location, and the facilities at the remote location shall be able to accommodate counsel's participation in the proceeding from the remote location. Parties and counsel at remote locations shall be able to mute the microphone system at that location so that they may have private, confidential communication.

8. In criminal matters, if the defendant and counsel are not in each other's physical presence, they shall be able to have private, confidential communication during the proceeding.

9. If applicable, there shall be a means by which documents can be transmitted between the courtroom and the remote location.

PROPOSED AMENDMENTS OF MCR 9.221.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.221 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at <http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx>.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 9.221. CONFIDENTIALITY; DISCLOSURE.

(A)-(H) [Unchanged.]

(I) Disclosure to Chief Judge. Nothwithstanding the prohibition against disclosure in this rule, and except for those situations that involve a dismissal with explanation, the commission shall notify the chief judge of a court when the commission has taken action under MCR 9.207(B)(2)-(5) involving a magistrate or referee of that court. Upon the chief judge's request, the referee or magistrate shall provide the chief judge with a copy of the commission's written notice of disposition.

Staff Comment: The proposed amendment of MCR 9.221 would add a new subrule (I) that would require the Judicial Tenure Commission to notify a court's chief judge if a referee or magistrate is subject to a corrective action that does not rise to the level of a formal complaint, including a letter of caution, a conditional dismissal, an admonishment, or a recommendation for private censure. The new requirement would not apply to a dismissal with explanation.

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 September 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at <http://courts.mi.gov/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-9-professional-disciplinary-proceedings.aspx>.

Index-Digest

INDEX–DIGEST

ACQUISITION OF MORTGAGES—*See*

MORTGAGES 1

ACTIONS

WHISTLEBLOWERS' PROTECTION ACT

1. Under the Whistleblowers' Protection Act, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) a causal connection exists between the protected activity and the adverse employment action; absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employment action; something more than a temporal connection between protected conduct and an adverse employment action is required to show causation when retaliation is claimed; it is reasonable to infer that the more knowledge the employer has of the protected activity, the greater the possibility of an impermissible motivation for the adverse employment action (MCL 15.361 *et seq.*). *Debano-Griffin v Lake County*, 493 Mich 167.
2. Once a plaintiff establishes a prima facie case of retaliation under the Whistleblowers' Protection Act, a presumption of retaliation arises; the employer might be entitled to summary disposition, however, if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that his or her protected activity was a motivating factor for the employer's adverse action; a plaintiff must not merely raise a triable issue that the employer's proffered reason was

pretextual, but must raise the issue that it was pretext for unlawful retaliation; a plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts (1) by showing that the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision; the soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext (MCL 15.361 *et seq*.). *Debano-Griffin v Lake County*, 493 Mich 167.

3. The Whistleblowers' Protection Act expressly waives legislative immunity, making the act fully applicable to public employers; the question whether a legislative body has lawfully exercised its authority when taking an adverse employment action is subject to judicial review (MCL 15.361 *et seq*.). *Debano-Griffin v Lake County*, 493 Mich 167.

being investigated does not necessarily constitute interrogation; a suspect's youth and inexperience with the criminal justice system do not necessarily render the suspect peculiarly susceptible to a particular form of persuasion (US Const, Am V). *People v White*, 493 Mich 187.

SUPREME COURT

3. MCL 768.27b, which in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permitted by MRE 404(b)(1), does not infringe on the Supreme Court's authority to establish rules of practice and procedure under article 6, § 5 of the 1963 Michigan Constitution. *People v Mack*, 493 Mich 1.

CONTRABAND—*See*

CRIMINAL LAW 2, 3

CONTROLLED SUBSTANCES

MARIJUANA

1. The Michigan Medical Marihuana Act (MMMA) provides an exception to the Public Health Code's prohibition of the use of controlled substances by permitting the medical use of marijuana when carried out in accordance with the MMMA's provisions; § 4(b) of the act, MCL 333.26424(b), limits the amount of marijuana that a registered primary caregiver may possess and still be entitled to immunity under § 4; § 4(b)(2) limits the number of marijuana plants that a registered primary caregiver may possess to 12 plants for each registered qualifying patient connected to the primary caregiver through the state's registration process; § 4(a) of the act, MCL 333.26424(a), concerns registered qualifying patients and contains similar limitations on the possession of marijuana plants; only one of two people may possess a patient's 12 marijuana plants for purposes of immunity under §§ 4(a) and 4(b): the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's plants or the patient's registered primary caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants. *People v Bylsma*, 493 Mich 17.
2. The Michigan Medical Marihuana Act incorporates the definition of possession of controlled substances used in

longstanding Michigan law; the essential inquiry is whether there is a sufficient nexus between the defendant and the contraband, including whether the defendant exercised dominion and control over it (MCL 333.26421 *et seq*.). *People v Bylsma*, 493 Mich 17.

3. For a patient or caregiver to receive immunity for possession of marijuana plants under § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, the plants must be kept in an enclosed, locked facility; the facility must be such that it allows only one person to possess the marijuana plants enclosed therein: the registered qualifying patient himself or herself if the patient has not specified that a primary caregiver be allowed to cultivate the patient's marijuana plants or the patient's registered primary caregiver if the patient has specified that a primary caregiver be allowed to cultivate the patient's plants (MCL 333.26423[c] and MCL 333.26424[b][2]). *People v Bylsma*, 493 Mich 17.
4. To establish the elements of the affirmative defense in § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, a defendant need not establish the elements for entitlement to immunity under § 4 of the act, MCL 333.26424; as long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) of the act, MCL 333.26427(b), exists, the defendant is entitled to dismissal of criminal charges. *People v Bylsma*, 493 Mich 17.
5. The Michigan Medical Marihuana Act authorizes the medical use of marijuana to the extent that it is carried out in accordance with the provisions of the act; § 3(e) of the act, MCL 333.26423(e), defines "medical use" broadly to include the transfer of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition; because a transfer is any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, the definition of "medical use" includes sales of marijuana. *Michigan v McQueen*, 493 Mich 135.
6. Section 4 of the Michigan Medical Marihuana Act, MCL 333.26424, sets forth the requirements for a person to be entitled to immunity for the medical use of marijuana; to be eligible for immunity under § 4, a registered qualifying patient must be engaging in marijuana-

related conduct for the purpose of alleviating the patient's own debilitating medical condition or symptoms associated with that condition; § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient; similarly, to be eligible for § 4 immunity, a registered primary caregiver must be engaging in marijuana-related conduct for the purpose of alleviating the debilitating medical condition, or symptoms associated with the medical condition, of a registered qualifying patient to whom the caregiver is connected through the registration process of Michigan's Department of Community Health; § 4 does not offer immunity to a registered primary caregiver who transfers marijuana to anyone other than a registered qualifying patient to whom the caregiver is connected through the state's registration process. *Michigan v McQueen*, 493 Mich 135.

7. Section 4(i) of the Michigan Medical Marihuana Act, MCL 333.26424(i), permits any person to assist a registered qualifying patient with using or administering marijuana, but the terms "using" and "administering" are limited to conduct involving the actual ingestion of marijuana. *Michigan v McQueen*, 493 Mich 135.
8. The affirmative defense of § 8 of the Michigan Medical Marihuana Act, MCL 333.26428, applies only to criminal prosecutions involving marijuana, subject to limited exceptions contained in § 8(c) for disciplinary action by a business or occupational or professional licensing board or bureau or forfeiture of any interest in or right to property. *Michigan v McQueen*, 493 Mich 135.

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 4, 8

CRIMINAL LAW

See, also, CONSTITUTIONAL LAW 1, 3

CONTROLLED SUBSTANCES 1, 2, 3, 4, 5, 6, 7, 8

ESTOPPEL 1

CRIMINAL SEXUAL CONDUCT

1. The elements of first-degree criminal sexual conduct under MCL 750.520b(1)(b)(ii) are (1) a sexual penetration, (2) a victim who is at least 13 but less than 16 years of age, and (3) a relationship by blood or affinity to the fourth degree

between the victim and the defendant; a relationship by blood means a relationship between persons arising by descent from a common ancestor or a relationship by birth rather than marriage; the civil presumption of legitimacy cannot be used to establish a relationship by blood under the statute when DNA evidence establishes that the defendant and the victim are not related by blood. *People v Zajaczkowski*, 493 Mich 6.

WEAPONS

2. Under MCL 750.224f(2), the felon-in-possession statute, persons convicted of specified felonies may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until certain conditions have been met; however, the statute does not sever a felon's ownership interest in his or her firearms; when a police department lawfully seizes noncontraband firearms belonging to a felon, the police department becomes a constructive bailee of the firearms; the felon-in-possession statute prevents the police department from delivering those firearms to the designated agent of the convicted felon, but the statute does not prevent a court from appointing a successor bailee to maintain possession of the felon's weapons during his or her period of legal incapacity. *People v Minch*, 493 Mich 87.
3. When analyzing a due process claim, courts first ask whether there exists a liberty or property interest of which a person has been deprived and, if so, whether the procedures followed by the state were constitutionally sufficient; with regard to depriving a felon of his or her possessory interest in noncontraband firearms under the felon-in-possession statute, MCL 750.224f, the felon receives all the process to which the felon is due when he or she is convicted of the underlying felony. *People v Minch*, 493 Mich 87.

tional concerns (MCL 280.1 *et seq*.). *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265.

PROJECTS

2. After a petition for maintenance or improvement of a drain or the consolidation of drainage districts is submitted, the county drain commissioner may appoint a board of determination to determine whether the maintenance or improvement or the consolidation is necessary and conducive to public health, convenience, or welfare; property owners who might be assessed for a drainage project are not constitutionally entitled to notice regarding a hearing on the necessity and conduciveness of the drainage project; they are constitutionally entitled, however, to notice regarding assessment proceedings for the drainage project (US Const, Am XIV; Const 1963, art 1, § 17; MCL 280.1 *et seq*.). *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265.

DUE PROCESS—*See*

CRIMINAL LAW 3

DRAINS 2

EFFECTIVE ASSISTANCE OF COUNSEL—*See*

CONSTITUTIONAL LAW 1

ESTOPPEL 1

ELEMENTS OF COLLATERAL ESTOPPEL—*See*

ESTOPPEL 1

EMPLOYER'S KNOWLEDGE OF PROTECTED ACTIVITY—*See*

ACTIONS 1

EMPLOYERS AND EMPLOYEES—*See*

ACTIONS 1, 2, 3

EMPLOYMENT—*See*

MASTER AND SERVANT 1

ENCLOSED, LOCKED FACILITY—*See*

CONTROLLED SUBSTANCES 3

EQUITABLE REMEDIES—*See*

DRAINS 1